IN THE COURT OF APPEALS OF IOWA

No. 9-087 / 08-0169
Filed July 22, 2009

IN RE THE MARRIAGE OF JUAN ROMEO RIOJAS AND YOLANDA SERVANTES RIOJAS

Upon the Petition of

JUAN ROMEO RIOJAS,
Petitioner-Appellant,

And Concerning

YOLANDA SERVANTES RIOJAS,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Fae Hoover-Grinde, Judge.

Juan Romeo Riojas appeals the child support, property division, alimony, and attorney fee provisions of the decree dissolving his marriage to Yolanda Servantes Riojas. **AFFIRMED AS MODIFIED.**

Theodore F. Sporer of Sporer & Flanagan, P.C., Des Moines, for appellant.

Benjamin W. Blackstock of Blackstock Law Offices, Cedar Rapids, for appellee.

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

MILLER, J.

Juan Romeo Riojas appeals the child support, property division, alimony, and attorney fee provisions of the decree dissolving his marriage to Yolanda Servantes Riojas. We affirm as modified.

I. BACKGROUND FACTS.

Romeo and Jo[1] were married in August 1984. Romeo was twenty-four years of age and Jo was twenty-three. Jo had a son, Hector, who was later adopted by Romeo when Hector was twelve years of age. Hector was twenty-six years of age at the time of the August 2007 trial in this case.

Two sons were born to the parties' marriage, the first in March 1992 and the second in December 1993. They were fifteen years of age and thirteen years of age respectively at the time of trial.

Romeo was forty-seven years of age at the time of trial. He was in good health other than being slightly overweight. Romeo is an engineer, having received his Bachelor of Science in Chemical Engineering degree in 1984. When the parties married in 1984 they first lived in California, where Romeo was then employed. Subsequent changes of residence, all related to Romeo's employment, have taken them to Maryland, back to California, to Virginia, back to California, to Arizona in about 1997, and finally to Iowa in 2003. Their times of residence at these locations have varied from about eight months to about eight years. Through his work experiences as an electronics engineer and more recently as a software engineer, and through his changes in employment, Romeo

[1] We refer to Juan as "Romeo" and to Yolanda as "Jo," the names by which they are commonly known and by which they were referred to at trial and in the trial court's ruling.

has secured positions of increasing responsibilities and increased compensation. By the time of trial Romeo had secured a transfer of his employment to Texas, to be near his father who was suffering from cancer. His base pay as shown at the time of trial is now $91,591 per year.

Jo was forty-six years of age at the time of trial. She was in good health, other than suffering from high blood pressure. In the early 1980s Jo attended junior college while working early morning and late evening shifts as a waitress and caring for her son who had been born in 1980. She took business and computer information system courses, but left school to marry Romeo and has not completed a two-year college degree. In Jo's opinion she has retained little of the knowledge or skills she may have acquired from the courses taken almost twenty-five years ago.

Prior to the parties' marriage Jo had some work experience as a secretary in an uncle's import-export business, and as a waitress. After their marriage and before the birth of their son in 1992 she had employment as a secretary/receptionist for a mobile home park manager, as a sales clerk in various businesses, and as an employee in a daycare center. Her employment changed frequently with the parties' changes of residence. All of Jo's jobs were at or below minimum wage.

When the parties' first son was born they agreed Jo would be a stay-at-home mother for their children. For a period of time in the mid-1990s she provided daycare for four to six children in the parties' home. It appears that Jo was not employed outside the home during the period from the parties' move to

Arizona in about 1997 until September 2006 when she secured employment in the delicatessen at a Target store about two months after the parties separated. The separation occurred when Romeo moved out of the family home and into an apartment. Jo works thirty-five hours per week on average, and is unable to secure more hours at Target. She has secured an increase in compensation since beginning her employment there, and now earns $8.27 per hour, the highest rate of pay she has ever received. Her gross income from employment is thus $15,051.40 per year.

In recent years Jo has been very active in, and has received some awards for, volunteer work. She has been particularly active in the Boy Scouts, where the parties' fifteen-year-old son has achieved the rank of Eagle Scout and their thirteen-year-old son is about to do so. Romeo has felt that Jo should have secured outside-the-home employment since about the time the youngest son started school, apparently in 1999.

II. THE DISTRICT COURT DECREE.

Certain portions of the district court's judgment are relevant to the issues presented on appeal.

Pursuant to an agreement of the parties, the district court ordered joint legal custody of the parties' two minor sons and placed responsibility for their physical care with Jo, subject to rights of visitation in Romeo. The court ordered Romeo to pay child support of $1418.55 per month, reduced to $963.15 per month when the older of the two children is no longer eligible for support.

The district court awarded Romeo a 1999 Ford E-150 van which had a value of approximately $6000, and ordered that he be responsible for the debt of $12,342 on the van. The court found the market value of the parties' residence to be $175,000, and awarded it to Jo, making her responsible for the debt on it of $162,630.97, consisting of a first mortgage of $136,597.58 and a second mortgage of $26,033.39.[2] The court further ordered that when Romeo's child support obligation ceased, Jo then sell the residence and pay Romeo one-half of an amount consisting of the equity existing in the residence at the time of the parties' divorce less real estate taxes prorated to the date of possession by the purchaser and less all costs of sale, including real estate broker fees, without payment of any interest on any amount payable to him.

The district court ordered that Romeo's retirement plans and accounts be divided equally between the parties by qualified domestic relations orders. One such account is identified as a Volt Technical Services Savings Plan 401(k) (with Charles Schwab) having a value of $125,742.54. Another is a Rockwell Collins Employee Stock Purchase Plan (with Fidelity) having a value of $43,559.16. A third, as shown by Romeo's testimony, is a "defined benefit plan" for which no present value is shown but which Romeo's testimony shows is vested and in which he had earned the right to eventually receive $185 per month.

In a joint pretrial statement filed shortly before trial Jo proposed that Romeo be responsible for the following debts and "bills": (1) Wells Fargo Auto Loan, (2) Wells Fargo Credit Card, (3) HAFCU Visa, (4) Marriott Visa, (5)

[2] It thus appears that the court implicitly found the parties had a time-of-trial equity in the residence of $12,369.03.

Discover gas card, (6) Rockwell Visa card (7) Wildwood Apartments, (8) Alliant Energy (Romeo's apartment), (9) Mediacom (apartment), (10) ANPAC Auto Insurance, (11) US Dept. of Education (loans 1 & 2), (12) US Dept. of Education (Hector loan), and (13) NACOLAH Life Insurance. Although the record is not clear on the point, it would appear that the second through sixth of these items are credit card debts or accounts, the seventh through ninth relate to Romeo's apartment, the tenth may be an outstanding bill for auto insurance, and the thirteenth may be for term life insurance (no value for life insurance is shown in any filing, and no life insurance policy is awarded by the district court's ruling). Jo proposed that she be responsible for the first and second mortgages and the recurring utility bills for the parties' residence that she hoped to continue occupying. The district court's ruling adopted Jo's proposal as to these items, except as to one of the US Dept. of Education loans, without findings as to the amount of any one or more of them. We have earlier noted above the amount of the auto loan and the amounts of the first and second mortgages. The evidence shows that the Marriott Visa debt was $3201.69, a "Pulaski credit card" (apparently one of the credit cards, but by a different name, that Romeo was to be responsible for) debt was approximately $2200, the US Dept. of Education (loans 1 & 2) debt was $4361.58, the US Dept. of Education (Hector loan) debt was $2454.96, and an ATT credit card debt was $3671.

The district court awarded each party all bank and credit union accounts in that party's individual name, but identified no accounts and placed no values or amounts on such accounts. The court awarded each party all household goods,

furniture, appliances, personal effects, and other tangible personal property presently in that party's possession, but placed no estimate of value on those awards.

The district court ordered Romeo to pay Jo one-half of a bonus of approximately $5000 he received from Rockwell Collins in December 2006, and ordered him to pay her $5000 to assist her in purchasing a vehicle. The court ordered Romeo to pay Jo $1300 per month in alimony until she dies or remarries. It ordered him to pay her $5000 in attorney fees.[3]

Romeo appeals, raising the issues noted above and described in greater detail below.

III. SCOPE AND STANDARDS OF REVIEW.

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 Smith*, 573 N.W.2d 924, 926 (Iowa 1998). 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*). 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).

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[3] This amount is in addition to $1000 previously ordered.

IV. MERITS.

A. Child Support.

The district court included a bonus of $5000 in Romeo's annual gross income in calculating his child support obligation. Romeo claims the court erred in doing so. For two reasons we reject this assignment of error.

"All income that is not anomalous, uncertain, or speculative should be included for the purpose of determining a child support obligation." *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004). Such things as overtime income, incentive pay, and bonuses are included in a party's income if reasonably to be expected. *Markey v. Curney*, 705 N.W.2d 13, 19 (Iowa 2005). When deciding whether bonuses should be included in gross income to determine a child support obligation, we look at a party's employment history over the past several years to determine whether the amount paid from year to year was consistent. *In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997). If the amount paid was consistent, the bonuses should be included. *Id.* Romeo received a bonus of $5000 or more in each of the three years immediately preceding the year in which the dissolution trial was held. We conclude the district court's decision to include the $5000 bonus in calculating Romeo's child support obligation is well supported by the evidence and the law.

We also note that the district court's order, that Romeo pay child support of $1418.55 per month, reduced to $963.15 per month when the older of the two children is no longer eligible for support, is exactly what Romeo proposed in a

joint pretrial statement filed just one day before trial. Having received precisely what he proposed, Romeo is in no position to complain.

B. Property Division and Alimony.

Romeo next claims the trial court erred in its distribution of property. Although the stated issue is limited to property division, Romeo includes within it a claim that the court erred in awarding permanent alimony to Jo. We will address both issues.

Before addressing the issues presented, we note some general principles concerning property division and alimony. 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 dividing property between the parties we take into consideration the criteria codified in Iowa Code section 598.21(5) (2007). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983).

Adjudicating property rights in a dissolution action inextricably involves a division between the parties of both their marital assets and liabilities. *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). The allocation of marital debts is as integral a part of property division as is the apportionment of marital assets. *Id.* The allocation of marital debts therefore inheres in the

property division. *Id.*; *In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa Ct. App. 1996). Accordingly, the term "property division" incorporates both division of assets and assignment of responsibility for debts.

1. Property Division.

Romeo claims the district court erred in finding the value of the parties' residence to be $175,000. He argues in part: "No credible evidence supports the trial court's record findings of value nor justifies the trial court's disregard of the objective and hence more credible evidence concerning value."

Romeo introduced in evidence the Linn County Assessor's assessment of the residence for real estate tax purposes. That assessment was at a value of $201,148. Jo introduced in evidence testimony and a written appraisal indicating the fair market value of the residence to be $175,000. This evidence was based on an appraisal by Jessica Trout, a certified residential appraiser, conducted a few days before trial. Trout observed the property, examined and considered the assessor's records, and inspected the property. She developed a list of comparable properties, considering similar properties in the same general neighborhood. Trout has considerable relevant experience, having conducted over 2000 real estate appraisals over the preceding ten years.

The district court quite apparently accepted and relied on the Trout appraisal.

> Ordinarily, a trial court's evaluation will not be disturbed when it is within the range of permissible evidence. . . . Although our review is de novo, we ordinarily defer to the trial court when valuations are accompanied by supporting credibility findings or corroborating evidence.

In re Marriage of Hansen, 733 N.W.2d 683, 703 (Iowa 2007). Here the trial court's valuation is within the range of permissible evidence and supported by that evidence. We affirm the court's valuation of the residence.

Romeo claims the district court erred in awarding the marital home to Jo until his child support obligation ends, thus providing her with an interest-free loan of his share of the parties' equity in the home. He also complains of the court's order that closing costs be taken out of the parties' equity before he receives any portion of that equity. We will here address his claim of error in awarding the residence to Jo until his support obligation ends. We will address his other complaint in our subsequent consideration of his other claims of error regarding property division.

"Frequently, payment of equity in a homestead to the non-custodial parent is postponed until the child or children graduate from high school to assure that the children have the stability of remaining there." *In re Marriage of Sychra*, 552 N.W.2d 907, 908-09 (Iowa Ct. App. 1996). Among the factors to be considered in property division is "[t]he desirability of awarding . . . the right to live in the family home for a reasonable period . . . to the party having physical care of the children." Iowa Code § 598.21(5)(g). The district court's decision places responsibility for the children's physical care with Jo. We presume, as the court apparently did, that the children will benefit from the stability of being able to remain in the home. We agree with and affirm the court's decision on this issue.

Romeo claims the district court erred in (1) dividing his retirement plans and accounts and his pension equally between the parties, (2) making him solely

responsible for the "US Dept. of Education (loans 1 & 2)," (3) ordering him to pay one-half of his 2006 bonus to Jo, and (4) ordering him to pay Jo $5000 to assist her in purchasing a vehicle.

We must, as the trial court must, consider the overall property division rather than any particular item or items in isolation. *See, e.g., In re Marriage of Pittman*, 346 N.W.2d 33, 37 (Iowa 1984) ("In considering the overall property division . . . we conclude the property division was equitable.").

The district court made no findings as to the values of either certain bank and credit union accounts or substantial personal property it awarded. The record appears to contain no findings or evidence as to the amounts of certain debts and obligations assigned by the court. The record discloses no present value for Romeo's pension plan which the district court divided equally between the parties. We therefore must, and do, assume that these items were of such value or were so divided that they need not be considered in evaluating whether the remaining division of assets and liabilities is equitable.

As previously noted, the district court found that the parties had a present equity of $12,369.03 in their residence, awarded the residence to Jo, and ordered that when Romeo's child support obligation ended Jo sell the residence and pay one-half of that equity to Romeo, with that equity reduced however by real estate taxes and costs related to the sale, including real estate broker fees. It would appear reasonable to assume that there will be a real estate broker's commission of six or seven percent, some real estate tax expense, and some small amount of other transaction costs. The court's order would thus reduce the

equity, of which Romeo is to receive one-half, to nothing. This appears to us to be inequitable. Although we have affirmed the award of the home to Jo without payment of one-half of the equity to Romeo until later, and then without interest, we conclude that equity requires that he receive his one-half of the present equity without reduction for real estate taxes and expenses of sale. We accordingly modify the district court's decree to so provide.

Romeo's 2006 year-end bonus of approximately $5000 was received some two months after a stipulation and resulting order required him to pay temporary alimony of $700 per month. The bonus was subject to, and thus reduced by, income taxes. The remainder of the bonus is presumably reflected in the assets owned by the parties at the time of trial some eight months later or resulted in a reduction in the debts they would otherwise have had at that time. We conclude that under these circumstances, together with our affirmance of most of the remainder of the district court's property division as noted below, it would be inequitable to require this payment. We accordingly modify the district court's decree to delete the requirement that Romeo pay Jo one-half of the 2006 bonus.

Both of the US Dept. of Education loans were for educational expenses incurred by the parties' now-adult son, Hector. Romeo proposed that each party pay one-half of each loan, and Jo proposed that Romeo pay all of each loan. The district court ordered that Romeo pay the "loans 1 & 2" and that each party pay one-half of the "Hector loan." We conclude that in order to make the district

court's property division equitable each party should be required to pay one-half of the "loans 1 & 2." We accordingly modify the decree to so provide.

The remainder of the district court's property division, as modified above, results in Romeo receiving a property award of $69,730.09, consisting of the 1990 van, one-half of the equity in the residence, one-half of the Volt 401(k), and one-half of the stock purchase plan, less the debt on the van, the Marriott Visa debt, the Pulaski credit card debt, one-half of the US Dept. of Education loans 1 & 2, one-half of the Hector student loan, and $5000 to be paid to Jo. It results in Jo receiving a property award of $89,709.40, consisting of one-half the equity in the residence, one-half the Volt 401(k), one-half of the stock purchase plan, and $5000 to be paid by Romeo, less the ATT credit card debt, one-half of the US Dept. of Education loans 1 & 2, and one-half of the Hector student loan. While this property division remains favorable to Jo, we believe that given the substantially differing earning capacities and educations of the parties[4] this division together with our following modification of the court's alimony award makes the combined property division and alimony award equitable.

2. Alimony Award.

In the parties' joint pretrial statement and at trial Romeo proposed that Jo be awarded rehabilitative alimony of $400 per month for forty-eight months or until her remarriage or either party's death. In the joint pretrial statement and in testimony at trial Jo proposed that she be awarded alimony of $900 per month until she died or remarried. Later, in a brief filed two weeks after trial, Jo

[4] *See* Iowa Code § 598.21(5)(f) (listing the parties' earning capacities and educations as factors to be considered in property division).

proposed that she receive traditional alimony of $700 to $900 per month, to be increased to $1500 or $1700 per month when Romeo's child support obligation ended. The district court ordered alimony of $1300 per month until Jo dies or remarries. Romeo claims the award of permanent alimony is not supported by the facts as shown in the record.

"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 1998). Alimony 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). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 598.21A(1). *Dieger*, 584 N.W.2d at 570. Even though our review is de novo, we accord the district court considerable discretion in making alimony 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).

When determining the appropriateness of an award of alimony, a court must 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). A court also considers the distribution of property, Iowa Code § 598.21A(1)(c), as well as the tax consequences to each party, *id.* §

598.21A(1)(g). A court must also balance a party's ability to pay against the relative needs of the other. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). In marriages of long duration, where the earning disparity between the parties is great, both spousal support and a nearly equal property division may be appropriate. *In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993).

After considering the relevant factors, we conclude an award of traditional alimony is appropriate, but, that given the somewhat unequal property division and Romeo's child support obligation the amount awarded is excessive during the period of time the child support obligation continues. We accordingly modify the district court's alimony award to provide that Romeo shall pay alimony of $900 per month until one of the two children is no longer eligible for child support, at which time his alimony obligation shall increase to $1100 per month, continuing until the second child is no longer eligible for child support, at which time his alimony obligation shall increase to $1300 per month.

C. Trial Attorney Fees.

Romeo claims the district court abused its discretion by awarding $5000 in attorney fees to Jo. An award of attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award must be for a fair and reasonable amount, and based on the parties' respective abilities to pay. *In re Marriage of Coulter*, 502 N.W.2d 168, 172 (Iowa Ct. App. 1993). Although the amount may seem rather large, Jo did testify that

she had incurred almost $11,000 in attorney fees. Under the circumstances shown we find no abuse of discretion and affirm the court's attorney fee award.

D. Appellate Attorney Fees.

Jo requests an award of appellate attorney fees. Such an award rests in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal. *Id.* Upon consideration of the foregoing factors, we award Jo $2000 in appellate attorney fees.

V. CONCLUSION.

Upon our de novo review, we modify the dissolution decree to provide that Romeo receive his one-half of the present equity in the parties' residence without reduction for real estate taxes and expenses of sale; to delete the requirement that Romeo pay Jo one-half of his 2006 bonus; and to make each party responsible for one-half of the "US Dept. of Education (loans 1 & 2)" debt. We also modify the alimony award, as noted above. In all other respects we affirm the district court's decree. We award Jo $2000 in appellate attorney fees.

Costs on appeal are taxed two-thirds to Romeo and one-third to Jo.

AFFIRMED AS MODIFIED.