IN THE COURT OF APPEALS OF IOWA

No. 6-1073 / 06-0638
Filed February 14, 2007

**IN RE THE MARRIAGE OF MICHAEL DEAN LANCE
AND STACIE KAY LANCE**

**Upon the Petition of
MICHAEL DEAN LANCE,**
Petitioner-Appellee,

**And Concerning
STACIE KAY LANCE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Henry County, Cynthia H. Danielson, Judge.

Respondent appeals from provisions of a dissolution decree. **AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.**

Robert J. Engler, Burlington, for appellant.

Timothy B. Liechty, New London, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Stacie Lance appeals from the child support, alimony, and property division provisions of the district court's decree dissolving her marriage to Michael Lance. We affirm in part and remand with directions.

I. Background Facts and Proceedings

Michael and Stacie Lance were married in November 1994. Michael was thirty-five years old at the date of trial and Stacie was thirty-one. Three children were born to the marriage: Madelaine, born in April 1995; Mikayle, born in September 1997; and Izaak, born in September 2002.

Michael has no post-high school education or training. In 1990 he purchased a sanitation business from his grandfather. Michael's grandfather operated the business as a hobby, but Michael turned "Lance Refuse" into a career. Michael works six days a week to run Lance Refuse. Outside the invoicing process, Lance Refuse is a one-man operation.

Stacie earned a two-year degree as an L.P.N. prior to the marriage. She worked as a medical assistant at Family Medicine for three years. She then worked at Hometown Medical Center for approximately one year. When Mikayle was born in 1997, Stacie quit her full-time position and primarily stayed home to care for the children and the home. While at home she did some secretarial work and billing for Lance Refuse. She also held various part-time jobs. She worked in the medical field as recently as 2004. She recently went back to school to receive training to become a massage therapist. At the time of trial she was only a few months shy of completing her training.

The parties have been effectively separated since November 2004. Michael filed this action in December 2004. He continued to pay all family living expenses until Stacie moved out of the family home in September 2005.

Prior to trial, the parties stipulated to an award of joint legal custody and joint physical care of the children. Under the shared physical care arrangement, each parent would have equal time with the children. The parties also stipulated to the division of most of their assets and liabilities.[1]

The parties were unable to agree on their respective incomes for purposes of calculating child support and whether Stacie should receive rehabilitative alimony. The parties were also unable to agree on the division of a home equity debt with State Farm. This loan was initially obtained for the purpose of making improvements to the family home. However, proceeds from the loan were also used to pay business expenses, purchase a boat, and pay off credit cards.

The district court ordered Stacie responsible for $54,649 of the home equity debt and Michael responsible for the remaining $10,500. The justification for the division was that it left both parties with a nearly equal division of assets and liabilities.[2] The district court also calculated Michael's self-employment income and imputed Stacie's earning capacity. Based on the child support guidelines, the court determined Stacie owed Michael approximately fifty-one dollars per month for child support. Due to the similarity in incomes and earning

[1]The family home and business assets constituted the bulk of the marital assets. Stacie wanted the home, and Michael wanted the various assets used in his refuse business.

[2]In total, Stacie was awarded $188,230 in gross assets, and Michael was awarded $122,172.50 in gross assets. Stacie was ordered responsible for $155,252.71 in liabilities and Michael responsible for $88,600.

capacity and the alternating dependency deduction for Madelaine, Michael suggested the court waive the child support obligation. The court agreed and ordered that neither party pay child support to the other.

Stacie appeals, arguing the court erred in the following matters: (1) improperly calculating Michael's self-employment income for purposes of determining child support, (2) improperly calculating her earning capacity for purposes of determining child support, (3) inequitably dividing the State Farm equity line of credit, (4) not awarding her rehabilitative alimony, and (5) not awarding her attorney fees at trial. Stacie also contends she should be awarded appellate attorney fees.

II. Standard of Review

Our scope of review in this equitable action is de novo. Iowa R. App. 6.4. Because the district court has a firsthand opportunity to hear the evidence and view the witnesses, we give weight to its findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). We accord the trial court considerable latitude in resolving economic provisions of a dissolution decree and will disturb a ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

III. Child Support

A. Michael's Self-Employment Income

Stacie contends the district court erred in calculating Michael's self-employment income for purposes of determining his child support obligation.

Stacie claims the court utilized deductions for accelerated depreciation and deductions for expenses not related to the production of income.

A court must determine the parent's monthly income from the most reliable evidence presented. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). The Iowa Supreme Court has stated, "some consideration must be given to business expenses *reasonably necessary* to maintain the business or occupation." *In re Marriage of Gaer*, 476 N.W.2d 324, 329 (Iowa 1991) (emphasis added).

When defining "net monthly income," the child support guidelines do not provide for a deduction for depreciation. *See* Iowa Ct. R. 9.5. However, our case law allows a deduction for all or part of *straight-line depreciation*, given a finding the guidelines would otherwise be unjust or inappropriate. *Gaer*, 476 N.W.2d at 326, 329. The decision of whether to allow depreciation is to be "determined from all the circumstances including the amount of depreciation claimed and the property depreciated." *Id.* at 328.

The district court adopted the $29,234 net income figure from Schedule C of their 2004 tax return as the most credible evidence of Michael's annual income. The court did not include its rationale for the wholesale adoption of all business expenses listed on Schedule C. Upon our de novo review we find several business expenses were improperly deducted when computing Michael's self-employment income.

As noted above, our supreme court allows a deduction for straight-line depreciation. *Id.* However, in this case multiple assets were depreciated using an accelerated depreciation method. The depreciation expenses included a

$5694 accelerated depreciation deduction for a Ford F-250 vehicle that was used only once or twice per week for business purposes. Also included was an accelerated depreciation deduction for dumpsters purchased in previous years and a $6771 section 179 deduction[3] for dumpsters purchased in the current year. These depreciation deductions and related section 179 deduction significantly reduced Michael's net annual income.

A review of the business expenses listed on Schedule C also suggests some personal expenses were included as business expense deductions. Schedule C lists a $1916 deduction for utilities expense. The 2004 tax return does not identify this expense as one incurred from the business use of a home, but Michael testified that this expense was for the utilities in the home. Schedule C also identifies $3256 in phone expense, but testimony suggests the family's home phone was used for the refuse business. There is no documentation allocating these expenses between personal and business use. Similarly, testimony indicates Michael used his vehicles for personal and business use, yet the licensing fees and insurance fees for these vehicles were included as business expenses. Also, as noted above, Michael depreciated the full cost of his Ford F-250 vehicle even though it was used only once or twice per week for business purposes. The 2004 tax return standing alone does not constitute credible evidence that the entire amount of each of these expenses are reasonably necessary to maintain or operate the refuse business.

[3] A section 179 expense deduction allows a party to elect to deduct the entire cost of certain business assets from current income rather than depreciating the assets over the length of their useful life. 26 U.S.C.A. § 179 (2006).

The deductions for accelerated depreciation and expenses were not reasonably necessary to maintain the business and artificially reduced Michael's net income for purposes of calculating child support. We believe adjustments are therefore necessary to provide for the needs of the children and to do justice between the parties. Under the circumstances of this case, Michael should be allowed a deduction for depreciation; however it should be determined by using the straight-line method of depreciation rather than an accelerated method or same-year section 179 expense deduction. *See In re Marriage of McKamey*, 522 N.W.2d 95, 99 (Iowa Ct. App. 1994) (recognizing that a noncustodial parent electing to expense certain depreciable assets should have that amount of expenses allocated over a reasonable depreciation period). Also, the district court should deduct from gross income only the portion of the aforementioned expenses which pertain to business use, rather than personal use. With this guidance in mind, we remand for a redetermination of Michael's self-employment income. The court may wish to set this matter for the taking of further evidence.

B. Stacie's Imputed Income

Stacie contends the court should have imputed her income for child support purposes to be $18,000, rather than $25,000.

Stacie has a degree as an L.P.N. and was previously licensed in that field. With minimal effort she could reactivate her license. Stacie stipulates that a full-time L.P.N. earns $12.45 per hour for a total income of $25,480 at the Henry County Health Center. The age of the children would not prevent Stacie from pursuing such full-time employment.

Stacie is also very close to completing her training to become a massage therapist. As a massage therapist, Stacie estimates she would charge forty-five dollars per hour and work approximately thirty hours per week. That would equate to a gross income of more than $70,000 per year. Even with deductions for costs related to running her own business, it is not unreasonable to conclude she could earn an annual income of $25,000 as a massage therapist.

Upon our de novo review of the evidence, we find $25,000 is a reasonable and equitable annual earning capacity.

IV. Property Division

Stacie disputes the court's decision to make her responsible for the majority of the State Farm home equity debt. The district court made Stacie responsible for $54,569 of the liability and Michael responsible for the remaining $10,500. The justification for the division was that it left both parties with a nearly equal division of assets and liabilities.

Stacie contends the court should have ordered both parties to pay the percentage of the debt which was expended towards the assets they were awarded in the decree. In essence, she contends that most of the money was spent on the refuse business, rather than the home, and therefore Michael should be awarded the lion's share of this debt.

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in

each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). The distribution should be made in consideration of the criteria set forth in Iowa Code section 598.21(5) (2005). *Id.* We accord the trial court considerable latitude in resolving economic provisions of a dissolution decree and will disturb a ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

As noted above, the current property division left both parties with a nearly equal division of assets and liabilities. Stacie was ordered to pay the larger portion of the State Farm debt because she desired to retain the single largest asset of the marriage, the family home. Her equity in the home far exceeds her liability to State Farm. "[T]he allocation of marital debts inheres in the property division." *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). "Even though a debt may have been incurred by a party for family expenses, it is not inequitable to order that party to be responsible for the entire amount of the debt as long as the overall property distribution is equitable." *In re Marriage of Sullins*, 715 N.W.2d 242, 251 (Iowa 2006). Because the overall property distribution is equitable, it is not inequitable that Stacie be charged with repaying the State Farm Liability.

Stacie also argues the liability should be offset because the client list and good will associated with the refuse business are income producing assets for Michael.[4] This argument is without merit and not supported by the record.

[4] Stacie states that we should not include a value for the good will when dividing the assets and liabilities.

Stacie did not present an expert or any type of appraisal indicating the value, or potential future income stream associated with the good will and client list of Lance Refuse. On the contrary, Mike Prottsman, owner of Mike Prottsman Sanitation, Inc., testified that Lance Refuse has little or no value without Michael's labor. When asked whether he would ever consider purchasing Lance Refuse, Prossman stated "without [Mike] in the driver's seat, there is no other business. There is no Lance Refuse. So it wouldn't really do me any good [to buy Lance Refuse]." The record also indicates that only one client has a contract with Lance Refuse. At any time, a client can hire someone else to handle their sanitation needs.

Lance Refuse is the vehicle by which Michael earns a living. It is not an income producing asset. We find no reason to alter the current distribution.

V. Alimony

Stacie challenges the district court's decision to deny her request for rehabilitative alimony. Rehabilitative alimony supports an economically dependent spouse through a limited period of education or retraining following divorce, "thereby creating incentive and opportunity for that spouse to become self-supporting." *In re Marriage of Anliker,* 694 N.W.2d 535, 540 (Iowa 2005). While we review the district court's award of alimony de novo, "we give that court considerable latitude in making this determination based on criteria in section 598.21(3)." *Id.* We will disturb the court's alimony determination "only when there has been a failure to do equity." *Id.*

Alimony is not an absolute right; an award of alimony depends on the circumstances of the particular case. *Id.* The district court may award alimony

after considering the factors in Iowa Code section 598.21A(1). These factors include: (1) the length of the marriage, (2) the age and physical and emotional health of the parties, (3) the property distribution, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking alimony, and (6) the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Iowa Code § 598.21A(1)(a)-(f).

Because we remand so that the court can recalculate Michael's self-employment income, it is no longer clear whether Stacie will become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. On remand, the district court shall address whether alimony is now appropriate in light of Michael's recalculated income.

VI. Attorney Fees

A. Trial Attorney Fees

Stacie argues the district court abused its discretion in failing to award her trial attorney fees. Attorney fees are not a matter of right but are within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court's award of attorney fees for abuse of discretion. *Sullins*, 715 N.W.2d at 255. The award should be reasonable and fair and based on the parties' respective abilities to pay. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa Ct. App. 1994). We conclude the district court did not abuse its discretion when it refused to award Kathy trial attorney fees.

B. Appellate Attorney Fees

Appellate attorney fees are not a matter of right, but rather rest in the court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the needs of the party making the request, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Based on the merit of the appeal, we award Stacie $500 in appellate attorney fees. Costs on appeal are taxed one-half to each party.

VII. Conclusion

We have considered all other arguments raised on appeal, and except as discussed above, we find them without merit or unnecessary to the disposition of this case. We remand to the district court to determine Michael's income in accordance with this opinion, to exercise its discretion in applying the income to the child support guidelines, and to address whether the recalculated income necessitates an alimony award. We affirm the other provisions of the district court's decree. We do not retain jurisdiction.

AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.