

IN THE COURT OF APPEALS OF IOWA

No. 6-955 / 06-0274
Filed February 14, 2007

IN RE THE MARRIAGE OF KIMBERLY ROBIN COWAN AND DOUGLAS LEE COWAN

**Upon the Petition of
KIMBERLY ROBIN COWAN,**
Petitioner-Appellee,

**And Concerning
DOUGLAS LEE COWAN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker,
Judge.

Douglas Lee Cowan appeals, challenging the financial provisions of the
decree dissolving his marriage to Kimberly Robin Cowan. **AFFIRMED AS
MODIFIED.**

Melissa A. Nine and Barry S. Kaplan of Kaplan & Frese, L.L.P.,
Marshalltown, for appellant.

Joseph R. Cahill of Cahill Law Offices, Nevada, for appellee.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

SACKETT, C.J.

Douglas Lee Cowan appeals, challenging the financial provisions of the decree dissolving his marriage to Kimberly Robin Cowan. Douglas contends (1) the district court did not correctly value certain assets, (2) the division of assets and liabilities was not equitable, (3) the child support was not properly calculated, (4) the award of spousal support to Kimberly is excessive in amount and should terminate upon her cohabitation, and (5) Kimberly should not have been awarded attorney fees. We affirm as modified.

SCOPE OF REVIEW.

Our review of the economic provisions of a divorce decree is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa Ct. App. 1998). We approach this issue from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992); (citing *In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992)).

In the case *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002), we set forth our considerations for distribution of assets and awards in a dissolution.

Before making an equitable distribution of assets in dissolution, the court must determine all assets held in the name of either or both parties as well as the debts owed by either or both. The assets should then be given their value as of the date of trial. The assets

and liabilities should then be equitably, not necessarily equally, divided after considering the criteria delineated in Iowa Code section 598.21(1) (2005). In general, the division of property is based upon each marriage partner's right to a just and equitable share of the property accumulated as a result of their joint efforts.

With these principles in mind we address the parties' challenges.

BACKGROUND.

Kimberly and Douglas were married in 1986. At the time of trial Kimberly was forty-two years old and Douglas was forty-five. Douglas is a roofer and does business as Cowan Roofing, Inc. (Cowan Roofing). He is the sole stockholder in the corporation. The parties have three children, a son who is emancipated, and two daughters, one born in 1988 and the second born in 1991. Kimberly is basically a homemaker. The parties' daughters are in high school. The younger child was diagnosed with leukemia and though currently in remission is being treated monthly in Iowa City.

The parties owned three tracts of real estate. The house where they lived, a rental house, and the building from which Cowan Roofing operated. In addition to the stock in Cowan Roofing the parties had a car, certain personal property, bank accounts, and retirement accounts.

The district court valued the property and then divided the property and debt and ordered Douglas to make an equalizing payment to Kimberly of \$47,000. The court also ordered him to pay \$2500 towards Kimberly's attorney fees.

Based on the values used by the district court it appears that this gave Douglas net equities of \$198,881 and Kimberly net equities of \$175,349. Douglas was ordered to pay child support of \$1000 a month and alimony of

\$1000 for sixty months to terminate at the end of that period or earlier if Kimberly dies or remarries.

VALUATION OF ASSETS.

In challenging the property division Douglas argues with certain valuations established by the district court and contends the district court considered certain property owned by Cowan Roofing as the parties' property. He advances that the net result of these findings is that the property division treated him inequitably.

We will not disturb the district court's valuation of assets if they are within a permissible range of the evidence. *In re Marriage of Sullins*, 715 N.W.2d 242, 251 (Iowa 2006) (citing *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973)).

Douglas contends the parties' home that went to Kimberly should have been valued at its assessed value for real estate tax purposes of \$94,759, not \$85,500 as determined by the district court. He further contends that a rental property that went to him should have been valued at its assessed value for real estate tax purposes of \$67,591, not the \$75,000 value the district court attributed to the property. He also argues that a second property that went to him should have been valued at \$83,200, not the \$99,375 the district court attributed to the property. He contends he purchased that property a year earlier for \$83,200 and had costs associated with its purchase of \$11,600 for a total purchase price of \$94,600. Douglas also challenges the value put on a Florida time-share that was given to him. The district court valued the property at \$30,000 and subtracted the debt of \$15,000 determining the equity in the property was \$15,000. Douglas

contends the debt is \$15,909, and the property has been listed for sale for at least a year. He contends that Kimberly should have to wait for her share until the time-share is sold.

Douglas challenges the allocation to him of values on a car given to him, which he says is the children's, a motorcycle that may be his son's, and his guns. He also claims he had guns at the time of the parties' marriage for which he was not given credit.

Douglas also contends in its division the district court failed to recognize that when it valued the corporation for distribution purposes that valuation included certain assets, which the court again valued. He specifically contends that the district court did not treat a Silverado truck that went to him as a corporate asset nor did it treat the debt on the vehicle as a corporate debt. He makes the same argument as to the Tahoe given to Kimberly and the debt on the Tahoe he was ordered to pay. Furthermore, he contends the district court valued an ATV given to him, which belonged to the corporation. Douglas further contends the district court considered he received \$35,000 in tools when the tools too were corporate assets. Kimberly contends that he showed the tools on his personal financial statement and they were not corporate assets.¹ The Cowan Roofing depreciation schedule shows both vehicles as assets of Cowan

¹ It appears this is a case where the parties are confused about corporate ownership. While Kimberly contends correctly that Douglas included the tools on this personal financial statement, he also included on his personal financial statement the vehicles that were owned by the corporation and failed to show any value for ownership of corporate stock.

Roofing.² The ATV that went to Douglas as a part of the \$10,000 value allocated to recreational vehicles is also an asset of Cowan Roofing.³

We believe some adjustment should be made to the property division. We question the district court's decision to value the home that went to Kimberly below assessed value and the property that went to Douglas above assessed value. For the purpose of our assessment of the equity of the property division we consider each property at its assessed value.

We also accept Douglas's argument that the \$35,000 in tools were corporate assets and were included in the value of the corporation. While the vehicles are also corporate assets they have little equity so we make no adjustment for them. We have also considered the other challenges Douglas made to the property division and believe an adjustment is necessary. We modify to reduce the cash payment Douglas is to make to Kimberly to \$32,000. In all other respects we affirm.

CHILD SUPPORT.

The district court fixed Douglas' child support at \$1000 a month and Douglas was awarded the income tax exemptions for both daughters until they would be of benefit to Kimberly, in which case they would be alternated.⁴

² The Tahoe is a corporate asset. Its cost basis was \$16,253 and as of the end of 2004 \$3,251 in depreciation had been taken. The Silverado truck is also a corporate asset and shows a cost of \$19,853 with \$3,971 in depreciation having been taken as of the end of 2004.

³ Cowan Roofing showed \$205,134 in assets and \$117,664 in liabilities as of the end of 2004.

⁴ Child support was initially set at \$1,369.58 a month but amended after a pretrial motion on the basis that Douglas should have some credit for the \$1000 a month in alimony he is paying Kimberly.

For purposes of fixing child support, Douglas contends the district court determined Kimberly's annual income to be \$0.00 and his to be \$80,616. Douglas contends the district court should have averaged his income for the prior three years. He contends that the income to be assigned to him should be \$60,200 a year. He contends he should have credit against that amount for the \$12,000 a year in alimony he pays Kimberly and the \$716.14 a month he pays in health insurance premiums, and in addition he should have credit for the deductible on the medical insurance of \$5500 a year he was ordered to pay. He further contends Kimberly is capable of working outside the home and she should have income attributed to her.

Kimberly has a high school education and has not been employed full-time during the marriage. However, for the last several years Douglas for the purpose of qualifying her for social security has been paying her \$500 a week from Cowan Roofing although apparently she does little or no work there. Kimberly's mother owns a tavern and she has done bartending there apparently without compensation. Although the children are all in school Kimberly argues her employment opportunities are limited by her daughter's illness and the fact that she suffers depression and an anxiety disorder.

Kimberly contends Douglas has been paying personal expenses from the corporation so, in essence, his income is higher than what is shown on his individual tax return.

Cowan Roofing showed taxable income of \$33,513 for 2002, a loss of \$23,452 for 2003, and no taxable income in 2004. The parties for the same period showed for 2002 \$38,000 in wages, \$165 in capitol gains, \$24,370 from

rents, and \$7500 in gaming wins for an adjusted gross income of \$70,078. For 2003 they show wages of \$66,000, \$25,602 in rents, and \$1500 in gaming wins for an adjusted gross income of \$93,102. Finally, in 2004 they showed \$53,000 in wages, \$21,295 in rental income, and \$4363 in gaming winnings for an adjusted gross income of \$93,102. The majority of the rental earnings come from the building rented to Cowan Roofing.

Using the work sheet that Douglas submitted the \$1000 is less than Douglas should pay with the alimony being deducted. While we agree that some income should be attributed to Kimberly, doing so would not reduce Douglas's child support. While it is almost certain with his daughter's illness Douglas will be paying the \$5000 deductible on the health insurance which could in some cases justify a deviation from the guidelines, the district court did not fail to do justice to the parties or abuse its discretion in not deviating from the guidelines here. We affirm the child support award. *In re Marriage of Lalone*, 469 N.W.2d 695, 696 (Iowa 1991); *In re Marriage of Miller*, 475 N.W.2d 675, 678 (Iowa Ct. App. 1991).

ALIMONY.

Douglas contends the spousal support award is too high and should terminate upon Kimberly's cohabitation and to not do so is against public policy.

"Alimony 'is a stipend to a spouse in lieu of the other spouse's legal obligation for support.'" *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005); *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004) (citation omitted). Such an award is not an absolute right. And whether it is awarded depends on the circumstances of the particular case. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996). When deciding to award alimony, the district

court must consider the factors in Iowa Code section 598.21(3) (2005). *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Although our review of the district court's award of alimony is de novo, we give that court considerable latitude in making this determination based on the criteria in section 598.21(3). *Spiegel*, 553 N.W.2d at 319. We will disturb that determination only when there has been a failure to do equity. *Id.* The award here is equitable.

Douglas contends alimony should have been terminated on Kimberly's cohabitation. We find no reason to reverse the district court on this issue.

ATTORNEY FEES.

Kimberly did not originally request an award of attorney fees but asked for them in a post-trial motion and the district court awarded her \$2500. Douglas contends that Kimberly should not have attorney fees as she did not request them initially and she has received sufficient property to pay her own attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* We find no abuse of discretion in the trial court's decision and accordingly, affirm.

Kimberly also request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997).

We award no appellate attorney fees. Costs on appeal are taxed to Douglas.

AFFIRMED AS MODIFIED.