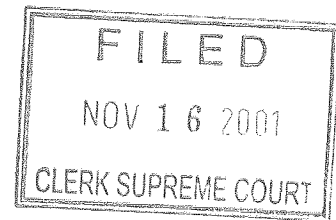


IN THE COURT OF APPEALS OF IOWA

No. 1-366 / 00-1450
Filed November 16, 2001



IN RE THE MARRIAGE OF DENNIS LOWRY
AND CINDY LOWRY

Upon the Petition of
DENNIS LOWRY,
Petitioner-Appellee/Cross-Appellant,

And Concerning
CINDY LOWRY,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Daniel P.
Wilson, Judge.

The respondent appeals, and petitioner cross-appeals, from various
economic provisions of the parties' dissolution decree. **AFFIRMED AS
MODIFIED.**

Daniel L. Bray and Chad A. Kepros of Bray & Kepros, Iowa City, for
appellant.

Dennis F. Chalupa and P.A. Henrichsen of Brierly Charnetski, L.L.P.,
Newton, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

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MILLER, J.

Cindy Lowry appeals, and Dennis Lowry cross-appeals, from various economic provisions of the parties' dissolution decree. Cindy contends (1) she is entitled to additional marital assets of \$57,733; (2) she should be awarded the storage shed lot as part of the residence which was awarded to her, and Dennis should be ordered to immediately pay off the entire mortgage on the marital home; and (3) she is entitled to monthly spousal support of \$2575 until she reaches age sixty-five. Dennis cross-appeals arguing Cindy's transitional spousal support should be reduced to \$1000 per month for forty-eight months. Cindy requests an award of appellate attorney fees. After we filed an opinion on September 12, 2001, we granted Dennis's petition for rehearing to resolve an issue, which although not presented upon submission has arisen after our opinion was filed and involves interpretation of the combined meaning and effect of our opinion and a supreme court order that was entered in this case during appeal. The issue is whether spousal support payments Dennis has made in order to comply with a supreme court order for spousal support during appeal are to be credited against rehabilitative spousal support ordered by the trial court and affirmed on appeal. We affirm as modified.

I. BACKGROUND FACTS

Dennis and Cindy Lowry were married in November 1975. Their marriage was dissolved almost twenty-five years later, in August 2000. Only the youngest of their three children, Brigitte, then seventeen and one-half years old, remained a dependent minor. She lives with Dennis.

When their first child was born in 1976 Dennis and Cindy agreed that Cindy should stay home and be a full-time mother and homemaker. Between 1977 and 1978 Dennis began doing work on his own as an electrician under the name Lowry Electric. Dennis and Cindy ran Lowry Electric together and had no other employees. Cindy would do the bookwork, answer the phone, pick up parts and take them to Dennis on the job site. As the business grew and they had their other two children in 1979 and 1983, Cindy continued to stay at home and be a full-time mother and homemaker while also working with Dennis in running Lowry Electric.

In the early to mid-1980s Lowry Electric's business expanded. The parties decided to open an appliance store in addition to the electrical business and called it Lowry Sales and Service. At that time Cindy, in addition to her homemaking, childcare, and Lowry Electric responsibilities, began working at the appliance store six days a week. She sold appliances, did the bookwork, and answered the phones.

The appliance business failed, and Cindy took a full-time job working for Evans Photography taking school pictures beginning in 1984 and continuing for approximately five years. During this period Lowry Electric continued to grow and prosper through both parties' hard work and dedication. In 1991 the parties incorporated Lowry Electric, Inc. (hereafter "Lowry Electric"), with each owning one-half the stock. As the business thereafter prospered the parties enjoyed a lifestyle that included taking several Caribbean vacations per year and purchasing and enjoying their home on a lake, jet skis, and a sailboat. They

regularly took three-day weekend trips on the sailboat, went out for expensive dinners, and enjoyed other social activities at a substantial cost.

Dennis filed a petition for dissolution in December 1999. The main issues at trial concerned the value of Lowry Electric, the amount of Dennis's income, debt division, possession or division of the parties' lakefront property, and spousal support.

Royal Raymond is a certified public accountant (CPA) who assists clients in buying and selling businesses and is called upon by them to estimate the value of businesses. In his opinion, after reviewing the financial records of Lowry Electric, its value would be determined by a valuation of two components. The first would be fixed assets plus other assets such as accounts receivable, inventory and cash. The second would be "blue sky" or "good will". He testified that in valuing Lowry Electric he would apportion very little value to good will because the income received from Lowry Electric was about equal to what people with electrical skills would earn in regular wages. He testified that in his experience, in Lowry Electric's geographical area the method he had described, an asset valuation method, was used for the purchase and sale of businesses such as Lowry Electric.

Steve Plate is a CPA who was consulted by the parties from time to time over a period of years concerning possible tax consequences of any sale of Lowry Electric. He told them that in his experience closely held businesses in the area normally sold primarily for the value of their assets. He testified that he had not seen a closely held business sold on an income valuation method in the geographical area of Lowry Electric. In advising the Lowrys of the tax

consequences of any possible sale Plate adjusted book values of fixed assets to fair market values by using estimates of fair market values provided by Dennis. Plate testified that using those values and an asset approach the value of Lowry Electric before taxes caused by sale would be \$150,682. He calculated that the tax effects of sale would reduce the value received by stockholders to \$91,434.

Shannon Shaw is a CPA with accreditation in business valuations who was retained by Cindy to give an opinion on the valuation of Lowry Electric using an income valuation method. Using such an approach he expressed an opinion that Lowry Electric had a value of \$181,000.

The trial court found the best evidence of Dennis's income showed that he had income of \$56,864 per year, consisting of \$30,720 from Lowry Electric plus \$26,144 rental income from a business/shop building owned by the parties and rented by Lowry Electric. It acknowledged the evidence showed the parties derived additional benefits in the form of personal expenses paid by Lowry Electric, but found such additional benefits were not sufficiently quantified or otherwise shown that they could be included in a party's income. It found that Cindy's current income was less than \$5000 per year but that she was capable of earning at least \$20,000 per year through her new career in home decorating, or through other employment she was capable of obtaining.

Both parties had incurred post-separation debt. In dividing the parties' property the court included as debts both parties' post-separation debts. The court awarded Cindy the parties' marital home, including the lot on which it is located and an adjoining lot, and awarded Dennis a lakefront lot located across

the road from the home. Dennis was ordered to be responsible for a mortgage on those three properties.

The court awarded Dennis what it calculated to be net property of \$153,301.69 and awarded Cindy net property of \$141,946.47. It then awarded Cindy a judgment of \$5677.61 against Dennis to equalize the property division. Dennis was ordered to pay Cindy spousal support of \$2000 per month for forty-eight months, and to pay \$10,000 toward Cindy's attorney fees.

Dennis appealed and posted a supersedeas bond to stay his spousal support obligation during appeal. Cindy sought, and in January 2001 secured, an order from the supreme court that required Dennis to pay monthly spousal support through the clerk of district court until an opinion on the merits was filed.

Cindy argues she is entitled to an additional \$57,733 in marital assets because the trial court erred in valuing Lowry Electric at \$91,434 rather than \$181,000, erred by undervaluing the household contents awarded to Dennis, and incorrectly included Dennis's post-separation debts in dividing property. She further contends she should have been awarded the lakefront lot as part of the residence and Dennis should have been ordered to immediately pay off the entire mortgage on the residence. She argues she should have been awarded spousal support of at least \$2575 per month until she reaches age sixty-five. She requests an award of appellate attorney fees.

On cross-appeal Dennis claims the transitional alimony award of \$2000 per month for forty-eight months should be reduced to \$1000 per month for forty-eight months.

II. SCOPE AND STANDARDS OF REVIEW

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In this equity case our review is de novo. Iowa R. App. P. 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. 14(f)(7). 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).

III. MERITS

A. Property Division.

1. Value of Lowry Electric, Inc.

Cindy claims the trial court should have valued Lowry Electric at \$181,000, based on the income valuation method utilized by Shannon Shaw, rather than the \$150,682 suggested by the asset value approach. Our supreme court has stated, "The value of stock in a closely held corporation is at best difficult to determine." *In re Marriage of Conley*, 284 N.W.2d 220, 222 (Iowa 1979). Further,

The general rule is that stock should be valued at market value if it can reasonably be ascertained. However, market value for the stock in a close corporation can rarely be ascertained. Thus its intrinsic value should be determined. A broad range of evidence is admissible to prove any fact calculated to affect its value. This includes evidence of the assets and liabilities of the corporation.

In re Marriage of Moffatt, 279 N.W.2d 15, 19 (Iowa 1979).

Shannon Sharp's income valuation method utilized national averages of profits for electrical contractors to estimate what Lowry Electric's profits should be, and then derived a value for Lowry Electric from those hypothetical profits. It did not take into consideration factors peculiar to Lowry Electric, other than its

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total revenues. The evidence shows that closely held businesses in the area normally sell primarily for asset value, and not on the basis of income, which may be greatly influenced by the work ethic and ability of the limited number of persons involved in the business. The trial court found that Lowry Electric's success or failure hinged on Dennis's continued involvement and motivation to put in long hours and undergo the stress of managing the business, a finding supported by the record.

The two values at issue, \$150,682 and \$181,000 are not greatly different, given the inherent difficulty and inexactitude involved in valuing a closely held corporation.

We need not arrive at an exact value. The purpose of determining value is to assist the court in making equitable property awards and allowances. This can be done without putting a precise value on the stock of a closely held corporation.

Moffatt, 279 N.W.2d at 19.

We agree with the trial court that the \$150,682 value derived using an asset value approach is the most reasonable value of Lowry Electric shown by the evidence.

2. Tax Consequences of Sale.

The trial court valued Lowry Electric at \$91,434. This figure was arrived at by reducing the value determined through an asset approach by the estimated corporate and individual income taxes to be paid upon a hypothetical sale. Cindy asserts the trial court erred in reducing Lowry Electric's value for such tax consequences.

The parties had from time to time in recent years discussed the possibility of selling Lowry Electric, and had consulted CPA Plate concerning tax consequences of any such sale. However, they have never listed Lowry Electric for sale or attempted to sell it, no one has offered to purchase it, and no one has approached them about purchasing it. The trial court has not ordered it sold, and in fact has awarded it to Dennis, as he has requested. No sale is pending. There is no evidence that a sale to any individual or entity is presently contemplated.

In dividing property the court is to consider the tax consequences to each party. Iowa Code § 598.21(1)(j) (1999); *In re Marriage of Hoak*, 364 N.W.2d 185, 193 (Iowa 1985). In *In re Marriage of Friedman*, 466 N.W.2d 689 (Iowa 1991), the trial court reduced the value of certain corporate stock awarded to a party in order to take into consideration capital gains taxes and costs of selling the stock. However, our supreme court rejected the reduction under the facts of the case, noting there was no evidence that a sale was pending or contemplated and the trial court had not ordered a sale. *Id.* at 691. It stated the reduction was the result of the inappropriate infusion of tax consequences on an illusory future sale of stock. *Id.*

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). We also have held that 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 award. See *In re Marriage of Hogeland*, 448 N.W.2d 678, 680-81 (Iowa Ct. App. 1989).

The key to these and other cases is that where sale of an asset is ordered, necessary, or otherwise relatively certain, consideration of tax consequences is appropriate, and where sale will not occur or is rather doubtful, consideration of tax consequences is inappropriate. In this case no sale or liquidation of the closely held corporation has been ordered, no such sale or liquidation is necessary to effectuate property division, and no such sale or liquidation is relatively certain to occur within the reasonably foreseeable future. We conclude the trial court should not have reduced the value of Lowry Electric by speculative and uncertain income tax consequences. We determine the approximately value of Lowry Electric to be \$150,682 rather than \$91,434.

3. Value of Household Contents.

Cindy estimated that the items of furniture, appliances and miscellaneous personal property she was to receive had a value of \$6400 to \$6600. Dennis valued them at \$6400. When Dennis moved from the parties' home he took certain items of furniture, appliances and personal property, and he later returned and took more. Cindy estimated those items to have a value of \$8650 and provided detailed lists of the items. After the parties' separation Dennis purchased additional furniture and appliances at a cost of \$6211. In a written "Proposed Distribution and Trial Exhibit" Dennis proposed that certain assets be awarded to him. He included, at a value of \$2750, the furniture and appliances he had purchased post separation, and also included "joint" household furnishings at a value of \$2350. Although the record is not completely clear on

the point, it appears the \$2350 must be a value he placed on the items he had removed from the family home.

The trial court placed a value of \$6400 on the items awarded to Cindy. It placed a value of \$2750 on the items awarded to Dennis. Cindy asserts the items awarded to Dennis should be valued at \$14,861, the sum of the \$8650 she estimates as the value of the items he took plus the \$6211 he spent.

In dividing property the trial court apparently overlooked and placed no value on the items Dennis took from the family home. From the number and nature of the items in question it appears their value may be somewhat greater than Dennis's estimate of \$2350 and somewhat less than Cindy's estimate of \$8650. We need not decide the exact value of the items in question. We find that the value of the items Dennis took from the parties' home is approximately \$4000, an amount not considered by the trial court in its property division.

Cindy asserts the items Dennis purchased post-separation should be valued at the \$6211 he spent for them rather than the value of \$2750 placed on them by him and the trial court. The evidence shows, and experience reveals, that the market value of such items is far lower than purchase price very soon after purchase. We affirm the value of \$2750 placed on these items by the trial court.

4. Post-Separation Debts.

Dennis incurred some \$20,000 or more in debt between the date of the parties' separation and the date of trial. Cindy asserts the trial court erred in considering these debts in its distribution of property.

Although there may be occasions when it is not equitable to use the trial date values in effecting property division, the general rule is that the date of trial is the only reasonable time at which an assessment of the parties' net worth should be undertaken. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976). Dennis's post-separation debt that the trial court included in property division included the \$6211 for furniture and appliances and \$8000 for attorney fees. However, the trial court also included in property division \$11,637 Cindy had borrowed, apparently post-separation, for attorney fees, and also included some other debts she had incurred post-separation. Further, the trial court awarded Cindy \$10,000 in attorney fees from Dennis. Under the facts and circumstances of this case we find nothing inequitable about the inclusion of Dennis's post-separation debt in property division and affirm on this issue.

B. Storage Shed Lot.

The parties' marital home consisted of three lots. One is a lakefront lot with a storage shed. The other two, on which the parties' residence is located, are immediately across the road from the storage shed lot and do not have lake access. The three lots and structures are subject to one mortgage, in the amount of \$51,148. The lakefront lot and storage shed has a value of \$27,000, and the other two lots and residence have a value of \$116,000. Cindy asserts she should have been awarded the lakefront lot as part of the residence and Dennis should have been ordered to immediately pay off the mortgage on the residence. She argues this is necessary and desirable to effect an equitable property division and to avoid continuing personal and financial entanglement of the parties.

Dennis agrees the parties should not be left with a post-separation arrangement that leaves them financially entangled, citing *In re Marriage of Webb*, 426 N.W.2d 402 (Iowa 1988) and *In re Marriage Mentel*, 359 N.W.2d 505 (Iowa Ct. App. 1984). In his brief he states

Cindy correctly asserts that Dennis should be ordered to pay off the entire mortgage on the home and the two lots that it sits on. Dennis stands ready to do this. Without Dennis' assumption of the full mortgage there is an unfair diminishment and burden upon Cindy's property award.

Appellee's brief at 19. He does, however, argue that his ownership of the lakefront lot does not constitute an entanglement, he may need it for collateral so he can fully assume the mortgage, and the lakefront lot should therefore remain his.

In attempting to divide the parties' property equally, the trial court awarded Dennis net assets that it valued at \$147,624.08 (\$153,301.69 less \$5677.61 judgment). We have found above that the trial court undervalued the assets awarded to Dennis by about \$61,000 (\$59,248 additional value of Lowry Electric plus \$1650 additional value of furniture and appliances awarded Dennis). Cindy should receive about one-half of this \$61,000. The lakefront lot is worth about \$27,000. We modify the trial court's decree to award Cindy the lakefront lot.

Under the trial court's decree, as modified herein, Dennis will receive a net property award of about \$180,000, including the parties' shop building and land from which Lowry Electric operates. The property awarded to Dennis includes net equity of \$64,200 in that building and land alone. With net assets of \$180,000, including the equity in the shop building and land, Dennis may have collateral sufficient to borrow the money necessary to pay off the mortgage on

the parties' residence, but we cannot be certain he will be able to do so. Further, the record does not show the rate of interest on the parties' present residence or on a loan necessary to pay off the mortgage. It may be financially disadvantageous to Dennis to borrow money to pay off the existing mortgage. We conclude the trial court was correct in not requiring Dennis to immediately pay off the mortgage, but that with the award of the lakefront lot to Cindy she should be awarded a lien on the real estate awarded to Dennis in order to secure payment of the mortgage. We therefore modify the trial court's decree to provide that Cindy shall have a lien on the shop building and lot awarded to Dennis. The lien shall be in the amount of the mortgage on the residence (three lots and structures) awarded to Cindy, as that amount may change from time to time as Dennis makes payments on the mortgage.

C. Spousal Support.

The trial court awarded Cindy spousal support of \$2000 per month for forty-eight months. She argues she should have permanent spousal support, in a somewhat greater monthly amount. Dennis asserts the spousal support award should be reduced to \$1000 per month for forty-eight months.

Spousal support 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 support is made after considering the factors listed in Iowa

Code section 598.21(3). *Id.* We consider the division of property in determining spousal support. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998).

When considering the appropriateness of spousal support, a court must consider, among other things, the parties' present standards of living and ability to pay balanced against their relative needs. *In re Marriage of Williams*, 449 N.W.2d 878, 883 (Iowa Ct. App. 1989).

Certain factors favor a substantial spousal support award in this case. They include the almost twenty-five year length of the parties' marriage, Dennis's greater earning capacity under present circumstances, and the fact that at least for a transitional period Cindy will not be able to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.

Other factors suggest that a substantial award of rehabilitative spousal support rather than permanent spousal support is appropriate. The parties are the same age, forty-three years of age, and each presumably has twenty years or more of remaining working life before retirement. Cindy is in good physical and mental health and capable of maintaining employment and being self-supporting. While Dennis has only a high school education, Cindy has taken several college courses and received "four point" grades. Cindy has substantial work experience in a variety of occupations, including being a bank teller, sales person, bookkeeper, retail appliance sales person and manager, photographer, and recently doing modeling and interior decorating.

The trial court found Cindy had an earning capacity of at least \$20,000 per year and this finding is not challenged. The trial court's spousal support award

amounts to \$96,000 over a period of four years, a sizeable amount of spousal support in view of the parties' respective earning capacities and the amount of property they had accumulated after twenty-five years of marriage and work. We conclude the trial court adequately and properly balanced the various factors in its award of spousal support and affirm on this issue.

Cindy now claims that Dennis is not entitled to a credit against the forty-eight months of rehabilitative spousal support for the payments he has made during appeal. Dennis claims the spousal support ordered by the supreme court is not in addition to the forty-eight months of rehabilitative spousal support ordered by the trial court.

The trial court found that the facts and circumstances of this case justified a post-decree award of rehabilitative spousal support in the amount of \$2000 per month for a period of forty-eight months and entered an order to that effect. Upon our de novo review we have affirmed on appeal. The supreme court's order for spousal support during the appeal did not set aside or nullify the findings or order of the trial court or those of this court on appeal. Rather, that order merely recognized that Cindy was in need of spousal support during the pendency of the appeal.

An appellate court decision on direct appeal which increases the amount of installment alimony payments speaks from the date of the original district court decree, absent express provision to the contrary. *Thomas v. Minner*, 340 N.W.2d 285, 286-87 (Iowa 1983). We conclude that our decision affirming the trial court's award of rehabilitative spousal support similarly speaks from the date of the district court decree. Cindy is therefore entitled to post-decree spousal

support of \$2000 per month for forty-eight months. We conclude that Dennis is entitled to credit against the award of rehabilitative spousal support for payments made during this appeal.

D. Appellate Attorney Fees.

Cindy requests appellate attorney fees. We have discretion to award appellate attorney fees under Iowa Code section 598.36. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). 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 trial court's decision on appeal. *Id.* After considering the relevant factors, we conclude Cindy should be awarded \$2000 in appellate attorney fees.

IV. SUMMARY AND DISPOSITION

We modify the trial court's values of Lowry Electric and furniture and appliances awarded to Dennis. We modify the trial court's decree to award Cindy the parties' lakefront lot and to award Cindy a lien on the shop building and lot awarded to Dennis. Dennis is entitled to credit against the award of rehabilitative spousal support for payments made during this appeal. We affirm the trial court's ruling and decree in all other respects. We award Cindy \$2000 appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.