

IN THE COURT OF APPEALS OF IOWA

No. 8-482 / 07-1954

Filed July 30, 2008

**IN RE THE MARRIAGE OF PEGGY SUE JONES AND RICHARD WILLIAM
DWAYNE JONES**

**Upon the Petition of
PEGGY SUE JONES,**
Petitioner-Appellee,

**And Concerning
RICHARD WILLIAM DWAYNE JONES,**
Respondent-Appellant.

Appeal from the Iowa District Court for Clarke County, Gary G. Kimes,
Judge.

Husband appeals the property division and child support provisions of a
dissolution of marriage decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Carol A. Clark of Clark Law Office, Lamoni, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Peggy, thirty-eight years of age, and Richard, forty years of age, have been together for approximately twenty years. They started living together in 1987, separated at various times, had a daughter in October 1991, and were married in January 1999. On June 15, 2007, Peggy filed for divorce. During the trial in September 2007, Peggy and Richard agreed to custody and visitation for their daughter and the district court adopted their stipulation. The amount of Richard's child support is the only issue relating to their fifteen-year-old daughter on appeal. Richard also appeals the trial court's property division. Peggy seeks appellate attorney fees.

We review this equity action de novo. Iowa R. App. P. 6.4. We have a duty to examine the entire record and "adjudicate anew the rights on the issues properly presented." *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968).

The district court noted Peggy and Richard's assets "consist of real estate, farm animals, farm equipment, construction equipment, trailer houses, and personal property." The court divided the personal property and awarded Richard "all farm machinery, equipment, supplies and crops and other farm personal property on hand, subject to all debts." Richard received all the real

estate subject to refinancing the joint debts awarded to him¹ and was ordered to timely pay the real estate taxes due and owing as of September 2007. The court concluded an equitable division of property required Richard to pay Peggy \$50,000.²

On appeal, Richard claims the district court improperly valued the assets and failed to utilize the proper setoffs for premarital property, inheritances, and gifts, resulting in the court “unjustly awarding Peggy a \$50,000 cash property settlement.”³ In allocating the parties’ assets and debts, the court strives to make a division that is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). “Ordinarily, a trial court’s valuation will not be disturbed when it is within the range of permissible evidence.” *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007).

After our de novo review of the record, and after consideration of all premarital property, inheritances and gifts, we conclude an equitable division of property requires Peggy to receive a \$50,000 property distribution. Based on the following valuations, Richard nets \$118,724 in assets and debts: Benson Farm (\$111,375), Flummerfeldt (\$5000), Douglas (\$5017), Jefferson (\$6500), Temple (\$8000), farm animals (\$8560), crops and feed (\$15,700 minus \$2,000 debt for hay, feed, dog food), machinery and equipment (\$38,400), vehicles (\$5817), ASB

¹ The court specifically provided: “Peggy shall not be obligated on any farm debt or mortgage.”

² If Richard did not pay the \$50,000 judgment within a ninety-day deadline, the court ordered a receiver to be appointed to take possession of all of Richard’s assets and sell enough assets to satisfy the judgment.

³ Richard also argues the court erred in failing to consider the tax consequences of the property division. Richard did not introduce any evidence of tax consequences; therefore, this argument is without merit.

debt 23188 (\$6060), ASB debt 262131 (\$25,085), farm debt to parents (\$47,500), and attorney fees ordered by district court (\$5000). Peggy receives the Jeep valued at \$500. The district court's smaller debt assignments are equitable and not detailed here.

As requested by Richard, we modify the decree to award Peggy the interest in the Barton Farm contract with the Germans, which has a net value of approximately \$20,000. The Barton Farm contract has a value of \$45,372 and Peggy shall be solely responsible for the \$25,187 debt owed to American Bank (#233039) as of August 23, 2007. Richard shall prepare the appropriate papers to convey all of his right, title and interest to the Barton Farm real estate, real estate contract, and CRP payments upon Peggy's refinancing of the Barton Farm debt. This does not affect the district court's order regarding Richard's payment of real estate taxes due and owing as of September 2007.

In light of the additional property awarded to Peggy, we reduce the cash equalization payment from \$50,000 to \$30,000 and make the district court's receivership provision applicable to the modified judgment for \$30,000. In all other respects, the district court's property determinations are affirmed.

Richard also appeals his monthly child support obligation arguing the court failed to consider all of Peggy's disability income and arguing the court erred in failing to use \$9000 as his annual income. We remand for a recalculation of Richard's child support obligation using the gross annual incomes set out below.

Peggy is mentally and physically disabled and receives \$12,900 annually in social security disability benefits, social security disability dependent benefits, and IPERS disability benefits. See *In re Marriage of Hilmo*, 623 N.W.2d 809, 813

(Iowa 2001). The Barton Farm contract will net Peggy approximately \$2300 in yearly income.⁴ Peggy's gross annual income for the child support calculation on remand is \$15,200.

Richard is a self-employed farmer who has done siding, roofing, backhoe work, and miscellaneous odd jobs to obtain extra income. Richard testified whiplash and back injuries from a May 21, 2007 automobile accident prevent him from doing contracting work as he had in the past and he has applied for disability benefits. However, in June 2007, Richard submitted a \$6750 bid for a contracting job. Also, with help, Richard plans to maintain his self-employed farming activities. Richard receives interest income and rental income.

"In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). After reviewing Richard's testimony and tax returns, we are convinced a substantial injustice would occur if income were not imputed to Richard. *See In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997) (holding earning capacity can be used when necessary to do justice). Also, the trial court's determination of credibility is given weight because it has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Under the circumstances of this case, we conclude Richard's gross annual income for the child support calculation on remand is \$21,000.

⁴ The Barton Farm note requires Peggy to make a yearly payment of \$4574 to American State Bank. The Germans pay \$6900 per year on the Barton Farm contract.

Peggy requests appellate attorney fees and costs. “An award of appellate attorney fees is not a matter of right, but rests within our discretion.” *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party requesting fees was required to defend the district court’s decision on appeal. *Id.* An award of appellate attorney fees is equitable and we order Richard to pay \$1000 to Peggy for appellate attorney fees. Costs on appeal are taxed to Richard.

AFFIRMED AS MODIFIED AND REMANDED.