

IN THE COURT OF APPEALS OF IOWA

No. 8-664 / 07-1851
Filed December 17, 2008

**IN RE THE MARRIAGE OF ANN
KIRKEGAARD and KIRK KIRKEGAARD**

Upon the Petition of

ANN KIRKEGARD,
Petitioner-Appellant,

And Concerning

KIRK KIRKEGAARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Gregory Hulse,
Judge.

Petitioner appeals from the economic and support provisions of the decree
dissolving her marriage to respondent. **AFFIRMED AS MODIFIED.**

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

Carmen E. Eichman, Des Moines, for appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

Ann Kirkegaard appeals from the decree dissolving her marriage to Kirk Kirkegaard. She claims the property division is inequitable, she should have been awarded spousal support and attorney fees, and the allocation of tax deductions between the parties is unfair. We affirm as modified.

Background Facts and Proceedings.

The parties were married in 1981. Four children were born during the marriage, two of which were minors at the time of the dissolution. Ann received an accounting and business administration degree from Iowa State University and later obtained her CPA designation. Throughout the marriage, she worked intermittently as an accountant, primarily during tax season. When not working, she was a homemaker and the primary caregiver for the children.

Kirk graduated from Iowa State with a degree in animal science. Upon graduation, he took a job as a hog buyer with Wilson Foods, where he remained until the company closed in 1980. He then worked for the Iowa Packing Company, until losing that job in 2007 as a result of changes in the hog industry. During his last full year of employment, Kirk earned a base salary of \$175,000. His income also included substantial bonuses in some years. Kirk also engaged in commodities trading and, with the help of Ann, earned a net profit of \$2,814,053 in 2004, his most successful year.

On October 26, 2006, Ann filed a petition seeking to dissolve the parties' marriage. At the time of trial, the parties held nearly \$6.5 million in assets. In January of 2007, the parties executed and filed a mediated agreement that, among other things, called for Kirk to continue paying the family's expenses and

allowed each party to withdraw \$250,000 from specific accounts. Following a five-day trial, the district court entered a decree dissolving the parties' marriage, and dividing the assets. The court ordered that an asset called Greenfield Acres¹ be sold for \$1,515,000, that the proceeds be divided equally and that each party should be responsible for one-half of the taxes associated with the sale. In that section, the court also ordered that "Ann shall pay to Kirk from her share the sum of \$304,898 to equalize the property division."

In a later paragraph in the same section, the court stated: "In order to equalize the assets, Ann shall pay to Kirk an additional sum of \$302,399.00 from her share of the proceeds of Greenfield Acres"

The court allocated all federal, state and property tax deductions to Kirk while allocating the charitable donation deductions to Ann. Finally, the court denied Ann's request for spousal support and ordered the parties to be responsible for their own attorney fees. Ann appeals.

Scope of Review.

We review dissolution of marriage proceedings de novo. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We examine the entire record and adjudicate rights anew on the issues properly presented. *Id.* Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g). We review the district court's decision to award attorney fees for an abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

¹ Greenfield Acres is a leased hog feeding operation consisting of three sites.

Equalization Payment.

The parties' total marital assets were valued at approximately \$6.5 million. In its decree, the court set forth a detailed chart valuing and dividing just under \$5 million worth of assets.² The division called for Kirk to receive assets valued at \$2,172,997.50, and for Ann to receive assets valued at \$2,782,794.50. In order to equalize the amount received by the parties, the court ordered Ann to make a "property equalization payment" of \$304,898.00 to Kirk out of her portion of the sale of Greenfield Acres. At least three times in the decree, the court refers to this particular equalization payment. However, in the second-to-last page of the lengthy decree, the court notes that "in order to equalize the assets, Ann shall pay Kirk an additional sum of \$302,399.00 from her share of the proceeds of Greenfield Acres"

Although the parties filed post-decree motions about various aspects of the decree, neither brought the second equalization payment to the attention of the court. The Amended and Substituted Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage contains the same two equalization payments as the original decree.

Ann now maintains the second equalization payment was in error, and that the court only intended one equalization payment.

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 Bonnette*, 584 N.W.2d 713, 714 (Iowa Ct. App. 1998). Equitable distribution does not

² The Greenfield Acres asset, valued at approximately \$1.5 million was dealt with in a separate division of the decree.

necessarily mean an equal division of property, nor does it mean a percentage division of the property. *Id.* In making this assessment, we consider the factors set forth in Iowa Code section 598.21(5) (Supp.2005).

Upon our review of the dissolution decree, we agree with Ann. It appears to us the provision for the second equalization payment was likely an error. Its inclusion simply makes no logical or mathematical sense. Nowhere in the decree are two equalization payments mentioned. No reason is given for this apparent double payment and to affirm it would disturb the court's earlier efforts to make the parties' property distribution exactly equal. Regardless of whether it was in fact a mistake by the district court, upon our de novo review of the record, we conclude the second payment of \$302,399.00 does not do equity between the parties. Accordingly, we modify the decree to eliminate this payment.

Tax Consequences of Sale of Greenfield Acres.

The court ordered that the Greenfield Acres asset be sold for \$1,515,000 and that "each party shall be responsible for one-half of the federal and state capital gains tax liability from said sale." Kirk testified that the tax liability from the sale would be \$295,675. On appeal, Ann claims that this tax consequence should be paid fully by Kirk. Because both parties benefited from this asset while they owned it, and because they shared equally in the proceeds from this sale, we agree with the district court that the tax consequences of the sale should be split equally.

Tax Deductions.

The district court made the following orders regarding property and charitable donation tax deductions:

Kirk shall receive any deductions for any federal, state and property taxes paid on or before June 6, 2007, for tax year 2007.

Ann shall be entitled to claim any charitable donations/deductions paid prior to June 6, 2007, by the parties for tax year 2007.

Ann now maintains that any refunds should have been split equally between the parties.

Kirk testified that he would like to be granted the property tax deductions and that Ann should be granted the charitable deductions. Ann did not counter this suggestion during her testimony. Moreover, the record contains no evidence, and the court made no findings, as to the values of the deductions granted to the parties. In light of these considerations, we decline Ann's invitation to modify the district court's determination of the equitable distribution of these deductions.

Spousal Support.

The district court rejected Ann's request for \$15,000 per month in spousal support. On appeal, Ann claims the court's denial fails to take into account the economic situations of the parties. Spousal support is a discretionary award, dependent upon each party's earning capacity and present standards of living, as well as the ability to pay and the relative need for support. *In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). In determining whether to award alimony, the district court is to consider the factors in Iowa Code section 598.21A(1). Prior cases are of little value in determining the appropriate alimony award, and we must decide each case on its own peculiar circumstances. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976).

Upon our de novo review, we agree with the district court that spousal support is not appropriate under the circumstances. Ann, who is still in her forties and is healthy, has a bachelor's degree in business and accounting and is a certified public accountant. Even though she has not been fully engaged in the job market for many years, she has a substantial earning capacity should she choose to be employed. Moreover, pursuant to the dissolution decree, she is receiving a substantial property settlement, from which she can expect to receive approximately \$300,000 per year in income.

Trial Attorney Fees.

The district court denied Ann's request for attorney fees, finding "each party has sufficient assets to pay his/her own fees." Ann appeals from this denial. The decision to award attorney fees rests within the sound discretion of the court, and we will not disturb its decision absent an abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). In light of the post-dissolution economic situations of the parties and their respective future earning capacities, we find no abuse of discretion in the court's denial.

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 consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Upon consideration of these factors, we award

Ann \$1000 in appellate attorney fees. Court costs are assessed one-half to each party.

AFFIRMED AS MODIFIED.