

IN THE COURT OF APPEALS OF IOWA

No. 2-693 / 12-0472
Filed September 19, 2012

**IN RE THE MARRIAGE OF THOMAS FITZPATRICK
AND JUNE FITZPATRICK**

Upon the Petition of

JUNE FITZPATRICK,
Petitioner-Appellant,

And Concerning

THOMAS FITZPATRICK,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mary Howes, Judge.

June Fitzpatrick appeals the district court's dissolution decree claiming the district court did not equitably divide the parties' property and failed to provide her with sufficient spousal support. **AFFIRMED AS MODIFIED.**

Gregg Geerdes, Iowa City, for appellant.

Stephen W. Newport of Newport & Newport, P.L.C., and Janice Roemer,
Davenport, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

June Fitzpatrick appeals the decree dissolving her twenty-five year marriage to Thomas Fitzpatrick. June asserts the district court erred in failing to equitably divide the parties' assets. She also claims the district court erred in awarding her an insufficient amount of spousal support. For the reasons stated herein, we affirm the district court's decree as modified.

I. BACKGROUND FACTS AND PROCEEDINGS.

The parties were married in 1986 when June was thirty-five and Tom was thirty-eight. This was June's second marriage, but Tom's first. They had no children, and by the time of trial, June was sixty-one and Tom was sixty-four. Tom owned and operated a camera store, called Camera Corner, originally owned and operated by his father. At the time of the parties' marriage, Tom owned fifty percent of the shares in the company, and the other fifty percent of the company stock was acquired during the marriage after his father passed away. Camera Corner, which at one point operated four locations, was down to only one store. The building, where the store was located, was owned by June and Tom, and Camera Corner paid the parties rent. June also operated a jewelry store out of the same building during the course of the marriage, but the store was closed before the dissolution was filed. In addition to the jewelry store, June also worked for Camera Corner. However, at the time of the dissolution, June was unemployed.

The parties accumulated a substantial amount of money and property during the marriage, including condos in Florida and Chicago, a home in

Bettendorf, and a vacant lot in Hawaii. The district court found the Camera Corner business had an estimated net value of \$387,771.72, which takes into account \$220,900 Tom still owes his father's estate for the father's fifty percent interest in the company. The commercial building where Camera Corner operated was appraised at \$788,000. Tom's retirement pension through Camera Corner was valued by the district court at \$1,614,777 and June's pension was \$108,839.¹ There were a number of motorcycles, a boat, a wave runner, and a motor home. The parties also owned five vehicles.

At the district court, Tom claimed to have premarital property including half of the Camera Corner business, a twenty percent share in the family farm, and several investments including CD's, a money market account, and stocks.

On appeal, June does not dispute the value the district court placed on the various assets, but claims the distribution of the assets was inequitable to her. She also asserts the district court failed to give her an adequate amount of spousal support. The court ordered Tom to pay June \$3000 per month for five years, at which point June would be eligible for Social Security and Medicare. June claims the amount should be increased to \$5000 per month for the rest of her life.

¹ The amounts assigned by the district court to the pension plans came from Tom's statement of assets and liabilities that he submitted to the court; however, no other document submitted supports this value for the accounts. On appeal neither party uses the amount assigned by the district court, but instead both parties use the value of the pensions Tom asserted in his trial testimony. For the purposes of our calculations, we will use the same amount used by the district court.

II. SCOPE OF REVIEW.

Our review of the district court's dissolution decree is de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We give weight to the trial court's factual finding, especially its determinations of credibility, but we decide the issues anew. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). As we base our decision on the facts of each case, precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

III. PROPERTY DIVISION.

"The parties to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts." *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). This does not mean we must perfectly divide the property so each party gets an equal share. *Id.* We focus on what is equitable in each case, and we are guided by the factors outlined in Iowa Code section 598.21(5) (2009).² *Id.*

² The factors in section 598.21(5) include:

- a. The length of the marriage.
- b. The property brought to the marriage by each party.
- c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
- d. The age and physical and emotional health of the parties.
- e. The contribution by one party to the education, training, or increased earning power of the other.
- f. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
- g. The desirability of awarding the family home or the right to live in the family home for a reasonable period to the party having custody of the

In this case, the district court awarded Tom the entire Camera Corner business, and found half of the business was a premarital asset. It also found the building which houses the business was owned by the company and awarded the same to Tom. We find this to be contrary to the evidence submitted by both parties. It is clear the parties jointly own the building, the company pays the parties rent for occupying the building, and the building was purchased during the marriage. Therefore, we find the building is a marital asset.

The court also awarded Tom the full value of his pension fund along with the Florida condo and all of its furnishings. There was no outstanding debt owed on this property. Tom was to receive all of the motorcycles, sports vehicles, and the boat, along with three of the parties' cars and the motor home.

In addition to half of the business, the court found Tom had premarital assets including a twenty-percent interest in a family farm and several investments consisting of CD's, a money market account, and stocks.

children, or if the parties have joint legal custody, to the party having physical care of the children.

h. The amount and duration of an order granting support payments to either party pursuant to section 598.21A and whether the property division should be in lieu of such payments.

i. Other economic circumstances of each party, including pension benefits, vested or unvested. Future interests may be considered, but expectancies or interests arising from inherited or gifted property created under a will or other instrument under which the trustee, trustor, trust protector, or owner has the power to remove the party in question as a beneficiary, shall not be considered.

j. The tax consequences to each party.

k. Any written agreement made by the parties concerning property distribution.

l. The provisions of an antenuptial agreement.

m. Other factors the court may determine to be relevant in an individual case.

The court awarded June the value of the marital home in Bettendorf that was currently listed for sale. The court estimated the net award for the house to be \$450,000, though it was currently priced at \$659,000 with no outstanding debt. It also awarded June the Chicago condo worth an estimated \$217,000. This property also had no debt. June was awarded her pension from the Camera Corner business. She also received two of the cars, a set of golf clubs, the Korean dance outfits and all musical instruments. Finally, the court awarded June spousal support in the amount of \$3000 per month for five years. This will be discussed in more detail later in this opinion.

In dividing the property, the district court rejected Tom's claim that it should attribute to June \$335,050 as the value of the leftover inventory from the jewelry store. Both parties said the other had possession of this inventory, and neither party offered any evidence to support its estimation of the value. Instead the district court awarded both parties all personal property, household hold items, bank accounts and jewelry currently in their possession. It also ordered the parties to split any joint bank accounts, but it is not clear based on the evidence submitted at trial whether the parties had any joint bank accounts, and if so, the value of those accounts.

The court also rejected Tom's request to attribute approximately \$300,000 in cash to June that he alleges she removed from the parties' bank account in 2005 as a result of a previous divorce filing. As the parties reconciled after that previous divorce filing, the district court refused to consider it a distribution for the

current pending dissolution proceeding. We agree with the district court's decision on this point.

The district court directed the parties to sell the Hawaii property and share equally in either the profit or liability that results from the sale. The parties had originally paid \$300,000 for the lot, but it was currently in foreclosure for unpaid homeowners association fees. Finally, the court directed the parties to pay their own debts which would include Tom being solely responsible for the debt owed to his mother's and father's estates.

The court concluded it had awarded Tom \$3,033,548 worth of assets and \$955,839 to June, but provided for no equalization payment stating instead that one reason Tom's share was higher is his obligation to pay his mother's estate several hundred thousand dollars. We find Tom's payment of the debt to his mother's estate does not make the distribution equitable in this case. Based on our calculations, June was awarded \$842,239 worth of property while Tom was awarded \$2,537,075 after subtracting out the debt Tom owed to both of his parents' estates and removing approximately \$231,436 worth of the premarital

property.³ Under the facts of this case, we agree with the district court that the premarital property should in equity be distributed to Tom and not shared with June. As to the remaining property, however, while we are not required to award an equal amount to each spouse, we find district court's division inequitable.

³ Our estimation of property distribution awarded by the district court is as follows:

June	Property	Tom
	Camera Corner Business	\$608,671
	Camera Corner Building	\$788,000
	Tom's Pension	\$1,614,777
\$108,839	June's Pension	
\$450,000	Bettendorf home	
	Florida condo	\$195,000
\$217,000	Chicago condo	
	20% interest Fitzpatrick Family farm	\$48,000
\$12,825	1997 Mercedes	
\$25,575	2006 Mercedes	
	2004 BMW	\$13,925
	2002 Jeep	\$13,125
	1997 BMW	\$9,612
	All motorcycles, sports vehicles and boat	\$127,750
\$28,000	Golf Clubs, Korean Dance outfits and musical instruments	
	1st National Bank IRA CD	\$37,000
	US Bank IRA	\$3,900
	Lee Enterprise Stock	\$2,650
	Debt owed to Tom's Dad's Estate for shares of business	-\$220,900
	Net debt owed to Tom's mom's estate	-\$473,000
\$842,239	Total of all Assets and Liabilities	\$2,768,510

Premarital property removed Tom's from share		
	1st National Bank IRA CD	\$37,000
	US Bank IRA	\$3,900
	Lee Enterprise Stock	\$2,650
	20% interest Fitzpatrick Family farm	\$48,000
	50% of net Camera Corner business	\$139,886
	Total premarital property removed	\$231,436
\$842,239	Net total	\$2,537,075

Therefore, we modify the property division to provide that June shall receive fifty percent of Tom's retirement pension from Camera Corner as of the date of trial,⁴ and in fairness Tom shall receive fifty percent of June's retirement pension from Camera Corner as of the date of the trial. Tom is responsible for preparing and filing the necessary qualified domestic relations orders to effectuate this modification.

IV. SPOUSAL SUPPORT.

June also seeks for us to modify the spousal support ordered by the district court. June claims the amount should be increased to \$5000 per month and should be paid for the rest of her life. She claims the increase is warranted as she is unemployed where Tom makes a good income, she is in poor health while Tom's health is good, and Tom was awarded substantial assets in the dissolution.

In his appellate brief Tom asserts June did not sustain her burden to prove she has a need for alimony. He claims she has not been diagnosed with any disability that prevents her from working and she should be required to work to support herself and not unduly lean on him. He seeks for us to reduce or eliminate the spousal support order. However, Tom failed to file a cross-appeal in this case, therefore the issue of reducing or eliminating the spousal support is not before us. See *In re Marriage of Sjulín*, 431 N.W.2d 773, 777 (Iowa 1988)

⁴ No evidence was offered at trial to indicate when Tom's retirement fund was established in order to determine the portion of the fund accumulated during the marriage due to the parties joint efforts, pursuant to *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). We therefore treat the fund as one accumulated during the twenty-five year marriage and award June half of the value as of the date of trial.

(refusing to consider the former wife's request to increase the amount of the spousal support because she failed to file a cross-appeal even though the former husband appealed the order granting spousal support). On appeal, we will only consider the issue of whether to increase the monthly amount or the duration of the support ordered by the district court.

Spousal support is not awarded as a matter of right. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). The facts and circumstances of each case inform whether it should be awarded. *In re Marriage of Shanks*, 805 N.W.2d 175, 178 (Iowa Ct. App. 2011). “[I]f both parties are in reasonable health, . . . they need to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for support.” *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009). We consider the factors outlined in Iowa Code section 598.21A(1) in determining whether spousal support should be ordered. In addition, we consider the property division and the spousal support provisions together. *Hazen*, 778 N.W.2d at 59. “An alimony or spousal support award is justified when the distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the support and there also is a need for support.” *Id.* In addition, while we review the district court's decision de novo, “we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity.” *Kurtt*, 561 N.W.2d at 388

In this case the court found an award of spousal support was appropriate in order for June to have regular income, which would be liquid for her living expenses. The district court awarded the family business to Tom free and clear of June's interest and found, despite the recent decline in his income from the business, he could afford the alimony payments. The court was particularly concerned about June's ability to manage the assets she was awarded to meet her monthly living expenses. It found an award of \$3000 per month would prevent her from falling into extreme financial distress and permit her to maintain her standard of living at a comparable level to what she became accustomed to during the twenty-five year marriage. In addition the court concluded five years would be long enough to permit her to become eligible for Social Security and Medicare.

Considering our adjustment to the property division above, we agree the award of spousal support of \$3000 per month for five years is appropriate in this case. This amount will permit her to maintain her standard of living until she becomes eligible to receive a distribution from her share of Tom's pension. The pension along with her Social Security benefits and Medicare coverage should adequately address the concerns identified by the district court regarding June's ability to manage the assets awarded to her to meet her living expenses. We therefore affirm the spousal support award.

V. APPELLATE ATTORNEY FEES.

Both parties request an award of appellate attorney fees. An award of attorney fees on appeal rests in our discretion. *In re Marriage of Okland*, 699

N.W.2d 260, 270 (Iowa 2005). “We consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court’s decision on appeal.” *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). After considering all these factors, we award June \$5000 in appellate attorney fees.

Costs on appeal shall be paid by Tom.

AFFIRMED AS MODIFIED.