

IN THE COURT OF APPEALS OF IOWA

No. 2-596 / 11-1030
Filed November 29, 2012

**IN RE THE MARRIAGE OF KEITH A. SNOW
AND KELLY L. BRANNAN-SNOW**

**Upon the Petition of
KEITH A. SNOW,**
Petitioner-Appellee,

**And Concerning
KELLY L. BRANNAN-SNOW,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson (trial) and Arthur E. Gamble (motion to reconsider), Judges.

Wife appeals the provisions of the decree dissolving her marriage.

AFFIRMED AS MODIFIED.

Bradley Schroeder and Jon Garner of Hartung & Schroeder, Des Moines, for appellant.

Becky S. Knutson of Davis Brown Law Firm, Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

EISENHAUER, C.J.

Kelly Brannan-Snow appeals the property, child support, and alimony provisions of the decree dissolving her marriage to Keith Snow. Kelly seeks trial attorney fees, and both parties request appellate attorney fees. We affirm as modified and award attorney fees to Kelly.

I. Background Facts and Proceedings.

At the time of the July 2010 trial, Keith and Kelly, both in their mid-forties, had been married sixteen years. They are the parents of one child, age seven. In the October 2010 dissolution decree, the court ordered joint legal custody and joint physical care as stipulated by the parties.

Kelly is an elementary school teacher with over twenty years of experience. Her income for the 2010-11 school year was \$59,000. Kelly is taking classes for a master's degree and plans to continue taking classes in order to increase her future earnings and her IPERS.

After working for Guide One Insurance and Strategic America, Keith started his own consulting business selling electronic information, web design, and marketing services. This business relies on the relationships Keith developed during his prior employment and is divided into two separate entities: Business Web Builders (founded in 2003) and B2E (founded in 2009). Currently, Business Web Builders owns two buildings, the original office and the current office for B2E, while B2E is the operating entity employing Keith and Keith's other employees. We will refer to the businesses as B2E.

Keith also owns a fifty-percent interest in GD Development. GD invested \$53,387 in the renovation of a 100-year-old building it purchased for one dollar

from the city of Grimes. Keith testified he will need to invest an additional \$28,000 in order to meet the building code by September 2010, or the building will revert to the city of Grimes.

During the course of the proceedings, Keith paid Kelly's housing expenses. At trial, Kelly asserted Keith's annual yearly income is approximately \$600,000.¹ Keith's expert calculated his yearly income to be either \$475,892 or \$577,034. The dissolution decree awarded Kelly monthly alimony of \$1000 for thirty-six months and monthly child support of \$1265. To equalize the property distribution, the district court ordered Keith to pay Kelly \$315,000. Kelly now appeals.

II. Scope and Standards of Review.

We review the trial court's decision de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). We examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 156 N.W.2d 845, 846 (Iowa 1968).

The district court adopted Keith's thirty-seven page proposed decree essentially verbatim. Kelly filed a motion to reconsider. Due to the trial judge's

¹ Kelly's calculation included B2E annual salary of \$125,000, B2E dividend income, Schedule C income, and accelerated depreciation.

extended leave, another judge denied Kelly's motion, stating: "This will preserve the issues raised in the motion and clear the way for de novo review on appeal."

"[W]e do not encourage the practice of adopting verbatim the proposed findings and conclusions submitted by one of the parties." *In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa Ct. App. 1996). Specifically:

[T]he practice of requesting counsel to prepare proposed findings and conclusions . . . should be done as a cooperative means of assisting the court in preparing a fair and prompt decision. Trial judges can show their responsible use of this practice by refraining from wholesale, or near wholesale, adoption of a proposed decision. Instead, the proposed decision should be a guide, with selected portions incorporated into the independent thoughts of the trial judge.

Id. We recognize Kelly's legitimate concerns "as to the extent of a judge's actual input into the process when a proposed decree is adopted verbatim." *Id.* However, in this equity action, "we review the evidence anew, disconnected, ultimately, from the trial court findings." *Id.*

III. Property Division.

Kelly contends the property division is inequitable and the court erred in its valuation of several assets. The net assets² of the parties at the time of trial exceeded \$1.2 million.

Iowa is an equitable distribution state, and each marital partner is entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage distribution. *In re Marriage*

² The parties stipulated to Keith's \$185,496 mortgage debt/\$14,169 car debt, as well as to Kelly's \$213,039 mortgage debt/\$8,707 car debt.

of Russell, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.*

Our findings regarding the assets and liabilities of the parties are reflected in the spreadsheet attached to this opinion. The parties stipulated³ to the valuation and allocation of numerous assets and debt. Kelly's expert reconstructed business balance sheets and valued B2B at \$511,000 as of August 2009.⁴ Keith's expert agreed with this valuation. Preliminarily, Keith's assets total \$719,646, and Kelly's assets total \$254,580.

Kelly argues the household contents were split and both parties received equal property. After our *de novo* review, we agree and assign no value to household property.

Kelly also requests we value Keith's Bank of the West checking account at \$13,285. Prior to trial, Keith reduced the account's value to \$4119 by paying expert witness fees. We note Kelly received mutual funds prior to trial to pay dissolution costs and fees and the mutual funds' value is included in her assets for property distribution. We therefore allocate \$13,285 in the Bank of the West checking account to Keith.

Kelly contends she is entitled to one-half of the 2009 tax refund of \$92,391. Keith testified it was his past practice to use the tax refunds to pay the estimated business taxes for the upcoming year and he followed that pattern for

³ The QDRO ordered by the district court on two assets (Kelly's IPERS and Keith's defined benefit plan) is not challenged on appeal.

⁴ The business valuation provides: \$1,517,000 marketable value minus \$949,000 for Keith's personal goodwill or \$568,000 (Keith's equity value). The \$568,000 is reduced by a ten percent discount for lack of marketability (\$57,000), yielding \$511,000 (Keith's equity value).

2009, despite the pending dissolution and despite Kelly's request to split the refund. Instead of using 2010 income streams or his own funds, Keith appropriated and used 2009 funds. Kelly had an interest in these funds, and they should be included in the division of property. We modify the decree to allocate \$92,391 to Keith.

Kelly contests the court's valuation of the newly-disclosed cash assets of B2E. Immediately prior to trial, Keith revealed the cash assets of B2E had increased by \$293,405. These assets were not included in the \$511,000 August 2009 valuation. Keith's expert applied a ten percent deduction for lack of marketability and other deductions in opining the net change in business value is an increase of \$231,848. Additionally, Keith argues he is entitled to a deduction of \$21,800 for future business expenses for computers and software. Keith asserts the resulting increase in business value is \$210,048. Kelly's expert testified the new cash assets increased the net value of the business by \$285,405. He explained the addition of the easily-liquidated tangible assets resulted in a downward adjustment of the marketability discount from ten percent to five percent, or a deduction of \$14,270.⁵ Application of this discount results in an overall increase in business value of \$271,135.

We conclude the net value of the business should be increased by \$285,405 due to the newly-accumulated cash assets. We apply a ten percent discount for marketability, deduct \$28,541, and award \$256,865 in additional

⁵ Kelly's expert also testified it would be appropriate, given the new cash assets, to recalculate the August 2009 valuation using a five percent discount rate. We decline to do so.

business equity to Keith. We decline Keith's request to deduct \$21,800 future expenses from the B2E valuation.

Finally, Kelly asserts Keith's interest in GD should be valued at \$26,694, or Keith's initial expense to renovate the building. Kelly's expert testified the total capital for GD is \$53,387 and "that figure would be considered if we were to perform a business valuation analysis of this entity." However, he also explained:

Q. And there is no guarantee of any kind that that building will ever have a positive cash value, is there? A. Without performing a valuation or having a real estate appraiser take a look at what the value of the building is in its refurbished state, no, I could not opine to what that value is.

Keith's expert valued GD at -\$28,000, the amount of future renovation costs Keith testified were needed to prevent reversion of the property to the city. We affirm the district court's use of the valuation of Keith's expert or -\$28,000.

Property Division Summary. Keith's \$719,646 preliminary net assets are reduced by -\$28,000 for GD's valuation and increased by \$92,391 (tax return), \$13,285 (checking), and \$256,865 (B2E cash increase). This results in Keith's net assets totaling \$1,054,187. Kelly's net assets are not modified and total \$254,580. Accordingly, we modify the decree and award Kelly \$400,000 to equalize the property distribution.

IV. Child Support.

The district court ordered Keith to pay \$1265 per month child support.⁶ Kelly was ordered to pay for daycare and after-school care, and she can utilize pre-tax wage withholding for those expenses. Keith was ordered to pay ninety percent of the extracurricular activity and school expenses. Noting Keith's net monthly income exceeds \$20,000,⁷ Kelly argues equity requires Keith pay \$2500 monthly child support.

Under Iowa Court Rule 9.26, when combined net monthly income exceeds \$20,000, "the amount of the basic support obligation is deemed to be within the sound discretion of the court." Further, Iowa Court Rule 9.3 recognizes the general purpose of child support is "to provide for the best interests of the children by recognizing the duty of both parents to provide adequate support for their children in proportion to their respective incomes."

The parties have joint physical care, and Keith's combined net monthly income significantly exceeds Kelly's combined net monthly income. Accordingly, under the specific facts of this case, equity requires us to modify the decree and increase Keith's child support obligation to \$1500 per month.

V. Alimony.

Noting Kelly's long-term employment and Keith's significant payment to Kelly to equalize the property distribution, the trial court awarded Kelly \$1000 per

⁶ Keith's guideline worksheets show child support of \$1236.06 for \$475,892 income and \$1294.29 for \$577,034 income. The district court found: Keith proposes to pay the average or \$1265 monthly.

⁷ One of Keith's child support exhibits listed: (1) Kelly's annual income at \$59,000 with her adjusted net monthly income at \$3301.18; and (2) Keith's annual income at \$475,892 with his adjusted net monthly income at \$28,087.46.

month alimony for thirty-six months. On appeal, Kelly requests alimony of \$5000 per month for ten years.

Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). The discretionary award of spousal support is made after considering factors such as the length of the marriage; each party's age, educational level, health and earning capacity; the ability of the spouse seeking support to be self-sufficient, length of absence from the job market, and the relative need for support. See Iowa Code § 598.21A(1) (2007). Further, we consider property division and spousal support together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

We have increased Kelly's property equalization payment to \$400,000. Kelly is educated and has significant, recent work experience. The parties did not have a lavish lifestyle, and Kelly's property award allows her to completely eliminate her mortgage obligation or invest the award to obtain additional income. We affirm the district court's alimony award.

VI. Attorney Fees.

Kelly's trial counsel certified \$31,000 in fees as of the first day of trial. The trial court ordered each party to pay his or her respective trial attorney fees. Kelly argues an award of trial attorney fees is appropriate due to the parties' unequal capacity to pay and because she was forced to request court assistance after Keith asked her to sign the signature page for the 2009 tax returns without showing her the returns or informing her of the amount of the refund. Kelly also

needed the court's assistance to access a mutual fund to pay her ongoing dissolution expenses.

Keith argues he also sought motions to compel due to the parties' discovery disputes. Further, during the dissolution Keith paid daycare expenses and Kelly's mortgage, escrowed taxes, insurance, and utilities.

An award of trial attorney fees is discretionary and "[w]hether attorney fees should be awarded depends on the respective abilities of the parties to pay. In addition, the fees must be fair and reasonable." *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994) (citations omitted). Keith's adjusted net monthly income is, at a minimum, \$24,768 and Kelly's adjusted net monthly income is \$3301. We recognize both parties contributed to discovery disputes and conclude equity requires Keith to pay \$10,000 for Kelly's trial attorney fees.

Kelly and Keith both request appellate attorney fees. "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 at 389. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party requesting fees was required to defend the district court's decision on appeal. *Id.* Kelly was successful on appeal and, given the circumstances, we think an award of appellate attorney fees is equitable. Accordingly, Kelly is awarded \$5000 for appellate attorney fees.

VII. Conclusion.

We modify the decree and award Kelly \$400,000 to equalize the parties' property distribution. Equity requires Keith pay \$1500 per month child support.

We affirm the district court's alimony award. We award Kelly \$10,000 for trial attorney fees and \$5000 for appellate attorney fees. Costs are taxed to Keith.

AFFIRMED AS MODIFIED.

SNOW PROPERTY	Keith Award	Kelly Award
Home Equity	49,504	99,461
Car Values	21,276	15,173
Keith's SEP / Kelly 401K	137,866	86,158
Keith Inheritance -Remodel		5,000
Kelly Whole Life		1,408
Kelly Checking		2,000
Kelly Money Market		2,600
Kelly 403B		24,164
Kelly Mutual Funds Advance		18,616
Keith's B2E Business without new cash, agree to Keith	511,000	
PRELIMINARY ASSET VALUES	\$719,646	\$254,580
Household Contents	0	0
Keith Bank of the West	13,285	
2009 Tax Refunds	92,391	
B2E NEW CASH VALUATION		
\$285,405 Net Value		
(\$28,541) 10% Discount		
Keith B2E Cash Modified Award	256,865	
GD Development - Grimes BLDG	(28,000)	
FINAL ASSET VALUES	\$1,054,187	\$254,580
Minus Kelly's Assets	(254,580)	
Difference	799,607	
1/2 Difference for Equalization	399,804	