IN THE COURT OF APPEALS OF IOWA

No. 1-032 / 10-1061
Filed February 23, 2011

IN RE THE MARRIAGE OF KYLE L. STONE AND DAWN R. STONE

Upon the Petition of

KYLE L. STONE,
Petitioner-Appellant/Cross-Appellee,

And Concerning

DAWN R. STONE,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

Kyle and Dawn Stone appeal from the economic provisions of the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

John R. Walker, Jr. and Kate B. Mitchell of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellant.

Timothy M. Sweet of Beard & Sweet, P.L.C., Reinbeck, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

TABOR, J.

This appeal from a dissolution decree presents us with questions concerning child support, spousal support, and attorney fees. Kyle Stone contends his child support obligation should be recalculated using the revised guidelines and considering his spousal support payments, his spousal support obligation should be eliminated or reduced, and he should not be responsible for Dawn Stone's attorney fees. Dawn cross-appeals, challenging the eventual reduction in spousal support and the amount of attorney fees awarded.

Because the district court recognized that it would be appropriate to consider Kyle's alimony payments to Dawn when calculating his child support obligation and because this case was pending on July 1, 2009, we remand for the court to recalculate the child support using the revised guidelines. In all other aspects, we affirm the decree.

I. Background Facts and Proceedings

After six years of living together, Kyle and Dawn Stone married in October 1998. They had one son, born in 2000, and one daughter, born in 2002.[1] Neither Kyle nor Dawn went to college, but both have been very industrious during their relationship. Kyle worked primarily in the scrap metal trade and owned or partially owned several businesses. Dawn worked as a waitress and a video store manager before being hired in 1998 at Weyerhauser where she operated a die-cut machine.

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[1] The parties resolved the issues of custody and visitation by stipulation and those are not being challenged on appeal.

At the time of the dissolution trial in May 2009, Kyle was thirty-eight years old and in good health. Dawn was thirty-nine years old and had been off work since 2007 due to complications following several surgeries for a fractured foot. She also takes medication for narcolepsy, a sleeping disorder that hinders her ability to maintain gainful employment. She receives approximately $1200 per month in social security disability payments and the children receive $307 per month.

Among the most contested issues at trial were the value of Kyle's business ventures and the impact of an antenuptial agreement[2] executed by the parties before the marriage. The district court engaged in a detailed and thorough analysis of the history and operation of Kyle's scrap metal and related businesses. Its determination of an appropriate value to place on Kyle's business interests was complicated by what the court termed his "deplorable" financing and accounting methods. Using the "going concern" valuation urged by Dawn rather than a liquidation value, the district court determined that Kyle's business was worth approximately $630,000. The court then ordered Kyle to pay Dawn a property settlement of $188,000, which was the amount she sought as an "equalization payment." The court allowed Kyle to pay the settlement in fifteen annual installments of $12,533.33, plus interest.

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[2] The antenuptial agreement assigned to the parties the assets they held before the marriage. Kyle's most significant asset was his fifty percent ownership of Strone Investments, which he estimated was then worth $100,000. The other half of the company was owned by Kyle's partner Ben Stroh. Dawn possessed a residence in Waterloo valued at $33,000 with a $25,000 mortgage. The district court concluded that the agreement did not protect property acquired after the marriage nor did it cover Kyle's businesses, which had "grown, merged, diverged, and warped into a variety of other business ventures."

For purposes of calculating his child support obligation, the district court determined Kyle's annual income to be $200,000, characterizing that amount as "a reasonable and even conservative estimate of his income through wages, distributions and cash transactions." The court ordered Kyle to pay $1787 per month in child support. The decree also ordered Kyle to pay Dawn traditional alimony in the amount of $1750 per month for fifteen years, then $1250 per month until he reaches the age of sixty-five, when the amount is reduced to $750 per month. Finally, the court ordered Kyle to pay $20,000 of Dawn's attorney fees. The first $5000 in attorney fees was to be paid within thirty days of the decree, an additional $7500 within ninety days, and the final $7500 within one-hundred and eighty days.

Kyle appeals the child support, alimony, and attorney fee portions of the decree. In her cross-appeal, Dawn asks for the alimony to continue in the original amount of $1750 per month and seeks a greater amount in trial attorney fees. She also requests appellate attorney fees.

II. Scope and Standards of Review

We review de novo claims of error in dissolution-of-marriage decrees. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). Although we decide the issues raised on appeal anew, we give weight to the district court's factual findings, especially regarding the credibility of the witnesses. *Id.* We defer to the district court's opinion regarding the believability of the parties because of the trial judge's superior ability to gauge their demeanor. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996).

Although our review is generally de novo, we give the district court considerable latitude in determining spousal support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). We will disturb the district court's determination of an alimony issue only where there has been a failure to do equity between the parties. *Id.*

Because interpretation of the child support guidelines is a legal question, our review on that issue is for errors at law. *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We review an award of attorney fees for an abuse of discretion. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996).

III. Analysis

A. Child Support

The district court ordered Kyle to pay child support in the amount of $1787 per month based on the child support guidelines in effect before July 1, 2009. The district court largely adopted proposed guideline worksheets completed by Dawn, imputing Kyle's annual income as $200,000 and Dawn's income as $22,128.

On appeal, both parties agree that the district court should have used the current child support guidelines to determine Kyle's obligation. *See* Iowa Ct. R. 9.1 (stating guidelines "apply to cases pending on July 1, 2009"); *see In re Marriage of Roberts*, 545 N.W.2d 340, 343 n.2 (Iowa Ct. App. 1996) (interpreting term "pending" in child support guidelines as including those cases pending on appeal as of the July 1 effective date). But they disagree whether the court's application of the previous guidelines is cause for remand. Kyle contends the

matter should be remanded to the district court for recalculation of his child support obligation using the revised guidelines. He does not challenge the district court's determination that his income was $200,000. Dawn argues that it is reasonable to assume that Kyle's yearly earnings are as high as $250,000. She argues: "Utilizing this income in the Guideline calculations should yield support at least as high as that awarded by the Court." She contends the amount of child support ordered in the decree is "well supported" even under the new guidelines and should be allowed to stand.

The district court's determination of Kyle's annual income as $200,000 was realistic based on the financial information available at trial and need not be disturbed on appeal. Dawn actually estimated Kyle's income at the slightly lower figure of $199,272 in her child support worksheets submitted to the court before trial. We decline to embrace her assertion on appeal that "while we may never know the exact amount," it would be reasonable to impute another $50,000 of personal income to Kyle. We find Dawn's estimation of Kyle's additional income too speculative to be included when calculating his child support. *See In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa Ct. App. 1993) ("[A]ll income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations.").

The parties debate another aspect of the child support order. Kyle contends that the decree was inequitable in not accounting for the amount of alimony he was ordered to pay when figuring his child support obligation. The

district court addressed Kyle's argument in its ruling on the motions to reconsider:

> The Petitioner further asks for reconsideration of the child support award to reflect the alimony award to Respondent. Upon reflection, the Court believes that such reconsideration may be appropriate in light of the substantial alimony award. However, the Court finds that the Petitioner has not been paying his alimony obligation since the entry of this Order. As correctly pointed out by Respondent, Child Support Guideline Rule 9.5(8) allows the deduction for alimony actually paid. Given the Petitioner's past financial maneuverings, this Court is not confident that the Petitioner will actually pay his alimony obligation even if child support is modified at this time.

The district court went on to state that if Kyle could establish a track record of paying his alimony for at least twelve months, modification of the child support obligation may be warranted. The district court did not make a written finding that such a future variance from the guidelines would be necessary to do justice between the parties under the special circumstances of this case. *See* Iowa Ct. R. 9.11.

On appeal, Kyle asserts that the district court erred in relying on rule 9.5(8), which allows deductions from a parent's net monthly income for "prior obligations" of child and spousal support, but does not address obligations in the same decree. Dawn agrees in her brief that rule 9.5(8) may only be considered "by analogy" and not for direct authority on the question before the court. But she argues that equity does not require the court to deduct the alimony amount from Kyle's income, because he does not come before the court with "clean hands"—having manipulated and concealed his true earnings.

We defer to the district court's finding of "little or no credibility" in Kyle's testimony concerning his finances. But we believe that lack-of-credibility finding is reflected in the court's assignment of an annual income of $200,000 to Kyle, rejecting Kyle's own substantially lower estimate of $104,988 in annual income included in his proposed child support worksheet. We agree with the district court's inclination to adjust Kyle's child support obligation in light of the substantial alimony he is ordered to pay. Iowa Ct. R. 9.4 (allowing amount of child support to be adjusted if necessary "to do justice between the parties"); *see In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991) (finding district court properly exercised its discretion in considering large alimony payments expected of father in determining his child support).

We disagree with the district court's view that the child support amount may only be modified if Kyle meets his spousal support obligation for one year. If Kyle does not meet his support obligation, Dawn may seek a rule to show cause to enforce the decree by a contempt sanction. *See* Iowa Code §§ 598.23, 598.23A (2009). But the decree should strive for equitable treatment of the parties from its inception. We believe, given the substantial amount of alimony Kyle is required to pay, deducting that spousal support when calculating Kyle's net monthly income may be necessary to achieve justice between the parents. *See In re Marriage of Russell*, 511 N.W.2d 890, 892 (Iowa Ct. App. 1993). We remand for the district court to recalculate Kyle's child support obligation under the guidelines that went into effect July 1, 2009, retaining the $200,000 annual income figure, and making the written finding required by Rule 9.11 as to why

variance from the guidelines would be necessary to do justice between the parties under the special circumstances of this case.

B. Spousal Support

Kyle asserts Dawn is not entitled to any spousal support, or at a minimum, the award should be for a lesser amount or for a shorter duration. While Kyle does not directly challenge the district court's valuation of his business, he does note that the court's determination of the property settlement stemming from that valuation has a bearing on the appropriate amount of alimony. It is true that the property division and alimony should be considered together in evaluating their individual sufficiency. *See In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

Dawn urges us not only to uphold the award of permanent alimony, but to modify the decree to eliminate the reductions in the amount of alimony over time. She asks that the alimony as initially set at $1750 per month be left constant. She contends that because the property payments also will end after fifteen years, "[t]he award takes away alimony at the precise moment she will need it the most."

The district court has discretion to order spousal support for a limited or indefinite length of time after considering the non-exclusive list of factors in Iowa Code section 598.21A. That section directs the court to look at—among other things—the length of the marriage, the age and health of the parties, the property distribution, the education level of the parties, the earning capacity of the party seeking maintenance and the feasibility of that party becoming self-supporting at

a standard of living comparable to that enjoyed during the marriage. Iowa Code § 598.21A.

The district court reasoned that traditional alimony was appropriate here based on Dawn's diminished earning capacity due to her disability, Kyle's capacity to earn as much as $200,000 per year, and the eighteen-year duration of the parties' relationship. The court explained that the fifteen-year time frame coincided with the couple's youngest child reaching adulthood, at which point Dawn could focus on her own financial needs.

Kyle complains that the district court impermissibly considered the years the parties lived together before they were married. He highlights the following analysis from our supreme court:

> Notably, section 598.21(3) [now section 598.21A] does not include in its list of factors the premarital relationship of the parties. Consequently, even though Sara emphasizes the emotional support she gave A.J. during their lengthy courtship, we give no consideration to this support even though it probably enhanced A.J.'s efforts to build the wealth he now enjoys.

In re Marriage of Spiegel, 553 N.W.2d 309, 320 (Iowa 1996), *superseded by statute on other grounds as noted in In re Marriage of Shanks*, 758 N.W.2d 506 (Iowa 2008).

We agree with Kyle that in determining the appropriate amount of alimony, the district court should not have taken into account the time when the parties were living together before being married. But when we limit our consideration to the eleven-year span of the actual marriage, we still think that the award of traditional alimony was appropriate here. While the Stones' marriage was not of the long duration seen in many cases where traditional alimony is awarded, it

also was not so short as to require reversal of the alimony award. *See Spiegel*, 553 N.W.2d at 320 (finding substantial alimony award inappropriate where marriage lasted "a mere six years" and alimony recipient was well-educated, in good health, and owned her own business).

More importantly, the record shows little likelihood that Dawn's disabilities will allow her to become self-supporting at a standard of living comparable to the one enjoyed during the marriage. The trial record demonstrates that her foot injury and narcolepsy are long-term impediments to finding gainful employment. Dawn's podiatrist stated that because the bones in her foot were not healing properly, she was unable to stand for prolonged periods of time or do much walking, lifting or, pushing, and needed to keep her foot elevated due to the swelling. He opined that he did "not see any type of job she would be able to perform." At the same time, Dawn's narcolepsy, a permanent condition for which she takes medication, leaves her unable to sit for long periods of time without falling asleep. In view of Dawn's disability and Kyle's earning capacity, we believe the award of traditional alimony was appropriate. *See In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997).

Kyle also alleges the district court engaged in "impermissible double counting of income" by awarding a property settlement based on a "going concern" valuation and also awarding alimony to Dawn. Kyle points to cases from other jurisdictions to bolster his argument. *See, e.g., Head v. Head*, 523 N.E.2d 17, 20 (Ill. App. Ct. 1988) (holding that addition to husband's valuation of professional corporation based on stream of future income resulted in erroneous

double counting by considering future income in both valuation of assets and maintenance award), *Rodriguez v. Rodriguez*, 894 N.Y.S.2d 147, ___ (N.Y. App. Div. 2010) (finding court engaged in double counting of husband's income in valuing his medical practice based on projected future earnings).

We are not persuaded by Kyle's "double counting" argument on the instant facts. *Rodriguez* and *Head* both involved professional practices where the court determined a value based not only on tangible assets, but the husbands' streams of future income. *Head*, 523 N.E.2d at 700, *Rodriguez*, 894 N.Y.S.2d at ___. The district court here found Kyle's scrap metal salvage company to be worth $630,000 based on its real estate, inventory and ongoing business value. Kyle's future income stream based on his professional services alone was not part of the calculation. Accordingly, the district court did not engage in impermissible double counting.

We conclude the award of traditional alimony was supported by the record and should not be disturbed. *See Anliker*, 694 N.W.2d at 541. We also think the reduction in the amount of support after fifteen years and again after Kyle reaches age sixty-five achieves equity between the parties. Dawn's own financial obligations will change when the children have grown and moved out of the home. The district court did not err in considering this factor when reducing the alimony award from $1750 to $1250 after fifteen years. The fact that Kyle's installments on the property settlement will be paid off after fifteen years is not cause for keeping the alimony payments at the same level beyond that time. We also find it reasonable to reduce the alimony award to $750 per month when Kyle

reaches retirement age. *See In re Marriage of Bell*, 576 N.W.2d 618, 623 (Iowa Ct. App. 1998), *overruled on other grounds by In re Marriage of Wendell,* 581 N.W.2d 197, 200 (Iowa Ct. App. 1998). We reject Dawn's cross-appeal on this issue.

C. Attorney Fees

Both parties contest the district court's order that Kyle pay $20,000 of Dawn's $35,000 in attorney fees. Kyle asserts the amount was too high; Dawn argues that it was too low. The district court has discretion to award attorney fees so long as the award is fair, reasonable and based on the parties' respective abilities to pay. *In re Marriage of Drury*, 475 N.W.2d 668, 671 (Iowa Ct. App. 1991). To overturn such an award, "the complaining party must show that the trial court abused its discretion." *Id.* Because Kyle has substantially more earning capacity than Dawn and yet is currently facing certain business setbacks, we conclude the award of $20,000 in fees for Dawn's trial attorney was within the district court's discretion.

On appeal, Dawn argues that the district court erred in declining to award interest on the attorney fee payments; she relies on Iowa Code section 535.3. That statute provides:

> Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13[3] . . . .

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[3] Interest shall be allowed on all money due on judgments and decrees on actions brought pursuant to this chapter, subject to the following: 1. Interest, except interest awarded for future damages, shall accrue from the date of the commencement of the action. Iowa Code § 668.13 (2009).

Iowa Code § 535.3(1).

Dawn also cites *Sheer Construction, Inc. v. W. Hodgman & Sons, Inc*., 326 N.W.2d 328, 334 (Iowa 1982) and *Mermigis v. Servicemaster Industries, Inc.*, 437 N.W.2d 242, 248 (Iowa 1989) for the proposition that the language used in section 535.3 was mandatory and "stripped the court of any discretion to withhold interest on the judgment." We find these authorities inapposite to the question whether the court deciding the Stones' dissolution case was required to order interest payments on the attorney fee award. *Sheer Construction, Inc.* and *Mermigis* both interpret section 535.3 in the context of awarding prejudgment interest. *Mermigis*, 437 N.W.2d at 248, *Sheer Const.*, 326 N.W.2d at 334.

It does not appear to us that Dawn is asking for prejudgment interest on the attorney fee award. In any regard, prejudgment interest would not be authorized. *See In re Marriage of Baculis*, 430 N.W.2d 399, 404 (Iowa 1988) (holding "portion of section 535.3 concerning prejudgment interest should not be construed to apply as a matter of course to property distribution awards in dissolution proceedings"); *see also Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 898 (Iowa 1990) (holding district court had no authority to award prejudgment interest on attorney fees under section 535.3); *but see Hoyt v. Beach*, 104 Iowa 257, 259-60, 73 N.W. 492, 493 (1897) (finding no error in trial court's order that judgment for attorneys fees should draw interest at six percent per annum from date of entry of judgment). In the district court, Dawn filed a motion under Iowa Rule of Civil Procedure 1.904(2) asking whether interest was to accrue on Kyle's attorney-fee installment payments until they were paid over

the 180 days or only if there was a default in the ordered payments. The district court declined "to add interest to this award."

Under chapter 598, a trial court may either order the parties to pay their own attorney fees or order one party to pay some or all of the other party's attorney fees. *See generally Conkling v. Conkling*, 185 N.W.2d 777, 787 (Iowa 1971) (explaining "[o]rdinarily, of course, a litigant is not required to pay his opponent's attorney fees, but under our divorce statute the court may order a litigant to pay the adverse party a sum 'to enable such party to prosecute or defend the action.'"). Given their considerable discretion whether to award attorney fees in the first place, logically trial courts also have leeway to decide if an equitable resolution of the dissolution action requires a party to pay interest on the attorney fee award. *Cf*. *In re Marriage of Keener*, 728 N.W.2d 188, 196 (Iowa 2007) (holding that "[i]nterest may not be necessary in every case" but that it was equitable to require interest on cash equalization payments of more than four million dollars to be paid over several years).

Here, the district court recognized that Kyle's shortage of liquid assets warranted allowing him to pay the $20,000 of attorney fees in installments. But the court did not stretch the payments over an extended period of time, requiring the third of three payments to be paid within 180 days of the decree. Under these circumstances, we conclude that the district court properly exercised its discretion in not adding interest to Kyle's attorney fee obligation.

Dawn also requests attorney fees on appeal. In exercising our broad discretion to determine if an award of attorney fees is warranted, we consider the

financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the parties' positions on appeal. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We appreciate that both parties presented cogent arguments for their positions on appeal; both prevailed on certain arguments and lost on others. When we consider Kyle's existing financial commitments to Dawn, we decline to order him to pay appellate attorney fees. Each party shall pay half of the costs of the appeal.

AFFIRMED AS MODIFIED.