

IN THE COURT OF APPEALS OF IOWA

No. 2-398 / 11-0790
Filed July 25, 2012

**IN RE THE MARRIAGE OF JAN A. REIS
AND DEAN A. STOWERS**

Upon the Petition of

JAN A. REIS,
Petitioner-Appellant/Cross-Appellee,

And Concerning

DEAN ALAN STOWERS,
Respondent-Appellee/Cross-Appellant.

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

Jan Reis appeals, and Dean Stowers cross-appeals, from the economic provisions of the decree dissolving their marriage. **AFFIRMED.**

Leslie Babich and Thomas W. Foley of Babich & Goldman, P.C., Des Moines, for appellant.

Joseph G. Bertogli, Des Moines, for appellant.

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

BOWER, J.

Jan Reis appeals, and Dean Stowers cross-appeals, from the economic provisions of the decree dissolving their marriage. Jan contends the district court erred in its property distribution. She also contends she should be awarded a greater amount of spousal support, while Dean contends the award is too great. Finally, Jan contends the district court erred in declining to award her trial attorney fees. On appeal, both parties seek an award of their appellate attorney fees.

Because we find the decree is equitable under the facts of this case, we affirm. The district court did not abuse its discretion in declining to award Jan her attorney and expert witness fees. We decline to award either party their attorney fees on appeal.

I. Background Facts and Proceedings.

Jan is fifty-six years old. She has an Associate's Degree from Iowa Central Community College and a Bachelor of Science in Nursing from Buena Vista College. After graduating, she worked two years as a nurse for Universal Home Health. She then reviewed claims for Blue Cross/Blue Shield before working as a nursing home inspector for the Iowa Department of Inspections and Appeals. She began working for Care Initiatives in 1995.

Dean is forty-eight years old. He is a graduate of the University of Wisconsin at Madison and Drake Law School. After graduating law school, Dean spent a year in Washington, D.C. working for the United States Sentencing

Commission. He then returned to Iowa where he worked as an associate at the Rosenberg Law Firm before being made partner.

Jan and Dean were married in November of 1997. It was Dean's first marriage and Jan's second. At the time of the marriage, Jan had approximately \$125,226 in assets, which included a townhouse, investment accounts, retirement accounts, checking and savings accounts, stock shares, and jewelry. Dean sold his townhouse in October 1997 and used the proceeds (over \$20,000) as part of the down payment on the \$356,000 home he bought with Jan in 1998. At the time of marriage, he also had a retirement account he had contributed \$24,000 to that year, approximately \$13,000 in checking and savings accounts, and \$3700 in stock purchased with Jan.

Jan was earning \$100,000 at Care Initiatives when the parties married. She rose through the ranks of Care Initiatives, and by 2005 was Chief Operating Officer, earning a salary and benefit package valued at \$386,404. Jan last worked for Care Initiatives in September of 2005 and was terminated at the end of December 2005.

As a result of her termination from and sexual harassment suffered during her employment with Care Initiatives, Jan suffered clinical depression, anxiety disorder, and posttraumatic stress disorder. In 2006 and 2007 Jan was doing so badly Dean was afraid she would attempt suicide. Jan filed a lawsuit against her former employer, which Dean helped finance. In November 2007, a settlement was reached by which Jan was paid \$1,100,000 in a payroll check, subject to the usual withholdings. She also received \$2,900,000, of which \$930,000 was paid

to Jan's attorneys for unpaid legal fees and \$1,970,000 was paid to Jan for non-wage damages and prepaid legal fees and expenses.

Dean earned approximately \$175,000 as a partner at Rosenberg Law Firm the year the parties married. He earned approximately \$350,000 in 2005 and 2006. In 2009 Dean started a new law practice. After deductions, his net earnings in 2009 were \$29,851. In 2010 Dean earned \$239,328.

In November 2007, the parties' joint Vanguard account had a balance of \$673,982.68. Proceeds from Jan's lawsuit settlement were deposited into the joint account of approximately \$1,484,860. In 2008, the parties purchased a home in Arizona for \$460,000, and in 2009 they remodeled their West Des Moines home at a cost of \$350,000. Both expenditures were made with funds from the Vanguard account. Subject to market fluctuations, the account lost money in 2008 and 2009.

On July 30, 2010, Jan transferred \$15,000 from the Vanguard account to her personal checking account. On August 5, 2010, she removed Dean's personal checking account as an authorized account for transfers in and out of the joint Vanguard account. On August 6, 2010, Jan withdrew \$4100 from the parties' joint account at Earlham Bank and closed it. She filed for divorce the same day. While separated, Jan remained in the parties' West Des Moines home. In November 2010, a temporary order awarded Jan \$2500 per month in spousal support.

Trial was held in January 2011. In the April 6, 2011 decree, the district court divided the parties' assets, awarding Jan the parties' Arizona home and its

contents, and Dean the West Des Moines home and its contents. The court awarded Jan \$861,633.50 from the joint Vanguard account with Dean receiving the remaining \$453,026.50 balance. Jan was awarded any funds remaining in the parties' joint savings account as well as her personal savings and checking accounts. Dean was awarded his personal checking and saving accounts and his business checking account. The court found Jan's earning capacity was \$36,000 per year and awarded her \$2000 of spousal support per month for a period of seven years. The court denied Jan's request for attorney and expert fees.

II. Scope and Standard of Review.

Our review of dissolution cases is de novo. *In re Marriage of Okland*, 699 N.W.2d 260, 263 (Iowa 2005). We examine the entire record and adjudicate the rights of the parties anew on the issues that are properly preserved. *In re Marriage of Jones*, 653 N.W.2d 589, 592 (Iowa 2002). However, we accord the trial court considerable latitude in making an award and will disturb its ruling only where there has been a failure to do equity. *Okland*, 699 N.W.2d at 263. We give weight to the trial court's fact findings, especially when considering the credibility of witnesses, although we are not bound by them. *In re Marriage of Duggan*, 659 N.W.2d 556, 559 (Iowa 2003).

We review the district court's award of trial attorney fees and expenses for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Property Distribution.

Jan first contends the property distribution set forth in the decree is inequitable. She does not dispute the court's valuation of the parties' assets, but argues she should have been awarded a much greater share of the Vanguard account. She also argues the Earlham Bank account should not have been included in the property distribution.

Iowa is an equitable division state. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). Equitable division does not necessarily mean equal division of each asset, although an equal division of assets accumulated during the marriage is frequently considered fair. *Id.* The issue the court must consider in each case is what is fair and equitable under the circumstances. *Id.* "The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts." *Id.* In distributing the property, we consider the criteria set forth in Iowa Code section 598.21(5) (2009).

A. Vanguard Account.

It is undisputed that at the time of the dissolution trial, the Vanguard account had a balance of \$1,314,660. The district court awarded Jan \$861,633.50 of the account and awarded Dean the remaining \$453,026.50. Although Jan acknowledges she received the greater share of the account, she argues the division is inequitable because it ignores the fact that over eighty-six percent of the remaining balance in the account was attributable to the non-wage portion of her settlement, which was meant to compensate Jan for pain, suffering, and humiliation. She asks that the decree be modified to award her

\$1,224,042 of the account—the entirety of what she contends is attributable to the non-wage portion of her settlement and one-half of the remaining funds in the account. Under Jan’s proposal, Dean would receive \$90,618. Jan’s proposal hinges on the assumption that the non-wage portion of her settlement is her personal property, which should not be subject to distribution.

In *In re Marriage of McNerney*, 417 N.W.2d 205, 206 (Iowa 1987), our supreme court considered the question of whether proceeds of a personal injury claim are marital assets. In that case, the husband was injured in an automobile accident during the parties’ marriage and received \$45,000 for breaking his clavicle, which continued to cause him pain at the time of the dissolution. *McNerney*, 417 N.W.2d at 206. The settlement did not specify what part of the \$45,000 was for medical expenses, lost wages, pain and suffering, damage to the automobile, or loss of consortium. *Id.* The parties invested the money from the settlement in a certificate of deposit that was worth \$54,954 at the time of dissolution. *Id.* The district court divided the certificate of deposit, awarding the wife \$13,112 and the husband \$41,842. *Id.* at 207. The court reasoned that in absence of any evidence indicating what the settlement was intended to cover it assumed some of it was for damage to the automobile and loss of consortium. *Id.*

On appeal, the supreme court reviewed two approaches to property distribution. *Id.* at 207-08. Under the “mechanistic approach,” “the court looks to the wording of the statute for the items expressly deleted from the property to be equitably distributed.” *Id.* at 207. Because section 598.21 only mentions

inherited and gifted property, any other property—including settlements—would be assigned for equitable distribution. *Id.* Under the “analytical approach,” the court looks at what the personal injury was intended to replace: the portion of the award attributable to pain and suffering is the property of the injured spouse; the portion of the award intended to compensate for lost wages and medical expenses represents marital property and is subject to equitable distribution; and any portion representing loss of consortium belongs to the non-injured spouse. *Id.* at 208. Our supreme court adopted the “mechanistic approach,” finding settlement proceeds do not automatically belong to either party and instead should be divided on a case-by-case basis. *Id.*

Because Jan’s settlement proceeds are subject to distribution, we must determine what is equitable under the unique facts of this case. The evidence shows that at the time of the settlement, the parties’ Vanguard account balance was \$673,983. A total of \$1,484,860 was added to the account after the settlement. Of the \$2,158,843 that totaled the Vanguard account after settlement, approximately thirty-one percent was from pre-settlement funds and sixty-nine percent was settlement money.

As a result of the settlement, the parties remodeled their West Des Moines home, and purchased and furnished a home in Arizona. These expenditures totaled approximately \$810,000. The account also lost money due to the economic downturn. By the time of trial, only \$1,314,660 remained in the Vanguard account. If we are to assume the parties’ expenditures and the market losses were taken equally from pre-settlement and settlement funds, \$412,665 of

the account was from pre-settlement funds and \$918,513 was from the settlement.

The district court found Dean offered a more plausible analysis of the money remaining in the Vanguard account at the time of trial. He offered into evidence an exhibit which showed Jan's lost wages and benefits through 2010 were \$1,161,141.86. Calculating that this represented seventy-eight percent of the approximately \$1,485,000 Jan netted in the settlement, Dean figured that that seventy-eight percent of the settlement remaining in the Vanguard account at the time of trial--\$716,440—was attributable to lost wages. When that figure is subtracted from the \$918,513 of the settlement remaining in the Vanguard account at the time of trial, \$202,073 of the settlement was attributable to the non-wage portion of the settlement. On this basis, the district court held Jan was entitled to an additional \$100,000 from the Vanguard account. The court's calculations of the parties' assets before subtracting debts shows Jan with \$1,219,936.50 and Dean with \$1,019,936.50, a difference of \$200,000, which Dean argues represents the bulk of the \$200,000 of non-wage settlement remaining at the time of dissolution.

Jan counters that her expert witness—Al Ryerson, a certified public accountant and forensic accountant—determined that after payment of attorney fees, seventy-two-and-one-half percent of the settlement was for compensation of Jan's pain and emotional distress, and only twenty-seven-and-one-half percent was for past and future wage loss. This calculation was made based on the assumption that only the \$1,100,000 for which Jan received a W-2 was lost

wages and the remainder was for pain and suffering. Ryerson was also told to assume that all of the distributions made from the account came from the wage portion of the settlement and the parties' joint funds—not the non-wage portion of the settlement. Ryerson was also told the non-wage portion of the settlement was not to be divided, but was to be treated as Jan's personal property. On this basis, Ryerson determined that of the \$1,314,660 remaining in the Vanguard account, Jan was entitled to \$1,224,042, which comprised the entirety of the remaining non-wage portion of the settlement, plus one-half of the remaining funds in the account. Under this analysis, Dean would receive \$90,618 from the Vanguard account.

We find the assumptions that Jan is entitled to the entire amount of the settlement for which she did not pay wage taxes on and that none of the parties' purchases came from this money are not supported by the facts of this case. The analysis of the Vanguard funds provided by Dean is a more reasonable explanation of which funds comprised the remaining Vanguard account sum. There is also no requirement that Jan be awarded the entire portion of the account comprising the non-wage settlement monies. The question is what is equitable under the facts.

We conclude the award of \$861,633.50 to Jan and \$453,026.50 to Dean is equitable under the facts of this case and when considering the property distribution as a whole. Under the property distribution, Jan receives net assets of \$1,219,936.50, and Dean receives net assets of \$967,868.50. Considering the parties' premarital assets, their near-equal earnings during the marriage, and

the damages Jan suffered at Care Initiatives, we conclude the property distribution is equitable.

B. Earlham Bank Account.

Jan also contends the court erred in including the Earlham Bank account as marital property in calculating the property distribution. She argues she acted reasonably in withdrawing the \$4100 in the account to pay for her monthly expenses because she did not begin receiving temporary spousal support until November 1, 2010, about three months after filing the petition for dissolution. She seeks a modification of the decree to award her the \$2050 the district court incorrectly credited to her.

The total amount of assets divided by the court—not including the parties' retirement assets—is approximately \$2,000,000. We conclude the property distribution is equitable under the facts of this case.

IV. Spousal Support.

Jan next contends the court erred in awarding her spousal support in the amount of \$2000.00 per month for seven years. She argues an award of \$5000 per month for ten years is more equitable. On cross-appeal Dean argues the district court's award of spousal support is excessive and should be reduced to \$1500 per month for eighteen months.

We consider the property distribution and spousal support provisions of a decree together to determine their sufficiency. *Hazen*, 778 N.W.2d at 59. Spousal support is justified when the distribution of the marital assets does not equalize the inequities and economic disadvantages suffered in marriage by the

party seeking the support, and there is a need for support. *Id.* While the property distribution is designed to sort out property interests acquired in the past, spousal support is made in contemplation of the parties' future earnings and is modifiable. *Id.* at 59-60.

There is no absolute right to spousal support. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996) (superseded by statute on other grounds as recognized by *In re Marriage of Shanks*, 758 N.W.2d 506, 510-11 (Iowa 2008)). Rather, whether it is awarded depends on the circumstances of each particular case. *Id.* Iowa Code section 598.21A(1) sets forth the criteria for determining spousal support. This includes the length of the marriage, the age and physical and emotional health of the parties, the property distribution, the earning capacity of each party, and any other factors the court may determine to be relevant. Iowa Code § 598.21A(1).

Jan contends the district court erred in determining her earning capacity is \$36,000 per year. The court arrived at this figure after noting Jan's mental health history, which shows Jan was unable to work in 2006 and 2007 due to the severe depression she suffered in the wake of her employment with and discharge from Care Initiatives. However, Jan terminated therapy in April 2008 and prior to that, had ceased taking medication for anxiety, depression, and posttraumatic stress disorder. The court also noted Jan's medical history of back and neck pain for which she has had surgery. Jan reported higher pain and discomfort in 2003 and 2004 than she did at the time of trial. Her use of medication to treat the pain had

also been lowered from as many as ten tablets of hydrocodone per day to one-third of a tablet two or three times per day.

Jan argues she is incapable of obtaining employment, citing a 2007 report from Kent Jayne, a vocational and economic expert retained for Jan's litigation with Care Initiatives. Jayne found Jan was incapable of obtaining employment due to her mental health condition. However, as previously noted, Jan's mental health condition has improved since 2007. Julie Svec, a vocational rehabilitation specialist set Jan's earning capacity at approximately \$60,000 per year. Svec did agree that if Jan was suffering from the mental health issues she had in 2007, it would be difficult for her to find employment.

The court found:

Jan has gotten substantially better on an emotional level particularly since the settlement and her physical condition appears and has been manageable. Further, this court notes that Jan appears physically fit, sat in court for four trial days with limited apparent physical discomfort, has been able to do significant physical activities, and has essentially lived on her own for the first five months of 2009 and the first six months of 2010.

The court acknowledged that while Jan had been earning a salary and benefits package of over \$380,000 per year with Care Initiatives, "due to 'litigation stigma' and the lack of comparable high level executive positions in the central Iowa community, that Jan will be very unlikely to find comparable employment to her job as chief operating officer at Care Initiatives" However, because Jan has a valid Iowa nursing license and "considerable skills in the nursing and regulatory field," the court found her earning capacity to be \$36,000 per year. The evidence supports this finding.

While Jan seeks an increase in her spousal support, both as to the amount and duration, Dean argues that if Jan is entitled to an award of spousal support it should be reduced to \$1500 per month for a period of eighteen months. He argues her earning capacity, when coupled with the approximately \$40,000.00 per year in dividends she is likely to receive from her share of the Vanguard account, would result in \$76,000 per year in earnings.

While we agree with Dean that Jan's expenses are not as high as the \$6922 per month Jan claims, we find the award of \$2000 per month in spousal support for a period of seven years is equitable. Dean is nearly a decade younger and enjoys a large income, which Jan cannot hope to match given the factors enumerated above. Given the length of the marriage, the significant assets that have been divided between the parties, and the standard of living they enjoyed during the marriage, we affirm the spousal support award.

V. Trial Attorney and Expert Witness Fees.

Jan also contends the district court abused its discretion in failing to award her trial attorney and expert witness fees. She seeks an award of \$35,000 in trial attorney fees and \$12,500 in expert witness fees.

Whether attorney fees should be awarded depends on the parties' respective abilities to pay. *Sullins*, 715 N.W.2d at 255. In addition, the fees must be fair and reasonable. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997).

In denying Jan's request for attorney fees, the district court noted the "substantial assets" from the marriage that were being awarded to Jan in the decree. Jan has not shown the district court abused its discretion in denying her request.

VI. Appellate Attorney Fees.

Both parties request an award of their 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 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).

We decline to award either party their appellate attorney fees.

AFFIRMED.