

IN THE COURT OF APPEALS OF IOWA

No. 9-065 / 08-1310
Filed April 8, 2009

IN RE THE MARRIAGE OF DAVID A. MYERS AND JODY R. MEYERS

Upon the Petition of
DAVID A. MYERS,
Petitioner-Appellant,

And Concerning
JODY R. MYERS,
Respondent-Appellee.

Appeal from the Iowa District Court for Howard County, James C. Bauch,
Judge.

David Myers appeals the alimony and property division provisions of the
decree dissolving his marriage to Jody Myers. Jody seeks an award of appellate
attorney fees. **AFFIRMED.**

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C.,
Decorah, for appellant.

Dale L. Putnam, Decorah, for appellee.

Considered by Mahan, P.J., and Miller and Doyle, JJ.

MILLER, J.

David Myers appeals the alimony and property division provisions of the decree dissolving his marriage to Jody Myers. He contends the district court erred in ordering him to pay alimony to Jody of \$1,000 per month until she dies or re-marries, and its division of property was unjust and inequitable. Jody seeks an award of appellate attorney fees. We affirm.

David and Jody were married on June 3, 1978. They have two adult children. David filed a petition for dissolution of marriage on September 10, 2007. On September 27, 2007, the court entered an order preventing either party from dissipating assets, and on October 29, 2007, an order requiring David to pay Jody \$500 per month in temporary support and \$2,500 in temporary attorney fees. The matter proceeded to trial in April 2008.

David was fifty-one years of age at the time of trial. He has been employed at R.R. Donnelley since 1984 and has farmed for twenty-four years. David's 2007 W-2 form shows gross pay of \$43,027.91, from which \$4,302.79 went into a 401(k) plan, and another \$6,602.24 was used to purchase additional "cafeteria" benefits. He had a retirement account with a value of \$247,111. The district court found that although David has some pain in his knees and back the pain was not inconsistent with his age and the type of work he does, and it did not preclude him from continuing any of his work. The parties agreed David would receive the family homestead at the appraised value of \$137,000, subject to the debt on it, and that he would keep certain equipment that he would need to continue farming.

Jody was forty-eight years of age at the time of trial. She completed school only through the eighth grade and never received a GED. She reads at approximately a third grade level, does math at a fifth grade level, has difficulty spelling words beyond the third grade level, and has an overall IQ of eighty. She has done manual labor her entire working life, and during the parties' marriage worked in a hog confinement facility as well as on their farm.

In January 1999 Jody injured her back while working at the hog confinement facility and has not been employed since. Under the Social Security Administration's rules and regulations Jody was classified as totally disabled as of March 1999. She receives \$669 per month in social security disability benefits as a result of this classification, but is required to pay \$100 per month of that for Medicaid, giving her a net monthly amount of social security benefits of \$569.

Jody also received a worker's compensation award in November 2001 as a result of her work-related injury. The Iowa Worker's Compensation Commissioner assigned her a seventy-five percent industrial disability and awarded her 375 weeks of permanent partial disability at \$311.28 per week, effective January 11, 2001. We note that based on this date and the number of weeks of benefits Jody's worker's compensation benefits ended approximately a month before trial in this case.

Jody continues to have several health problems, including chronic back pain and chronic pain syndrome, and takes a multitude of prescription medications for these and other problems. The district court found that her limited education and health issues are significant and permanent problems that

will preclude her from obtaining employment and make it highly unlikely that she will ever become self-supporting in any work, let alone be in a position to enjoy the standard of living she enjoyed during the marriage.

The court filed a dissolution decree on July 1, 2008. Each party filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). In ruling on these motions the court amended its decree. As amended, the decree ordered David to pay Jody \$1,000 per month in alimony until she dies or remarries; awarded David property with a net value of approximately \$251,000 and awarded Jody property with a net value of approximately \$240,000; and ordered David to pay an additional \$4,000 toward Jody's attorney fees. In making its property division the court ordered David to sell a sufficient amount of stored grain to pay Jody \$100,000 and to be responsible for any resulting taxes, and awarded Jody one-half of David's 401(k) plan.

David appeals, contending the court's award of \$1,000 per month in traditional alimony was excessive and inequitable relative to his income and ability to pay, and particularly so given the court's property division. He further claims the property division, particularly the division of his retirement account, was unjust and inequitable. Jody seeks an award of appellate attorney fees.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We need not separately consider assignment of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de

novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We give weight to the fact-findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

David first contends the district court's award of \$1,000 per month traditional alimony to Jody was excessive relative to his income and ability to pay, and particularly so given the court's property division.

"Alimony is an allowance to the spouse in lieu of the legal obligation for support." *In re Marriage of Sjulín*, 431 N.W.2d 773, 775 (Iowa 1988). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Spousal support is not an absolute right; an award depends on the circumstances of each 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 what is now Iowa Code section 598.21A(1) (2007). *Id.* Even though our review is de novo, we accord the district court considerable discretion in making spousal support determinations and will disturb its ruling only where there has been a failure to do equity. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one

enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). Property division and alimony should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Traditional alimony, such as was awarded here, is payable for life or for so long as a dependent spouse is incapable of self-support. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). In marriages of long duration where the earning disparity between the parties is great, both spousal support and nearly equal property division may be appropriate. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993).

Here the parties had been married for nearly thirty years, David was fifty-one and Jody was forty-eight. David was in relatively good health other than some minor knee, back, and hip problems, which the district court found were not inconsistent with his age and work, and no substantial evidence indicates these problems will prevent him from working and continuing to farm, now or in the foreseeable future. The evidence shows that David's gross income for 2007 was \$43,027.91.

Jody, on the other hand, has been found by the Social Security Administration to have become permanently disabled in 1999, has been found by the worker's compensation commissioner to have a seventy-five percent industrial disability, and suffers from several work-related and other health

problems. She attended school only through the eighth grade, and reads, writes, and performs math at very low levels. Jody has not worked outside the home since her 1999 work injury. Although she has attempted to obtain other employment she has been unsuccessful due to her physical conditions and her limited reading, writing, and math abilities. Jody's only sources of income at the time of trial were her social security disability benefits and temporary spousal support. Accordingly we, like the district court, find Jody's health problems and her low level of education and functioning to be significant and permanent problems that severely limit her earning capacity and ability to work, even if they perhaps do not entirely prevent her from some work. Further, Jody is only forty-eight years of age and her health problems may only worsen with age. It is highly unlikely she will ever become self-supporting at a standard of living comparable to the one she enjoyed during marriage.

Applying the factors under section 598.21A(1), and for the reasons set forth above, we conclude Jody is entitled to the award of traditional spousal support of \$1,000 per month until she dies or remarries. Although we agree with the district court that the amount of \$1,000 per month of traditional alimony is rather high, based on the particular facts and circumstances of this case as detailed above we conclude the district court did not act inequitably or abuse its discretion in awarding the amount and duration of alimony. As noted above, in marriages of long duration where the earning disparity between the parties is great, such as here, both spousal support and nearly equal property division may be appropriate. *Weinberger*, 507 N.W.2d at 735. David's alimony payments will

be deductible from his gross income in calculating his income tax obligation, giving him some income tax benefit. See I.R.C. §§ 62(a)(10), 215(a) (2007). David received a substantial property award, including the homestead, which will allow him to continue working and farming, thus enjoying a lifestyle approaching the one he enjoyed during the course of the marriage, even after his alimony payments. The alimony award was not excessive in relation to David's current income and earning capacity.

David next contends the district court's property division, particularly the division of his retirement account, was unjust and inequitable because the court required him "to pay the taxes on all of the assets,"¹ and he received mostly non-liquid assets while Jody received more liquid assets. He claims the division was also inequitable given the court's alimony award.

Iowa is an equitable distribution state, which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.* When distributing property we take into consideration the criteria now codified in Iowa Code section 598.21(5). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). In dividing property the court is to consider the tax consequences to each party. Iowa Code §

¹ We presume David means the court required him to pay any income taxes that resulted from the court's order that he sell stored grain to generate the funds to pay Jody the \$100,000 ordered by the court.

598.21(5)(j). In making a property division we have taken into consideration the tax consequences a party is expected to face in satisfying a property distribution. See e.g., *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996). Where a payment of a lump sum of cash to a spouse will in all probability require the liquidation of capital assets, the income tax consequences of such a sale should be considered by the trial court in assessing the equities of the property and spousal support awards. See *In re Marriage of Hogeland*, 448 N.W.2d 678, 680-81 (Iowa Ct. App. 1989).

In making the property distribution, the district court stated it took into account the deposition testimony of attorney Robert Story, the parties' tax preparer. Story testified that David may incur approximately \$28,619 in federal taxes and approximately \$10,776 in state taxes if the court were to require him to sell his stored grain worth approximately \$110,000 in order to pay Jody the \$100,000 lump sum she was requesting. The court ordered David to sell the grain in order to pay Jody \$100,000, and to be responsible for any taxes resulting from that sale. In doing so the court stated, "[I]t is apparent that what tax consequences may occur to David will be significantly reduced or eliminated as a result of his farming operation."

Considering the factors set forth in section 598.21(5), and based on our de novo review, we conclude the district court's property division was not unjust or inequitable. The court's division of David's retirement plan was necessary in order to make the property division equitable. Furthermore, assuming without deciding that the district court somewhat underestimated the income tax

consequences to David from the sale of the grain, we conclude the property division would not be inequitable even if David must pay all or most of the approximately \$39,000 in taxes that may result from the sale. After the payment of such taxes David would have a net property award of approximately \$212,000, while Jody would have a net award of approximately \$240,000. Considering the fact David received the homestead, thus allowing him to continue the farming operation, the length of the marriage, Jody's poor health, and the great disparities in income and earning capacities of the parties, we believe the property division, while somewhat favorable to Jody, would nevertheless remain equitable. The economic provisions of a dissolution decree are "not a computation of dollars and cents, but a balancing of equities." *Clinton*, 579 N.W.2d at 839.

Jody seeks an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of a party seeking an award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Applying these factors to the circumstances in this case, we award Jody \$2,000 in appellate attorney fees.

AFFIRMED.