IN THE COURT OF APPEALS OF IOWA

No. 1-459 / 10-1366
Filed September 8, 2011

IN RE THE MARRIAGE OF KIRSTEN M. JACKSON AND GERALD E. JACKSON

Upon the Petition of

KIRSTEN M. JACKSON,
Petitioner-Appellee,

And Concerning

GERALD E. JACKSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Dallas County, Darrell Goodhue, Judge.

A husband appeals the property division and spousal support provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED**.

David L. Brown and Jay D. Grimes of Hansen, McClintock & Riley, Des Moines, for appellant.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellee.

Considered by Sackett, C.J., and Danilson and Mullins, JJ.

MULLINS, J.

I. Background Facts & Proceedings.

Gerald Jackson and Kirsten Jackson were married in 1988. They have two minor children, born in 1994 and 1996. Kirsten filed a petition for dissolution of marriage on June 22, 2009. The parties entered into a stipulation agreeing to joint legal custody of the children with Kirsten having physical care. Gerald was ordered to pay child support of $2370.27 per month, which will reduce to $1678.84 when support is payable for only one child.

At the time of the dissolution hearing held on May 6, 2010, Gerald was fifty-five years old. During the marriage Gerald went back to school and obtained a law degree. He is a sole practitioner practicing law as a professional corporation specializing in workers' compensation cases on behalf of claimants. Gerald is in good health.

Kirsten was fifty-one years old at the time of the dissolution hearing. She has a college degree and had previously been employed with a publishing company. She was earning about $55,000 a year until she stopped working outside the home when the parties' oldest child was born in 1994. Throughout most of the marriage Kirsten was a stay-at-home mother. Shortly before the dissolution hearing, she became employed part-time in a chiropractor's office, earning thirteen dollars per hour. Kirsten has been treated for depression for several years.

At the hearing, Kirsten presented the testimony of Ronald Nielsen, a certified public accountant. Nielsen was hired as an expert to value Gerald's law

practice. Nielsen found the law practice had very few assets, as it had no real estate and rented some of its equipment. Nielsen reported the value of the company was $118,000. This was based primarily on cash in a bank account held by the professional corporation.

The district court entered its decree of dissolution of marriage on July 20, 2010. The court found Gerald's earning capacity was $270,000 per year, while Kirsten's was $36,000 per year. The court determined the value of Gerald's law practice was $65,000 and awarded each party $32,500. Pursuant to the parties' stipulation agreement, the bulk of the parties' property was divided nearly equally. Both parties received their respective inheritances, Gerald in the amount of $21,000 and Kirsten in the amount of $100,000. The court ordered Gerald to pay spousal support of $3250 per month until Kirsten is sixty-two years old, or until she remarries, or until the death of either party.

Gerald filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). He claimed that under an unpublished Iowa Court of Appeals decision the court should not consider goodwill as an asset.[1] The district court denied the motion, finding "[n]o goodwill was involved in valuing Jerry's law practice." Gerald appeals and challenges the property division and spousal support provisions of the parties' dissolution decree.

II. Standard of Review.

In this equity action our review is de novo. Iowa R. App. P. 6.907. We give weight to the fact findings of the district court, especially on credibility

[1] This court of appeals decision was *In re Marriage of Barton*, No. 09-1268 (Iowa Ct. App. June 30, 2010).

issues, but we are not bound by the court's findings. Iowa R. App. P. 6.904(3)(*g*). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

III. Property Division.

Gerald contends the property division is inequitable because the district court improperly valued his law practice. He claims his law practice has no intrinsic value. He asserts the cash in the firm's account was used to pay his income, the income for his assistant, and to cover overhead for the firm. He argues the district court considered this same cash account twice, once as an asset of his law firm and then a second time as his income for purposes of establishing his spousal support obligation. Gerald also claims the district court improperly considered goodwill in valuing his law firm.

In matters of property distribution, we are guided by Iowa Code section 598.21 (2009). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). In considering the economic provisions in a dissolution decree, we will disturb a district court's ruling "only when there has been a failure to do equity." *In re Marriage of Smith*, 573 N.W.2d, 924, 926 (Iowa 1998) (citations omitted). "A trial court's valuation of an asset will not be disturbed when it is within the

permissible range of evidence." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007).

We first determine the district court did not utilize goodwill to value Gerald's law practice. The court specifically stated it had not considered goodwill in assessing a value for the law practice. Furthermore, it is clear the court did not consider future income in finding a value for the law practice. *See In re Marriage of Bethke*, 484 N.W.2d, 604, 607 (Iowa Ct. App. 1992) ("The goodwill of a professional corporation is a factor that bears on the *future earning potential* of the professional." (emphasis added)). Nielsen testified he valued the company based on a net asset value approach. The district court used Nielsen's figures, but reduced them to arrive at an after-tax value. Therefore, contrary to Gerald's assertions, the district court did not consider goodwill in arriving at a value for the company.

Although we have rejected Gerald's claims concerning goodwill, we find that the district court did not properly consider the character of the cash account. The record is clear that Gerald's professional corporation held very few assets, except for a cash account and other receivables and accounts. The character of the cash account is not changed from income to asset just because some of his income had not been distributed to him on the date of the appraisal. His income, past and projected into the future, should be (and was by the trial court) considered in addressing the issue of spousal support. *See id.* at 607-08 (explaining that in a case where spousal support is awarded, we do not consider projected future earnings in determining the value of a professional corporation

but do consider it in assessing spousal support). We find the account represented Gerald's income and not a separate asset.

We conclude Gerald's legal practice had no appreciable value. We modify the parties' dissolution decree to eliminate the provision that Gerald pay Kirsten $32,500 as her share of the value of his legal practice. In all other respects, we affirm the distribution of property in the parties' dissolution decree.

IV. Spousal support.

Gerald contends the spousal support award is excessive. He was ordered to pay Kirsten traditional spousal support of $3250 per month until she reaches the age of sixty-two, either party dies, or she remarries. Kirsten earned about $55,000 per year until she left the job market when the parties' first child was born in 1994. Gerald claims Kirsten has marketable job skills that would allow her to earn at least this much in the future. He argues that if any spousal support is awarded it should be limited in amount and duration.

Iowa Code section 598.21A provides for spousal support and the factors to consider in determining whether an award should be made. Those factors are,

> (a) The length of the marriage.
> (b) The age and physical and emotional health of the parties.
> (c) The distribution of property made pursuant to section 598.21.
> (d) The educational level of each party at the time of marriage and at the time the action is commenced.
> (e) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
> (f) The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to

> that enjoyed during the marriage, and the length of time necessary to achieve this goal.
>
> (g) The tax consequences to each party.
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> (h) Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.
>
> (i) The provisions of an antenuptial agreement.
>
> (j) Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A(1).

In applying the statutory factors, the courts have set forth three different types of spousal support—traditional, rehabilitative, and reimbursement. *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). Each type has a different purpose: (1) traditional is payable for life or until the spouse becomes self supporting; (2) rehabilitative is payable for a period of time to permit a spouse to obtain education or training; (3) reimbursement "allows the spouse receiving the support to share in the other spouse's future earnings in exchange for the receiving spouse's contributions to the source of that income." *Id.* An award of spousal support need not strictly fall into one of the defined categories, but can be a combination of types. *Id.* "Whether spousal support is justified is dependent on the facts of each case." *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009). [I]n determining if [spousal support] is to be awarded and what amount should be awarded, the court may consider the amount of child support under the decree." *In re Marriage of Will,* 489 N.W.2d 394, 400 (Iowa 1992). Although our review is de novo, we give the district court considerable latitude in determining whether to award spousal support based on the statutory factors. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). We disturb

the district court's "determination only when there has been a failure to do equity." *Id.*

Several factors in the present case weigh in favor of an award of spousal support. The parties were married for twenty-one years. Both parties had college degrees when they were married, but during the marriage Gerald returned to school and obtained his law degree. Thereafter, Gerald grew his law practice and Kirsten stayed at home with the children for sixteen years, foregoing the opportunity to maximize her salary. At the time of trial, Kirsten was fifty-one years old with a bachelor's degree in journalism that she had not utilized since 1994. Although she was currently employed part-time, she was underemployed and was capable of greater earnings. Consequently, the district court found Kirsten's earning capacity was $36,000, while Gerald's was $270,000.[2] Thus, there was a large disparity between the parties' earning capacities. Kirsten also received nearly $800,000[3] in marital assets, of which nearly $600,000 is held in retirement accounts.

We must also examine a party's ability to become self supporting and need for spousal support. *See* Iowa Code § 598.21A(1) (providing a factor to be considered is the "feasibility of the party seeking maintenance becoming self-

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[2] On appeal, Gerald asserts that his earning capacity should be $241,683, rather than $270,000. He argues that his contributions to his retirement account should not be included in his income because he could not draw on those accounts until he was age fifty-nine and one-half. The district court found that the amount he contributed to his retirement fund was optional and could be paid to him as wages. We find the district court's determination is supported by the record.

[3] Gerald states the property division provides Kirsten with approximately $833,000 in marital assets, which is reduced by our decision eliminating the provision that Gerald pay Kirsten $32,500. It is not clear how he arrived at that figure.

supporting at a standard of living reasonably comparable to that enjoyed during the marriage"); *In re Marriage of Hitchcock*, 309 N.W.2d 432, 436-37 (Iowa 1981) (considering the earning capacity of each party, and the present standards of living and ability to pay balanced against the relative needs of the other). If Kirsten works full time and earns $36,000 per year as expected by the district court, her monthly employment income would be $3000. Gerald was ordered to pay support child support of $2370.27, which will reduce to $1678.84 when support is payable for only one child. Combined with spousal support of $3250, Kirsten would receive monthly support of $5650.27 (which will reduce to $4928.84 when child support is payable for only one child). This would result in her monthly gross income and support to be about $8600. However, the district court found Kirsten's anticipated monthly expenses totaled approximately $7500, which includes the expenses of raising the two children.

After considering all of the statutory factors concerning spousal support, we agree that Kirsten is entitled to an award of spousal support. We recognize the considerable sacrifices made by Kirsten in assisting Gerald obtain a greater earning capacity and foregoing employment outside of the home for sixteen years. As the district court found, at Kirsten's age, it would not be reasonable to assume she would be able to achieve the income she would make had she remained working. Nevertheless, Kirsten's earning capacity combined with child support payments and $800,000 in assets received in the property distribution, does not demonstrate a need for permanent or traditional spousal support. *See Becker*, 756 N.W.2d at 827 (explaining that the spousal support in that case

could not be characterized as strictly rehabilitative or traditional, but may be a combination of both). Under these circumstances, we find spousal support is warranted but modify so that it is payable at the rate of $2500 per month for seven years and shall terminate only in the event of the death of either party.

V. Appellate Attorney Fees

Kirsten asked for attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). On a request for appellate attorney fees, 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 Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). Gerald is ordered to pay $1000 toward Kirsten's attorney fees on this appeal.

We affirm the decision of the district court, except as specifically modified. Costs of this appeal are assessed to one-half to Gerald and one-half to Kirsten.

AFFIRMED AS MODIFIED.