IN THE COURT OF APPEALS OF IOWA

No. 3-148 / 12-1389
Filed April 24, 2013

IN RE THE MARRIAGE OF JOSEPH PAUL MICHAEL BERGER AND CIRA LYNN OGNIBENE-BERGER

Upon the Petition of
JOSEPH PAUL MICHAEL BERGER,
Petitioner-Appellant,

And Concerning
CIRA LYNN OGNIBENE-BERGER,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Thomas A. Bitter, Judge.

Joseph Berger appeals from the provisions of the decree dissolving his marriage to Cira Berger. **AFFIRMED.**

Jenny L. Weiss of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellant.

Darin S. Harmon of Kintzinger Law Firm, P.L.C., Dubuque, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

After twenty-four years of marriage and five children, Joseph (Joe) and Cira Berger divorced. The district court ordered Joe, an obstetrician/gynecologist, to pay Cira, a stay-at-home mother, $8000 per month in spousal support for sixty months and then $6000 per month until Cira turns sixty-five, remarries, or either party dies. The court also divided the parties' significant marital assets.

On appeal, Joe raises four issues. First, he contends the amount of spousal support is inequitable. Second, he objects to the requirement that he maintain a $1,000,000 life insurance policy with Cira as the sole beneficiary. Third, Joe asks for the property distribution to be modified to reflect Cira's dissipation or waste of marital assets. Fourth and finally, he contends he should be awarded the family's golden retriever, Max. Cira requests an award of her appellate attorney fees.

On de novo review, we find that the district court acted equitably in fixing the amount and duration of spousal support payable to Cira. Because we decline to modify the spousal support provision of the decree, we likewise decline to modify the provision relating to the life insurance policy. Because Joe failed to show Cira dissipated marital assets during the separation, we do not disturb the property distribution. We also affirm the award of Max to Cira. Finally, we award Cira $4000 in appellate attorney fees.

I. Background Facts and Proceedings.

Joe and Cira were married in July 1987. At the time, Joe had earned his undergraduate degree in biology from Loras College and was attending medical school at the University of Iowa. Cira also graduated from Loras College, earning a bachelor's degree in classical studies. She worked at an Arby's restaurant and then as a pharmacy technician to support Joe during his studies.[1]

In May 1990, after Joe finished medical school, the parties moved to Tennessee for Joe's residency. Cira continued working as a pharmacy technician until she became pregnant with twins and had to quit due to the severe morning sickness she experienced. The twins, Zachariah and Alexandria, were born in May 1992. Their third child, Nicholas, was born in November 1993. Jacob followed in October 1995. The parties agreed Cira would stay home and care for their young family. Their youngest child, Victoria, was born in 2003.

After several moves in the decade following Joe's graduation from medical school, the family eventually settled in Dubuque. They purchased a five-bedroom home on Brandywine Park Drive for $300,000. The property is currently assessed at $330,000, but has an appraised value of $265,000. The mortgage on the home at the time of dissolution was approximately $14,500.

Joe is a board-certified obstetrician and gynecologist at Medical Associates. He earns a base salary of $225,000, which is supplemented based on how many patient visits, surgeries, and deliveries he performs. His income

[1] Joe also worked at Arby's during all but his final year of schooling.

grew steadily to a high of $718,072 in 2009 before decreasing in 2010 and 2011. His average gross income over the past six years was $633,122.

Joe filed a petition to dissolve the marriage on November 9, 2011. On the same day, he petitioned for a civil domestic abuse protective order under Iowa Code chapter 236 (2011). The court entered a protective order removing Cira from the Brandywine home. After living in a hotel for approximately one month, Cira purchased a $398,000 home on Wedgewood Drive. The home was purchased on contract, using a $30,000 down payment she received from her parents. Cira spent approximately $23,000 of marital money to furnish the home and spent approximately $5000 on electronic equipment.

The court held trial on May 29, 2012. The parties agreed Cira would have physical care of Victoria and would share physical care of Jacob.[2] Although they agreed on the division of the majority of their personal and household items, the parties could not agree who would be awarded Max, one of their two dogs. Issues at trial included the division of the parties' monetary assets, Joe's child and spousal support obligations, and Cira's attorney fees.

The district court entered its decree dissolving the marriage on June 11, 2012. It ordered Joe to pay Cira $3500 in child support for two children and then $2500 per month for one child. The court also awarded Cira $8000 per month in spousal support for a period of sixty months, and $6000 per month thereafter until Cira reached the age of sixty-five, remarried, or either party died. Joe was ordered to maintain a life insurance policy of at least $1,000,000 death benefit

[2] The three oldest children had reached the age of majority by the time of trial. They lived with Joe.

payable to Cira until Victoria reached the age of eighteen, and then $250,000 thereafter as long as he had a spousal support obligation to Cira.

In dividing the assets, the court awarded each party property valued at $1,011,343.15. The court awarded Joe the Brandywine home, which had a net value of $250,500, and awarded Cira the Wedgewood home, which had no value as marital property. The court awarded Max to Cira. Finally, the court directed Joe to pay $5000 of Cira's trial attorney fees.

Both parties filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2). Specifically, Joe requested the court amend the spousal support provisions of the decree to limit Cira's spousal support to ten years, with five years of support at $8000 per month and five years of support at $6000 per month.[3] He also requested the court amend the property division to take into account Cira's spending of $130,000 during five months of the separation. Finally, Joe asked the court to amend the decree to award him Max.

On July 3, 2012, the district court entered its order on the motions to amend. It reduced Joe's child support obligation to $3064 for two children and $2174 for one child, as well as making other amendments not relevant to this appeal. The court denied the remainder of the requests. Joe appeals.

II. Scope and Standard of Review.

We review dissolution of marriage proceedings de novo. *In re Marriage of Kimbro*, 826 N.W.2d 696, 698 (Iowa 2013). We defer to the district court's fact findings, though we are not bound by them. *Id.*

[3] The amount of spousal support Joe requested in his 1.904(2) motion was more generous than the amount he proposes on appeal.

The trial court has considerable latitude in determining a spousal support award. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 486 (Iowa 2012). We only disturb such an award if it fails to do equity between the parties. *Id.*

III. Spousal Support

Joe contends the district court's award of spousal support is inequitable.[4] He focuses on the age and health of the parties, Cira's living expenses, her anticipated reentry into the workforce, and the property award. Considering

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[4] The legislature has directed courts to consider a host of factors in determining a spousal support award, including:

> 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.
> 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).

those factors, he contends a more reasonable award would be $5000 per month for five years and then $2500 per month for five years.

Joe's first argument, regarding the age of the parties, actually relates to his income. At the time of trial, Joe was forty-eight years old and his gross annual income had averaged $633,122 over the previous six years. Joe testified that sometime between the age of fifty and fifty-five, most obstetrician/gynecologists discontinue their obstetrics practice due to difficulty maintaining the long hours and late night calls involved in that practice. Discontinuing obstetrics, Joe testified, usually results in a decrease in income of approximately one-third. Joe further testified that before filing for dissolution, he had intended to stop practicing obstetrics at the age of fifty. Cira disputed this claim, testifying she had never heard him express that intent.

When Joe will decide to retire from obstetrics and how much less he will earn at that point is speculative. Assuming Joe does forego his obstetrics practice sometime between the ages of fifty and fifty-five, the district court's spousal support award remains equitable. The decree provides for five years of spousal support at $8000 per month, before being lowered to $6000 per month. This drop would occur when Joe was fifty-three, halfway between the ages a typical obstetrician retires from practice. If after he retires from obstetrics Joe's circumstances render him unable to continue support at the level ordered in the decree, Joe may petition the court for a modification of the decree. *See In re Marriage of Bell*, 576 N.W.2d 618, 623 (Iowa Ct. App. 1998), *overruled on other*

grounds by In re Marriage of Wendell, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998).

Joe next argues Cira's living expense claim of $9055 per month is exaggerated, reflects support for adult children, or reflects expenses for their two minor children who are covered by the child support award. He sets forth a list of expenses he believes are unreasonable, and argues her actual expenses are closer to $7000 per month.

We note that living expenses are not specifically identified in section 598.21A(1) as a factor to consider in making a spousal support award. While the Code does require the court take into account the feasibility of the party seeking maintenance becoming self-supporting, the measure we use is "the standard of living reasonably comparable to that enjoyed during the marriage." Whether Cira's living expenses are $7000 per month or $9000 per month, an award of $8000 per month in spousal support is equitable. *See In re Marriage of Becker*, 756 N.W.2d 822, 827 (Iowa 2008) (finding that where a wife's expenses to maintain the standard of living reasonably comparable to that enjoyed during the marriage was $6980 per month, a spousal support award of $8000 per month was appropriate). This award reflects a standard of living comparable to the one Cira enjoyed during the marriage.

Likewise, Joe's argument that Cira will re-enter the workforce in four to five years does not obviate her need for spousal support. Cira testified she planned to earn a master's degree in criminal justice by taking online courses from the University of Phoenix. She estimates it will take her between four and

five years to complete her education. The evidence shows that even after she has finished her education, Cira's earning capacity will be a fraction of Joe's—between $30,000 and $41,000 per year, or less than ten percent of what Joe estimates he would earn even after retiring from obstetrics. There is no objective likelihood she will be able to achieve a standard of living reasonably comparable to that which she enjoyed during the marriage after she finishes her education. The decrease in Cira's spousal support from $8000 to $6000 after five years reflects her earning capacity after her education is completed.

The district court's spousal support award accomplished equity between the parties. Joe earns a base salary of $225,000 per year, and takes in additional income based on the number of procedures he performs. His six-year average income was $633,122. He has the ability to continue this level of earning. Even if Joe gave up obstetrics and his salary decreased by one-third, he would still earn in excess of $400,000. In contrast, Cira has not worked in twenty years as part of the parties' agreement that she would stay home and raise their five children. Even after Cira completes the education she needs to reenter the work force, her income will be a fraction of what Joe is able to earn and will not support her at the standard of living enjoyed during the marriage. An award of $8000 per month while she receives that education and $6000 per month thereafter is equitable under the facts of this case.

Finally, Joe contends it is inequitable to require he maintain a life insurance policy payable to Cira with a death benefit of $1,000,000 until Victoria turns eighteen and $250,000 thereafter. A provision in a dissolution decree to

maintain life insurance is enforceable. *Stackhouse v. Russell*, 447 N.W.2d 124, 125 (Iowa 1989). But Joe argues that if we decrease the spousal support award, we should reduce the amount of the death benefit accordingly. Because we decline to modify the spousal support award, we likewise decline to modify the provision requiring Joe to maintain a life insurance policy.

IV. Property Division.

Because Iowa is an equitable distribution state, courts must divide the marital assets even-handedly, considering the factors outlined Iowa Code section 598.21(5). *In re Marriage of McDermott*, 827 N.W.2d 671, 678 (Iowa 2013). A division may be equitable even if it is not an equal division of each asset. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). Rather, we must consider what is fair under the circumstances. *Id.*

A. Dissipation of assets

When making a property distribution, the court may generally consider a spouse's dissipation or waste of marital assets before the dissolution. *Kimbro*, 826 N.W.2d at 700. If one spouse's conduct during the separation results in loss or disposal of property otherwise subject to division at the time of divorce, we include the lost asset in the martial estate and award it to the spouse who wasted it. *Id.* at 700-01. The doctrine does not apply to monies used for "legitimate household and business expenses." *Id.* at 701.

Joe challenges the property distribution, arguing the district court failed to take into account Cira's dissipation of marital assets and credit the waste against her share of the division. He claims Cira spent $126,000 over the course of five

months during their separation. In support of this claim, he cites an exhibit he introduced at trial, which summarizes the parties' spending from joint accounts during that time period. Joe highlighted items that he was responsible for, those attributable to the children, and maintains the rest are Cira's spending.

In determining if one party has dissipated assets, dissolution courts examine "(1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances." *In re Marriage of Fennelly*, 737 N.W.2d 97, 104 (Iowa 2007). The first factor can be resolved depending on whether the spending spouse can show how the funds were spent or the property disposed of by testifying or producing receipts or similar evidence. *Id.* The second issue requires the court to consider many factors, including:

> (1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefited the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure.

Id. at 104-05. We also consider whether the dissipating party intended to "hide, deplete, or divert the marital asset." *Id.* at 105.

We find insufficient evidence to show Cira dissipated $126,000 in marital funds during the parties' separation. Joe's exhibit summarizes charges incurred on a joint credit card. The record does not show which party was responsible for which expenditures. Joe marks the expenditures that he claims he is responsible for, but provides no evidence other than his recollection as to what he purchased or withdrew from the parties' joint account some months earlier. Because the

record does not reveal what any of these expenditures were for, it is impossible to determine whether they benefited the joint marital enterprise.

The district court found Cira used approximately $23,000 in marital funds to furnish the Wedgewood home when she was unable to access the Brandywine home to retrieve her belongings. Furthermore, she spent an additional $5000 on electronics for the home. We agree the record supports this finding. The spending of these marital funds was accounted for in the property distribution. These Wedgewood home furnishings were valued at $10,330 and awarded to Cira, as the parties stipulated.

The district court considered the parties' expenditures in the six months leading up to the trial and found that while Cira spent "significantly more money" in those six months than she would have if the marriage was not being dissolved, "it would be a stretch to find that the expenses constitute a waste." We agree and find the district court's property distribution was equitable.

B. Award of pet

In his final complaint, Joe asserts the district court erred in awarding Max, the parties' ten-year-old golden retriever, to Cira. He argues that because Cira has another dog—Sophie, which lives with her—it would be equitable for him to be awarded Max. Joe also contends the parties' oldest son, who lives with him, is very attached to Max.

The district court opined the "biggest issue" regarding the dog was which party would be more available to care for him. In awarding Max to Cira, the district court noted she has been responsible for taking him to the veterinarian

and, because she stays at home, would have more time than Joe to provide attention for the dog.

A dog is personal property. *In re Marriage of Stewart*, 356 N.W.2d 611, 613 (Iowa Ct. App. 1984). While a family pet should not be put in a position of being neglected or abused, courts do not have to determine a pet's best interests when making a properly division. *Id.; but see Houseman v. Dare*, 966 A.2d 24, 28 (N.J. 2009) (recognizing pets have special "subjective value" to their owners); Eric Kotloff, Note, *All Dogs Go to Heaven . . . Or Divorce Court: New Jersey Un"leashes" a Subjective Value Consideration to Resolve Pet Custody Litigation in Houseman v. Dare*, 55 Vill. L. Rev. 447, 447-49 (2010) (recognizing while current legal framework does not coincide with modern public sentiment about pets, the law is changing).

We find the district court did equity in awarding Max to Cira. The evidence shows that Max is licensed to Cira by the City of Dubuque. The "GEO tracker" device associated with Max is in Cira's name alone. Cira took Max to training classes and got Max medical attention when he had his most recent ear infection, even though he was in Joe's care at the time. Cira also has physical care of the parties' youngest child, who has known Max all of her life.

Finding the property distribution to be equitable, we affirm.

V. Appellate Attorney Fees.

Cira requests an award of $5000 in appellate attorney fees. Such an award is discretionary. *Kimbro*, 826 N.W.2d at 704. Whether attorney fees should be awarded depends on the parties' respective ability to pay. *Id.* In

making this determination, "we review the parties' entire financial picture, 'including their respective earnings, living expenses, and liabilities.'" *Id.* (quoting *In re Marriage of Willcoxsoni*, 250 N.W.2d 425, 427 (Iowa 1977)). We also consider the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006).

In making her request, Cira cites the fact that her only income is the spousal support she receives from Joe. She argues she should not have to spend this money, which is meant to maintain her livelihood, on attorney fees incurred due to Joe's appeal. She also cites Joe's substantial income and his ability to continue to earn that income. We are persuaded by Cira's arguments and award her $4000 in appellate attorney fees. Costs of appeal are taxed to Joe.

AFFIRMED.