

IN THE COURT OF APPEALS OF IOWA

No. 6-496 / 05-1727
Filed December 13, 2006

**IN RE THE MARRIAGE OF LORI MARDELL HARRIS
AND KIPP JAMES HARRIS**

**Upon the Petition of
LORI MARDELL HARRIS,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
KIPP JAMES HARRIS,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

Kipp James Harris appeals the district court's ruling in his dissolution proceeding. Lori Mardell Harris cross-appeals. **AFFIRMED AS MODIFIED ON BOTH APPEALS.**

Joanne Lorence of Otto & Lorence Law Firm, P.C., Atlantic, for appellant.

J.C. Salvo and Bryan Swain of Salvo, Deren, Schenck, & Lauterbach, P.C., Harlan, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Kipp James Harris appeals the district court's ruling in his dissolution proceeding. He claims the district court (1) failed to divide the marital assets equitably; (2) incorrectly awarded alimony; and (3) abused its discretion in awarding attorney and expert witness fees. Lori Mardell Harris cross-appeals. She argues the district court (1) failed to divide assets equitably and (2) awarded an inadequate amount of alimony. We affirm the decree as modified below.

I. Background Facts and Proceedings

Kipp and Lori were married for twenty-seven years. The couple has two children, neither of whom are minors. At the time of the decree, Kipp was forty-eight years old and Lori was forty-six years old. Both are in good health. Kipp works as an insurance salesman employed by Brocker, Karns & Karns, Inc. (BKK). He earns an annual salary of \$43,200. Due to stock he owns in BKK, however, his annual income is approximately \$175,000. Lori works in human resources at Glacier Daido American. Her annual salary is \$30,534. Her job will soon be outsourced, but she does not anticipate difficulty finding other, comparable employment. Her net annual income is \$26,100.

In the couple's dissolution decree, the court provided a property/debt division spreadsheet according to which the parties' assets were to be divided. Each was to receive a net distribution of \$191,400. Within the distribution, the court valued the BKK stock at \$300,000 and awarded it to Kipp. The marital home was to be sold and the proceeds divided. The court also originally determined that a stipulation made by the parties to sell and divide the profits of their property was not in the parties' best interests, and instead ordered the

property to be divided. With respect to alimony, it found that neither party's expert was credible as to the parties' tax cash flow. Lori was awarded \$1000 alimony per month for 180 months. The court also awarded Lori \$15,000 in attorney fees and \$10,900 in expert witness fees.

Both Kipp and Lori assign error to the decree. According to Kipp, first, the district court failed to equitably divide the couple's property. He claims the district court (1) failed to include Lori's Cash Plus retirement account worth \$3844; (2) failed to give him credit for paying the couple's 2004 income tax in the amount of \$26,000, or alternatively, to acknowledge the \$20,000 he had to borrow to pay 2005 quarterly income tax estimates; (3) incorrectly valued and distributed assets that were to be sold; (4) erred in valuing his BKK stocks; (5) overvalued his bank account and vehicle; (6) erred in ordering him to pay Lori \$114,000 in their cash settlement, rather than \$106,560; and (7) erred in ordering him to pay the cash settlement within six months of the decree. Second, he argues the alimony award is inequitable. He claims (1) the district court overestimated his income; (2) Lori failed to demonstrate need; (3) the district court failed to consider Lori's cohabitation; and (4) Lori failed to demonstrate need in light of her cohabitation. Finally, he claims the court abused its discretion by ordering him to pay \$15,000 in attorney fees and \$10,900 in expert witness fees.

According to Lori, first, the district court failed to equitably divide the parties' assets. She argues primarily that while the BKK stock was correctly valued, \$60,000 was deducted from the value of the stock and then also included in the marital debts. Therefore, Lori argues her cash settlement should be an

additional \$30,000, or \$136,560 total. Second, she argues her alimony award is inadequate. She claims she should be awarded \$2750 per month.

We review each argument below.

II. Standard of Review

We review dissolution decrees de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *Id.*

III. Merits

A. Property Division

First, Lori acknowledges she left her Cash Plus account worth \$3844 out of her affidavit of financial status. She argues that the account cannot be valued on its face because retirement accounts are subject to income taxes upon liquidation. See *In re Marriage of Hogeland*, 448 N.W.2d 678, 680 (Iowa 1989). However, because (1) she need not liquidate the account for the purposes of the dissolution and property settlement; (2) it may increase in amount before she begins drawing on it; and (3) she did not give us any other possible estimation; we value the account on its face. We therefore add the amount of that account, \$3844, to her part of the settlement.

Second, the couple was still married when their joint 2004 income tax was paid. The \$26,000 Kipp claims he should be credited with paying came out of the marital assets. Therefore, we refuse to give him credit for either the 2004 or 2005 taxes.

Third, during trial the parties entered a stipulation as to the division of certain property. In its decree, the court found that the auction of the property

would not be in the parties' best financial interest. Instead, the court ordered the items divided. Kipp protested the division in his motion to enlarge. Lori urged the court to deny the motion, even though she had agreed to the sale during trial. The court sustained Kipp's motion. Because the parties initially stipulated to the sale and the court cites no evidence in its original decree to support its decision to divide the assets, we affirm the decision to auction the assets subject to the parties' stipulation.

Fourth, Kipp claims the BKK stocks were incorrectly valued. We disagree. We find instead the problem to be the duplicate addition of the BKK stock debt to the marital debt. In the body of the decree, the court indicated that it had already subtracted the \$60,000 debt from the value of the stock, and came to the conclusion that the stock was worth \$300,000. The decree states,

Based on the foregoing and after careful consideration of the experts' opinions, the Court finds and concludes that \$300,000 is the fair and reasonable value of the parties' 25 percent interest in the Brocker, Karns & Karns, Inc. *after subtracting any indebtedness secured hereby.*

(Emphasis added.) However, in the spreadsheet, the court subtracted an additional \$60,000 for the BKK stock debt. Thus, we remove the \$60,000 BKK stock debt from the marital debts, leaving the parties with \$49,900 debt. Kipp also urges us to reduce the value of the BKK stock by the value of his personal goodwill. However, the court's valuation of the stock is within the permissible range of the evidence. We therefore decline to disturb the valuation on appeal. *In re Marriage of Steele*, 502 N.W.2d 18, 21 (Iowa Ct. App. 1993).

Fifth, the court's valuation of Kipp's bank account and vehicle are within the permissible range of the evidence. For that reason, we do not adjust their value on appeal. *Id.*

Sixth, both parties argue the district court erred in calculating the cash distribution Kipp should pay Lori. Following the stipulation, we eliminate the parties' personal items from the distribution and set them aside for sale.¹ Adding Lori's Cash Plus account to her distribution leaves her with assets totaling \$81,184. Eliminating the \$19,000 motorcycle debt the court included reduces the total debt amount to \$30,900. The debt is assigned to Kipp. After subtracting the debt, Kipp's assets total \$332,060. After finding the difference between Kipp's and Lori's assets, and dividing it in half, we conclude Kipp should pay Lori \$125,438.

Finally, we conclude the court did not err in giving Kipp six months to pay the property settlement. The evidence showed he was able to meet the obligations.

B. Alimony

The court provided Lori \$1000 in alimony per month for 180 months. Lori contends the court should have awarded her \$2750 per month until she turns sixty-two, dies, or remarries. Kipp argues alimony is not appropriate in this case. He claims (1) the court overestimated his income; (2) Lori failed to demonstrate need; (3) the court failed to consider the financial aspects of Lori's cohabitation; and (4) Lori failed to show need in light of her cohabitation.

¹ The items include a 1984 Jeep CJ7; a Harley Davidson motorcycle; household contents, equipment, and personal effects; a hot tub; a mower; a golf cart and clubs; and a tanning bed.

Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). In determining whether to award alimony, the district court is to consider the factors in Iowa Code section 598.21(3) (2005). That section allows the court to consider the property division in connection with the alimony award. *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). We only disturb the district court's determination if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540; see Iowa Code § 598.21(3)(c).

First, Kipp's income grew steadily over the last four years; it did not fluctuate from year to year. Therefore, it was unnecessary for the court to average the last four years. The court's estimation of Kipp's income at approximately \$175,000 is supported by the evidence. Second, sufficient evidence of cohabitation was not shown at trial. Given the length of the parties' marriage, the disparity between the parties' incomes, and the property settlement, \$1000 of alimony per month for 180 months is appropriate.

C. Attorney Fees

An award of attorney fees is within the court's discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa 1994). The award should be reasonable and fair and based on the parties' respective abilities to pay. *Id.* We conclude the district court did not abuse its discretion in awarding trial attorney and expert witness fees.

Both parties have requested appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's 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 making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Both parties' requests for appellate attorney fees are denied. Costs of the appeal are taxed one-half to each party.

IV. Summary

In conclusion, we adjust the property settlement such that we (1) assign Lori her \$3844 Cash Plus account; (2) eliminate the listing of the \$60,000 BKK stock debt; (3) order items agreed upon in the stipulation to be sold and the proceeds divided; and (4) order Kipp to pay Lori a \$125,438 cash distribution. The rest of the decree is affirmed.

AFFIRMED AS MODIFIED ON BOTH APPEALS.