IN THE COURT OF APPEALS OF IOWA

No. 7-540 / 06-1152
Filed October 24, 2007

IN RE THE MARRIAGE OF APRIL DENINE SCOTT
AND JOHN PAUL FRANKLIN SCOTT

Upon the Petition of
APRIL DENINE SCOTT,
Petitioner-Appellee/Cross-Appellant,

And Concerning
JOHN PAUL FRANKLIN SCOTT,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, J.C. Irvin, Judge.

The respondent appeals and the petitioner cross-appeals from the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

G. Elizabeth Otte, Council Bluffs, for appellant/cross-appellee.

Shannon Dell'Orfano Simpson of Telpner, Peterson, Smith, Ruesch, Thomas & Simpson, Council Bluffs, for appellee/cross-appellant.

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

VOGEL, J.

John Scott appeals and April Scott cross-appeals from the decree dissolving their marriage. Finding the economic provisions of the decree are equitable when viewed in their entirety, we affirm. However, we modify a portion of the decree relating to visitation with the parties' children.

I. Background Facts and Proceedings.

John and April were married in 1989 and had four children. April, who was thirty-eight years old at the time of trial on this matter, has attended one year of secretarial school and received a cosmetology degree in 2005. Early in the marriage, she worked in secretarial jobs, but left the job force to care for the children. John, who was forty-one at the time of trial, has a high school education and has primarily been employed in sales. In 2003, he entered the mortgage business, earning approximately $139,000 working for Advantage Mortgage. The following year, he earned $73,000; however, he left Advantage Mortgage midway through the year after a dispute arose over John's attempt to operate his own branch. John also operated a family farming business that sold produce at several roadside stands. The income from this operation was the subject of great debate and testimony at trial.

On August 31, 2004, April filed a petition seeking to dissolve her marriage to John. Following five days of trial, the court entered a decree dissolving the parties' marriage, which, among other things, granted April physical care of the children and ordered John to pay child support in the amount of $2000 per month. It further ordered that John pay to April alimony of $1500 per month for ten years. Finally, it ordered John to pay April a property settlement in the

amount of $40,000, payable at $5000 per year for eight years. John appeals and April cross-appeals from this decree.

II. Scope of Review.

Our standard of review for dissolutions of marriage is de novo. Iowa R. App. P. 6.4; *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

III. John's Income Level.

John first claims there is "insufficient, coherent evidence of [his] income and earning capacity to support the awards of child support and spousal support." The district court found John's income, for purposes of support calculations, to be $135,000. This figure consists of the potential for $50,000 per year as a mortgage broker and $85,000 from his farming and produce sales operation. The court in large part based this determination on its specific and strong findings regarding John's lack of credibility. On several specific topics, it found John had been less than forthcoming.

We find the court's determination of John's income is consistent with the evidence. First, the court's adverse credibility findings are significant on this issue. *See In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999) (noting that even in de novo review we defer to the trial court's valuations when accompanied by credibility findings or corroborating evidence). John's credibility is particularly relevant to the court's finding that he intentionally reduced his wage earnings during the dissolution proceedings and that much of his income from

the farming operation was unreported or under-reported. *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993) (stating that a party may not claim inability to pay when that inability is self-inflicted).

Furthermore, in the years 2003 and 2004, John earned $140,000 and $74,000 as a mortgage broker. Paul Salais, who John called to testify as to his employment in the mortgage industry, stated that his own 2005 salary as a mortgage broker was approximately $52,000. He also testified he was not surprised John could have earned $140,000 in 2003 because John was "a very good worker." The district court did not use figures from John's peak income years as those amounts were earned in the height of the refinancing boom, but instead, the court lowered the amount to a more reasonably anticipated earning capacity within the industry. Accordingly, we affirm the court's imputation of $50,000 earning capacity for John as a mortgage broker. *See In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991) (noting the appropriateness of considering the earning capacity of the parents).

The income from John's farm and produce sales was based in large part on the testimony of four of John's employees. Their testimony supports the court's determination of his income from this operation. This evidence, offered by April, was unrefuted by John. Also, John's lack of accounting for these revenues makes this testimony from the employees particularly compelling. As always, we must determine a parent's current income from the most reliable evidence presented. *See In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). As John failed to offer evidence contrary to that of his own employees,

the court was correct in relying on this testimony as the most reliable to determine John's income from farming and produce sales.

IV. Child and Spousal Support.

John next asserts the child support award is excessive. He largely bases this contention on what he claims is the district court's excessive determination of his income and earning capacity. Because we have already affirmed the court's calculation of John's income and earning capacity from the most credible evidence, we reject his argument. John also asserts the court should have deducted his alimony payments from the calculation of his net income for purposes of determining child support. Deduction of alimony payments from monthly income for the purposes of computation of child support is within the discretion of the trial court. *In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991). The court may consider alimony in an attempt to do justice between the parties. *Id.* Considering the overall equity achieved in the decree, we conclude the court did not abuse its discretion in this regard.

John also claims the level of spousal support is excessive when considered in light of all the other financial obligations he will have toward April. "Alimony is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa 1988). Spousal support is not an absolute right; an award depends on the circumstances of the particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 598.21A (2003). *Id.* Even though our review is de novo, we accord the district court considerable latitude in making alimony

determinations and will disturb its ruling only when there has been a failure to do equity. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997).

As noted above, John's lack of credibility regarding his level of income and earning capacity is significant on this question. He not only hid income, but voluntarily left his very lucrative employment in the mortgage industry after April had filed the petition for dissolution. This was a marriage of sixteen years. During the marriage, April was not as actively involved in the job market as John. Although she had recently advanced her education, it appears her earning capacity is far less than John's and she cannot as readily maintain her standard of living without assistance. *See In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998) (allowing consideration of the likelihood the party seeking spousal support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage). Moreover, the amount set by the district court is fair and reasonable, without saddling John beyond his ability to pay this amount. *See In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (allowing consideration of ability to pay). We affirm the spousal support award as well as the determination of income for the purposes of calculating child support.

V. Property Distribution.

In her cross-appeal, April argues the district court erred in failing to award her an equitable property settlement. She cites evidence that she believes establishes John engaged in a "pattern of repeated dissipation and concealment of assets." She requests an award of half of what she claims he dissipated, or

$225,359.93. *See In re Marriage of Olson*, 705 N.W.2d 312, 317 (Iowa 2005) (holding dissipation of assets is a proper consideration when dividing property).

Iowa is an "equitable distribution" state for purposes of dividing property in a marriage dissolution. *Id.* (citing *In re Marriage of McNerney*, 417 N.W.2d 205, 207 (Iowa 1987)). Marital property is to be distributed equitably, considering the factors outlined in Iowa Code section 598.21(1). "Equitable distribution" does not necessarily mean an "equal" division of marital property. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). "The determining factor is what is fair and equitable in each circumstance." *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa Ct. App. 1995). We "look to the economic provisions of the decree as a whole in assessing the equity of the property division." *In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). We accord the district court considerable latitude and will disturb the property distribution only when there has been a failure to do equity. *Schriner*, 695 N.W.2d at 496

We believe that when viewed in light of the alimony award, and the property distribution, the district court's decree is equitable when considered as a whole. April stands to receive a substantial amount of money from John over the next ten years. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998) (noting property division and alimony must be considered together in evaluating their individual sufficiency). From the evidence offered, there remained many unanswered questions and unexplained accountings as to the current status of some assets that were in John's control. We have consistently recognized that conduct of a spouse that results in the loss or disposal of property that would otherwise be subject to division in a dissolution of marriage

action may be considered in making an equitable distribution of the parties' property. *In re Marriage of Bell*, 576 N.W.2d 618, 624 (Iowa Ct. App. 1998). However, the district court's decree appears to have thoroughly and appropriately considered what it deemed John's "pattern of dissipation and concealment of funds." According the district court's decision wide latitude, and concluding the decree as a whole achieved equity, we affirm the property distribution.

VI. Visitation.

April asserts the court erred in failing to award her "extended, uninterrupted summer visitation." She notes that although John will enjoy three separate two-week visitations with the children during the summer, she will not have such similar stretches because her time with the children will be interrupted by John's twice-weekly visitation. John concedes the decree should be modified to provide April with extended summer visitation. In this regard, we modify the decree to provide that John shall exercise his summer visitation with the children during the first two weeks of June, July, and August, and that April shall have the children, uninterrupted by John's visitation, the remainder of June and July and the second week of August before school starts.

VII. Tax Exemptions.

The court ordered that John initially shall be allowed to claim three children as exemptions for tax purposes, but that when only three children are eligible, John shall be allowed two exemptions. On appeal April requests that we modify this to allow her additional exemptions. Courts have the discretion to award tax exemptions to non-custodial parents when necessary to achieve an

equitable resolution of the economic issues presented. *See In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). In consideration of the substantial alimony and property awards made to April, in conjunction with John's higher earning capacity, we affirm the court's allocation of the exemptions.

VIII. Attorney Fees.

April requests an award of appellate attorney fees. This Court has the authority to award appellate attorney fees. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). In arriving at our decision, we consider the parties' needs, ability to pay, and obligation to defend the trial court's decision on appeal. *Id.* at 568. Upon consideration of these factors, we conclude April has the ability to pay her own attorney fees. Costs of this appeal are assessed to John.

AFFIRMED AS MODIFIED.