

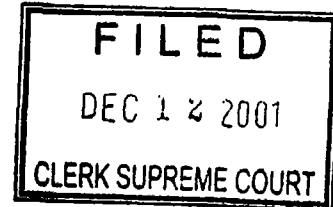
IN THE COURT OF APPEALS OF IOWA

No. 1-566 / 00-1919
Filed December 12, 2001

**IN RE THE MARRIAGE OF CLAUDETTE JOYCE WARNER
AND MAYNARD DUANE WARNER**

**Upon the Petition of
CLAUDETTE JOYCE WARNER,**
Petitioner-Appellee,

**And Concerning
MAYNARD DUANE WARNER,**
Respondent-Appellant.



Appeal from the Iowa District Court for Van Buren County, Annette J.
Scieszinski, Judge.

Maynard Duane Warner appeals the property distribution, alimony, and
attorney fee provisions of the parties' dissolution decree. **AFFIRMED.**

Thomas F. Kintigh of Griffin, Dew & Kintigh, Ottumwa, for appellant.

R.E. Breckenridge of Johnson, Hester, Walter & Breckenridge, L.L.P.,
Ottumwa, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

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EISENHAUER, J.

The respondent appeals the property distribution, alimony, and attorney fee provisions of the parties' dissolution decree. The respondent argues the district court erred in (1) undervaluing the pie bird collection, (2) awarding the petitioner permanent monthly alimony of \$500, and (3) ordering him to pay \$3000 toward petitioner's attorney fees. The petitioner requests an award of appellate attorney fees. We affirm.

I. Background Facts and Proceedings. Maynard and Claudette Warner were married in January 1954. They have no minor children. During the marriage, Maynard held a variety of jobs. He is currently a truck driver, earning approximately \$15,000 per year plus an additional \$2757 in unemployment compensation. Claudette raised the parties' children during the first half of the marriage while working on the family farm. After the farm was sold in 1975, Claudette worked as a nurse's aid, nanny, and a housekeeper. She is now unemployed due to arthritis and depression. Claudette earns \$391 per month in social security benefits.

During the marriage, Claudette became interested in collectibles. In addition to several other collections, she accumulated a large pie bird collection. During the last ten years of the marriage, Claudette acquired expert knowledge of pie bird collecting.

Claudette filed a petition for dissolution in December 1999. The main issues at trial concerned the distribution of marital property and the payment of

alimony. The district court awarded Claudette a net property award of \$79,460 and Maynard \$75,231. The court declined to award alimony.

Claudette filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) alleging error in over-valuing the pie bird collection and in failing to award her alimony. The court granted the motion and entered a substituted and amended decree. In the amended decree, the court awarded Claudette a net property award of \$73,595 and Maynard \$73,231. It ordered Maynard to pay monthly alimony of \$700 until July 2001, and then \$500 per month. The alimony is to continue for the rest of her life. Maynard was also ordered to pay \$12,000 in cash to Claudette and \$3000 toward her attorney fees.

Maynard then filed his own rule 179(b) motion, contending the property settlement and alimony award effectively prevented him from retiring. He further argued Claudette should pay her own attorney fees. The motion was denied. Maynard appeals. Claudette requests an award of appellate attorney fees.

II. Scope of Review. Appeal of economic provisions of a divorce decree is de novo. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). This standard requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *Id.* We recognize the value in listening to and observing the parties and witnesses. See Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Campbell*, 623 N.W.2d at 586.

III. Valuation of the Pie Bird Collection. In its decree, the district court valued Claudette's pie bird collection at \$32,500. Maynard maintains the district

court undervalued the collection. He asserts the value of the pie bird collection is at least \$40,000.

At trial, Maynard testified that Claudette had told him the pie bird collection would be worth up to \$50,000. Maynard admitted this figure would be on "the very high end." Claudette testified extensively about the pie birds. She valued the collection at just over \$22,000. Additionally, she reproduced part of a pie bird valuation book as one of her exhibits. She also testified there has been a recent drop in the prices pie birds are drawing at auctions.

"Although our review is de novo, we will defer to the trial court when valuations are accompanied with supporting credibility findings or corroborating evidence." *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). The district court found and the evidence supports that Claudette is an expert in pie bird collecting. The court then valued Claudette's collection at \$32,500, a figure halfway between the parties' valuations. The valuation found by the trial court was well within the permissible range of evidence. *See In re Marriage of Williams*, 449 N.W.2d 878, 881 (Iowa Ct. App. 1990) (valuing a marital farm at an amount between the parties' calculations was in the permissible range of evidence). We therefore decline to disturb it on appeal.

IV. Alimony. Maynard next argues the district court erred in awarding Claudette too much alimony and the monthly amount should be decreased. He contends that he is ready to retire, and that he would be unable to pay the alimony obligation and the property settlement in addition to his own living expenses. He requests his alimony obligation be decreased to \$300 per month.

Alimony is not an absolute right. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). Instead, an award of alimony depends on the circumstances of each particular case. *Id.* When determining the appropriateness of alimony, the court must consider the length of marriage, the age and health of the parties, and the distribution of property. Iowa Code § 598.21(3)(a) – (c) (1999). The court also considers “(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other.” *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (citation omitted).

We find the district court did not err in awarding Claudette \$500 per month in alimony. Maynard is in good health and is gainfully employed. He earns approximately \$2400 per month from his work, unemployment benefits, and social security. Meanwhile, Claudette suffers from arthritis and depression, and is unable to take a job. She earns \$391 per month in social security benefits. As a result of her health problems, Claudette must take costly medications. She estimates the total cost of her medicine is \$320 per month. While Maynard argues Claudette's assets are equal to his because the court divided the property equally, his argument ignores the fact that he was awarded the marital homestead and is thereby able to live rent-free.

Maynard argues that when he retires Claudette will receive \$1096 in monthly income, while he will only receive \$535 per month. However, Maynard is currently working and earning approximately \$2000 per month to Claudette's

\$1100. Because Claudette has the added expenses of rent and medication, we find the district court's alimony award of \$500 per month is equitable.

V. Attorney Fees. Finally, Maynard argues the district court should have included the \$3000 toward Claudette's attorney fees as marital debt and equalized the property settlement accordingly.

The attorney fees incurred in this divorce action are personal debts, not marital debts. Therefore, the district court properly excluded them from the division of marital property.

VI. Appellate Attorney Fees. Claudette requests an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We are to 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. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We award Claudette no attorney fees on appeal. Costs of this appeal are taxed to Maynard.

AFFIRMED.

Vogel, P.J., concurs; Miller, J., specially concurs.

MILLER, J. (concur specially)

I fully concur in the result, but write separately to state somewhat different or additional reasons for resolving certain issues as we have.

The trial court considered Claudette's request for an award of attorney fees separately from its consideration of property division. I believe the trial court was correct in doing so not because attorney fees incurred in a dissolution of marriage proceeding are not a "marital debt," but rather because statutes and case law allow the court to order one party to pay toward the other party's attorney fees and because the relevant factors, the requesting party's need and the other party's ability to pay, justify such an award in this case.

I do not believe the fact that Maynard was awarded the marital homestead and can live rent-free while Claudette has rent expense has any bearing on the questions of whether spousal support should be awarded or the amount of any such award. Each party received an approximately equal amount of property. With all other assets and debts being divided approximately equally, Claudette received a pie bird collection worth \$32,500, an IRA of \$15,616, and a judgment of \$12,000 against Maynard, a total of \$60,116, and Maynard received a home with a value of approximately \$60,000. Claudette could sell the pie bird collection, cash in the IRA, and invest the proceeds together with the \$12,000 property settlement in a home, and be in the same position as Maynard. Alternatively, Maynard could sell his home, invest \$32,500 in a pie bird collection and place the remainder of the proceeds in savings, and be in the same position as Claudette. Accordingly, the fact that Claudette pays rent while Maynard does

not is merely a product of the *nature* of the property awarded to each party, not the *amount* awarded to each party, and should have no bearing on the spousal support issue.

The facts justify an award of permanent spousal support, and the parties' present incomes justify the amount awarded by the trial court, Maynard having not yet retired despite the fact he was sixty-six years of age at the time of trial and is two years older than Claudette. Modification may well be required at the time of his retirement, as it appears the present award will result in him then having substantially less income than Claudette, even after consideration of her extraordinary expenses for medications.