

IN THE COURT OF APPEALS OF IOWA

No. 0-957 / 10-0814
Filed March 7, 2011

**IN RE THE MARRIAGE OF LISA JEAN MEEK-DUNCOMB
AND JONATHAN RALPH DUNCOMB**

Upon the Petition of

LISA JEAN MEEK-DUNCOMB,
Petitioner-Appellant,

And Concerning

JONATHAN RALPH DUNCOMB,
Respondent-Appellee.

Appeal from the Iowa District Court for Mitchell County, Christopher C. Foy, Judge.

Lisa Meek-Duncomb appeals from the economic provisions of the decree dissolving her marriage to Jonathan Duncomb. **AFFIRMED AS MODIFIED.**

DeDra Schroeder of Schroeder & Larson Law Office, Osage, for appellant.

Aaron R. Murphy of Walk & Murphy, P.L.C., Osage, for appellee.

Considered by Mansfield, P.J., and Danilson and Tabor, J.

TABOR, J.

Lisa Jean Meek-Duncomb appeals the economic provisions of her dissolution decree. She contends the district court erred in determining the parties' relative incomes, which led to inequities in its award of child support and its denial of spousal support. Lisa also complains the court failed to award her a cash property settlement to compensate for an inheritance she received during the marriage and for the value of the trucking business operated by Jonathan Ralph Duncomb. Finally, she contends the court erred in denying her request for trial attorney fees, and she requests an award of appellate attorney fees.

Because the district court erred in its determination of Lisa's income, we remand for the court to recalculate Jonathan's child support obligation. We affirm the district court's denial of spousal support, but modify the property division to reimburse Lisa for a portion of her inheritance. We decline to award Lisa trial or appellate attorney fees.

I. Background Facts and Proceedings

Lisa was born in December 1971. She has a bachelor's degree in social work from the University of Northern Iowa and is employed by Avalon Center in Mason City as a program supervisor. Instead of earning an annual salary, Lisa receives compensation based on the number of cases she supervises. In 2007, Lisa reported wages of \$31,817. In 2008, she earned \$27,451. She is in good health.

Jonathan was born in September 1975. He has a high school equivalency diploma and has worked as a truck driver for twelve years. He is licensed to haul

livestock or unfinished agricultural products such as grain and soybeans. Hauling other items would raise his insurance rates. Jonathan also is certified to launch fireworks displays and had put on shows in the summer for extra income during the marriage, but stopped doing so two years ago because he experienced back problems.

Lisa and Jonathan were married on May 8, 2005. They have two children: H.D., born in August 2005, and T.D., born in January 2008. Both Lisa and Jonathan have children from previous relationships; Lisa has a seventeen-year-old son who lives with her and Jonathan has two children, who live with their mother, and for whom he pays \$422 per month in child support.

In 2007, Jonathan purchased his own semi-tractor and began doing business as Duncomb Trucking. He is the only employee of the business. The semi-tractor he currently owns has a value of approximately \$31,995 and, at the time of trial in this matter, the unpaid balance of the loan was more than \$62,970. Duncomb Trucking hauls freight for Ivan Johnson Trucking, Ltd., from which it also must lease trailers. No written contract exists between the two companies. In 2007, Jonathan reported a net business loss of \$216. In 2008, he reported a profit of \$49,174. His estimated profit for the business in 2009 was \$40,395.

In February 2008, Lisa received an \$89,737.36 inheritance from her father's estate. She deposited the money into an account in her name alone. She spent more than \$15,000 on the purchase of a motor home and another \$14,000 on a Disney time-share unit. She used the rest of the money to pay marital debts and make smaller purchases. Lisa paid for vacations to California

and Mexico costing nearly \$15,000. Lisa exhausted all but approximately \$2500 of her inheritance within a year of receiving it.

Lisa and Jonathan separated in April 2009 and Lisa petitioned to dissolve the marriage in May 2009. The district court held a trial in January 2010. The parties agreed about issues relating to child custody and visitation, as well as the general division of their marital assets. The court was left to determine the division of Lisa's inheritance, the valuation of Duncomb Trucking, the loan payoff amount for the semi-tractor, the amount of child support to be paid by Jonathan to Lisa, and whether Lisa should be awarded spousal support.

Lisa called Larry Pump to testify regarding the value of Duncomb Trucking. Pump is a certified public accountant with thirty-one years experience. He has been valuing businesses for approximately twenty of those years, but does not perform certified evaluations. Pump reviewed Duncomb Trucking's tax returns for 2006, 2007, and 2008, as well as its 2009 1099 form and some Excel spreadsheets. Using a combination of three valuation methods (book value, capitalization of earnings, and dividends paying capacity), Pump assigned a \$145,000 fair market value to the business. However, the valuation he conducted was less formal than a business audit. Pump did not consider the business's assets or debts, how many customers it has, or the likelihood those customers would continue to employ Duncomb Trucking's services. Pump also testified Jonathan's actual income in 2007 was \$38,355 and his income in 2008 was \$60,916.

Lisa testified she had applied to the University of Northern Iowa to receive her master's degree in social work. The program would take one year to complete and would require Lisa to reduce her hours at Avalon Center by half while she was enrolled. But by obtaining a master's degree Lisa would increase her earning capacity. She testified she could spread the coursework over a three-year period, which would require her to miss less work. Lisa requested the court award her \$200 per month in alimony for sixty months to make up for her reduced earnings while attending the University of Northern Iowa. Lisa testified her annual childcare expenses are approximately \$7280.

On April 19, 2010, the district court entered its decree dissolving the marriage. The court calculated Jonathan's income for 2007 to be \$35,784 and his income in 2008 at \$52,392. The court found Jonathan's annual income for 2007 through 2009 averaged \$42,857. Based on this, the court calculated Jonathan's child support obligation at \$529 per month for both children and \$322 for one child.

The court further found Duncomb Trucking has no value to Jonathan outside of his salary. It also found Lisa spent her inheritance of her own volition and that it would be unfair to require Jonathan to reimburse her for any of the expenditures. Under the division of assets and debts agreed upon by the parties, the court found Lisa was awarded \$40,000 in assets while Jonathan was left with \$34,000 in debts. Concluding this division "fairly reflected the financial and other contributions made by each of the parties during the marriage," the court did not

require a cash settlement. The court declined to award Lisa spousal support and ordered each party pay his or her own legal fees.

II. Scope and Standard of Review

We review dissolution of marriage proceedings de novo. Iowa R. App. P. 6.907; *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). Although we decide anew the issues raised on appeal, we give weight to the district court's factual findings, especially regarding the credibility of the witnesses. *Witten*, 672 N.W.2d at 773. We defer to the district court's view regarding the believability of the parties because the trial judge enjoys a superior ability to gauge their demeanor. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996).

Even though our review is de novo, we accord the trial court considerable latitude in determining alimony and will disturb the ruling only when there has been a failure to do equity. *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996). This deference to the district court's view of the spousal support issue "is decidedly in the public interest." *Id.*

When appellate courts unduly refine these important, but often conjectural, judgment calls, they thereby foster appeals in hosts of cases, at staggering expense to the parties wholly disproportionate to any benefit they might hope to realize.

Id.

We review the district court's decision whether to make an award of attorney fees for an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997).

III. Child Support

Lisa contends the court erred in calculating the amount of child support Jonathan must pay, basing its calculations on salary amounts unsupported by the record. She argues her income historically has not exceeded \$27,000 per year, while Jonathan carries an earning capacity of nearly \$60,000 per year.

The court determined Jonathan's income by allowing him a deduction for depreciation of his semi-tractor under the straight line method for his net salaries in 2007 and 2008. The court figured Jonathan's salaries for 2007 and 2008, allowing only the depreciation deduction, as \$35,784 and \$52,392 respectively. The court figured Jonathan's 2009 salary as \$40,395 by referring to Jonathan's exhibit showing his trucking company's income and expenses for 2009 which included a reduction for the repayment on the principal on his business debt. The court averaged the salaries for 2007, 2008, and 2009 to arrive at an annual income of \$42,857.

Lisa's expert witness, Larry Pump, arrived at different figures when calculating Jonathan's income. Pump testified Jonathan's actual income for 2007 was \$38,355.42 and his actual income for 2008 was \$60,916. Although Jonathan did not have his 2009 tax returns completed at the time of trial, Pump reviewed documents relating to Duncomb Trucking's profits for that year and concluded the business was on pace to exceed its 2008 profits.

Lisa also notes that Jonathan's income prior to starting Duncomb Trucking was significantly higher than the \$42,857 figure used by the trial court. Jonathan's 2006 tax return lists his wages as a truck driver as \$64,348. She

argues this amount more accurately reflects Jonathan's earning capacity and is comparable to the figures presented by Larry Pump. At trial, Lisa asked for Jonathan's salary to be calculated at \$53,229.

When a parent's income is subject to substantial fluctuations, it may be necessary for a court to average the parent's income over a reasonable period of time to determine the current monthly income. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 52 (Iowa 1999). Jonathan testified his earnings could fluctuate based on the agriculture market and the subsequent demand for his services. We find that averaging his income for 2007, 2008, and 2009 was an appropriate method of determining his support obligations. Because we conclude this case must be remanded to recalculate the child support using a more accurate salary figure for Lisa, the court should use the 2009 income—allowing for a straight line depreciation deduction—for assets depreciated and reported on Jonathan's 2009 tax returns, if those are available, in its three-year average.

Because the record showed yearly fluctuations in Lisa's income, we believe the district court should have used the averaging method for that calculation as well. The district court stated: "Lisa is paid twice a month and on average earns \$1565 per pay period, which is equal to a gross annual income of \$37,560." Lisa argues she earns significantly less. At trial, she testified she does not receive an annual salary or hourly wage, but rather is paid based on the number of cases she is able to supervise. Her 2008 income tax return lists her income as \$27,451 and her 2007 return shows she earned \$31,817. The only evidence in the record for 2009 is an April 26 pay stub for the pay period of

March 1 through March 15, 2009, which shows her gross earnings as \$1466.85 and her gross earnings for the year to date as \$11,345.85.¹ Upon our de novo review of the record, we conclude that the most accurate estimate of Lisa's income would be to average her earnings for 2007, 2008, and 2009.²

We remand this case to the district court to recalculate Jonathan's child support obligations under the guidelines by using three-year averages for both of the parties' salaries.

IV. Spousal Support

Lisa also contends the district court erred in failing to award her spousal support. She seeks an award of support to enable her to return to school and

¹ At trial, Jonathan used a figure of \$32,000 for Lisa's salary in computing the amount of child support he should pay. The following exchange occurred on Lisa's cross-examination:

Q. Now, I—In looking at those child support guideline worksheets, I want to explain, I put an income in there for you of \$32,000. That was my doing, not yours. But what I did was I took three pay stubs you had given me, averaged them out and then annualized it. Is that fair or— A. I would have no idea. Numbers are not my thing.

Q. Okay. Okay. Do you know—And I know you probably don't have a W-2 or anything yet. A. No.

Q. Do you know how much you're going to make for 2009? A. I don't. I—I would assume it's probably around there, around the \$32,000 mark. I don't know.

However, neither party introduced the pay stubs discussed into evidence.

² Because we are remanding the case for recalculation of the child support, we note that the district court will have Lisa's 2009 reported income available to use in the three-year averaging. We acknowledge that there is very little variance between Lisa's income in 2007 and 2008. However, the district court determined by extrapolation that Lisa's current income for 2009 was \$37,560. Thus, a much greater variance. The district court's sum is greater than suggested by either party at trial. Although there was evidence that Lisa had earned income of over \$11,000 by March 15, there was no evidence that extrapolating this sum over one year would be an accurate method of determining her income, particularly in light of Lisa's testimony that her caseload directly impacted her income, and her caseload was decreasing. In view of the possible significant variance of Lisa's income, and the testimony that her caseload is decreasing, averaging her income is equitable to both parties.

earn a master's degree so that she can increase her earning capacity to approximately \$60,000 to \$70,000 per year.

Spousal support is not an absolute right but is awarded depending on the circumstances of each particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). In considering whether to award a party spousal support, the court must consider the length of the marriage, the age and health of the parties, the property distribution, and earning capacity, among other factors. Iowa Code § 598.21A(1) (2009).

In rejecting Lisa's request for spousal support, the district court considered the following factors: (1) Lisa is healthy, college-educated, and able to support herself, (2) the parties were married less than five years, (3) the property division is favorable to Lisa, (4) Lisa's present income is similar to Jonathan's income, and (5) Lisa did not make any unusual or self-sacrificing contribution to Jonathan's earning capacity and Jonathan did not pursue any advanced education during the marriage.

We defer to the district court's decision declining to award Lisa spousal support. Although Jonathan's income is higher than Lisa's, an award of alimony is not equitable under the circumstances. Lisa entered the marriage with a college degree, while Jonathan has only a general equivalency diploma. Lisa is gainfully employed and able to support herself. The parties' marriage was of relatively short duration. The overall property distribution favors Lisa. Because no other factors weigh in favor of awarding Lisa spousal support, we affirm.

V. Property Division

Lisa contends the district court erred in dividing the parties' property in two respects. First she claims the court erred in failing to assign a value to Duncomb Trucking. Second, she asserts the court erred in determining her inheritance became marital property. She requests a cash settlement from Jonathan.

1. Valuation of Duncomb Trucking

With regard to the valuation of Jonathan's business, the district court found as follows:

Lisa asserts the business is worth \$145,000. If the value of Duncomb Trucking was anywhere close to the value Lisa has assigned it, there would be some basis for the cash settlement she seeks. However, . . . the value of the business is minimal. The Court gave no weight to the informal valuation of Duncomb Trucking prepared by Larry Pump, C.P.A. Mr. Pump had insufficient information to provide a valid or reliable estimate of the value of the business. Mr. Pump prepared his informal evaluation without any information regarding the assets of the business, the debts of the business, the source or sources of revenue for the business, or the strength of the relationships between the business and its customers.

After discrediting the opinion of Lisa's expert, the district court described its reasons for not placing an independent value on the enterprise:

Given that Duncomb Trucking has only one asset of any value, has no trailer of its own to haul freight, is insolvent, has a single customer, and relies solely on the personal relationship between Jon and Johnson Trucking for the freight it hauls, the Court cannot conceive of any reasonable buyer who would be willing to pay even \$10,000.00 for Duncomb Trucking. Other than the means it provides Jon to support himself and the children, Duncomb Trucking has no economic value to Jon.

We concur in the court's assessment of the evidence and likewise decline to assign a value to Jonathan's business.

2. Inherited Property

Lisa next assigns error to the district court's refusal to credit her for the inherited funds she spent on family expenses.

Iowa Code section 598.21(6) states:

Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division under this section except upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.

In determining whether inherited property is divisible as marital property, the controlling factors are the intent of the donor and the circumstances surrounding the inheritance or gift. *In re Marriage of Liebich*, 547 N.W.2d 844, 850 (Iowa Ct. App. 1996). Placing inherited property into joint ownership does not, in and of itself, destroy the separate character of the property. *Id.*

The district court rejected Lisa's request for reimbursement for the inherited money she spent on marital debts and vacations:

The problem with this argument is it ignores the fact that Lisa freely and willingly spent all of the inheritance while the parties were still together. At the time of trial, there was nothing left of the funds that Lisa received as her inheritance. With the exception of the Disney time-share unit and the Fleetwood motor home, none of the property presently owned by the parties could be traced to or characterized as proceeds of the funds inherited by Lisa. Lisa used the bulk of the money she inherited to pay down various marital debts and obligations. There was no testimony that Jon somehow pressured or coerced Lisa to use the inherited funds as she did. Lisa never did or said anything to suggest that she expected to be reimbursed for any of the inherited money she used. Because Lisa freely spent the inherited funds and took no action during the marriage to preserve them as her separate property, she must live with the fact that this money is gone.

The district court reached the following conclusion about the equities of returning the full amount of the inheritance to Lisa:

It strikes the Court as unfair to shoulder Jon with the burden of returning the inherited funds to Lisa when she benefited as much, if not more, than Jon did from the use of this money.

We agree with the district court that it would be inequitable to Jonathan to allow Lisa to recoup the entire \$79,189.60 in funds she inherited from her father's estate and then spent on vacations and other family expenses. But we do believe that Lisa is entitled to a cash settlement reflecting her purchase—with funds from her inheritance—of a new camper that was awarded to Jonathan in the dissolution. See *In re Marriage of Passick*, 375 N.W.2d 284, 286 (Iowa Ct. App. 1985) (finding wife who received inheritance was entitled to property settlement for amount of inheritance used to purchase husband's clinic, but not to remainder of inheritance which the parties lost when they went through bankruptcy).

The record shows that Lisa spent between \$13,000 and \$14,000 to pay off a note on the garage that stands on the marital property awarded to Lisa. The court also awarded the Disney time-share to Lisa, according to the parties' stipulation. Further, she spent approximately \$4000 on a vehicle for her older son, which did not benefit Jonathan. It would be inequitable to require Jonathan to reimburse these amounts to Lisa.

Lisa also estimated she spent an additional \$15,000 on family medical bills, \$15,000 to pay off family credit-card debt, and \$5000 to repay a loan from Jonathan's father. The evidence does not clearly establish how these debts

were generated or if Lisa indeed paid them with her inherited funds. Nor does the record indicate that Jonathan asked her to use the inherited money to pay these debts or that she expected any repayment. Under these circumstances, we decline to credit Lisa for these funds. We find this situation to be distinct from *In re Marriage of Harberts*, 492 N.W.2d 435, 437 (Iowa Ct. App. 1994). In that appeal, we found the district court properly required a husband to reimburse his wife who deposited a \$2300 gift into a joint bank account and used it to pay credit card bills. *Harberts*, 492 N.W.2d at 437. We noted in *Harberts* that the original purchases on those credit cards benefited the husband significantly more than the wife. *Id.* That was not the case here.

Finally, Lisa spent \$15,000 to pay off a loan on the parties' old camper, which they then traded in for a new camper. She also paid the \$4000 difference on the trade in. Jonathan received the camper per the parties' stipulation. Because this expenditure can be traced directly to Lisa's inheritance, Lisa should be reimbursed in the amount of \$14,995, the value of the camper as assigned by the parties at the time of the dissolution.

VI. Trial Attorney Fees

Lisa emphasized that the district court's denial of her request for attorney fees was based on its erroneous conclusion that such an award would be unfair "[g]iven the weak legal and factual foundation for the positions taken by Lisa in this action."

Generally, the award of trial attorney fees is based on the parties' respective abilities to pay. *In re Marriage of Starcevic*, 522 N.W.2d 855, 857

(Iowa Ct. App. 1994). Sometimes courts will consider whether one of the parties has abused the process causing the other party to incur unnecessary legal expenses. *Id.* We will reverse the refusal to award trial attorney fees only for an abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

Given the respective financial positions of Lisa and Jonathan, we concur that an award of attorney fees is not warranted here.

VII. Appellate Attorney Fees.

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of our court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (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. *See Maher*, 596 N.W.2d at 568. We decline to award attorney fees given that the parties have similar abilities to pay and both presented viable arguments on appeal. Costs of the appeal are assessed equally to the parties.

AFFIRMED AS MODIFIED.