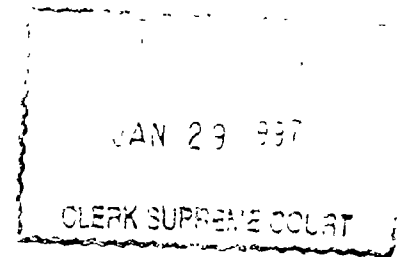


IN THE COURT OF APPEALS OF IOWA

No. 6-651 / 96-0149



**IN RE THE MARRIAGE OF DARCY M. SHEAR
AND DALLAS F. SHEAR, Jr.**

**Upon the Petition of
DARCY M. SHEAR,**

Petitioner-Appellant,

**And Concerning
DALLAS F. SHEAR, Jr.,**

Respondent-Appellee.

000287

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K.
Bovard, Judge.

Appeal from dissolution decree on division of property award. **AFFIRMED
IN PART, REVERSED IN PART.**

Jerry H. Folkers of Dunkelberg, McKinley, Folkers & Walk, Osage, for
appellant.

Mark S. Lagomarcino of Hanson, Bjork & Russell, L.L.P., Des Moines, for
appellee.

Heard by Streit, P.J., and Vogel, J., and Schlegel, S.J.* Sackett, J., takes no
part.

* Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

STREIT, P.J.

This is an appeal from the entry of a dissolution decree, where the appellant seeks to share in the increased value of the parties' residence that was brought to the marriage by her spouse. She also seeks an award of appellate attorney fees.

Darcy and Dallas Shear were married in May 1988. The parties separated from September 1991 until August 1993 and separated a final time on November 30, 1994. Darcy and Dallas had no children. Trial was December 1995.

During the marriage, the parties lived in a house near Clear Lake. Dallas owned this house prior to the marriage. When the parties married in 1988 it was valued at \$22,000. Dallas later bought an adjoining lake front lot for \$15,000 using gifted funds and the proceeds from the sale of other real estate he had owned prior to the marriage. The parties substantially improved the residence by enclosing a deck, adding a bedroom with a screened-in porch, erecting a garage, adding a half-story, and remodeling.

The district court found that during the ninety-two month marriage the parties had lived together for fifty-five months and had been separated for thirty-seven months. The court concluded Dallas owned the residence prior to the marriage and was primarily responsible for all of its improvements. The court did not include the house in the property distribution. The court divided the parties' remaining assets and

debts. It directed Dallas to pay a \$5,000 settlement award to Darcy for a net property award of \$7,838 to Darcy and \$10,200 to Dallas.

On appeal, Darcy claims she was entitled to share in the increased value of the residence because of her substantial contributions in terms of “sweat equity” as well as significant economic contribution. She also seeks an award of appellate attorney fees.

Our scope of review in equitable proceedings is de novo. Iowa R. App. P. 4.

I. Division of Property. Partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Peterson*, 491 N.W.2d 535, 537 (Iowa App. 1992). The determining factor is what is fair and equitable in each particular circumstance after consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). 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 Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Peterson*, 491 N.W.2d 535, 537 (Iowa App. 1992). The determining factor is what is fair and equitable in each particular

circumstance after consideration of the criteria codified in Iowa Code section 598.21(1). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Iowa Code section 598.21(1) (1995) provides “the court shall divide all property *except* inherited property or gifts received by one party, equitably between the parties.” (emphasis added). The only exception to this rule must be based “upon a finding that refusal to divide the property is inequitable to the other party or to the children of the marriage.” Iowa Code § 598.21(2) (1995). We look to the contributions of each party to the marriage. Iowa Code § 598.21(1)(c). Property which a party brings into the marriage is a factor to consider in making an equitable division. Iowa Code § 598.21(1)(b). In some instances, this factor may justify a full credit but does not require it.¹ An additional factor in dividing appreciated property acquired before the marriage is whether the appreciation which occurred during the marriage was fortuitous or due to the efforts of the parties. *In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa App. 1982). An equitable property division of the appreciated value of the property should be a function of the tangible contributions of each party and not the mere existence of the marital relationship. *In re Marriage of Hass*, 538 N.W.2d 889, 893 (Iowa App. 1995).

¹Antenuptial agreements are available to preserve premarital assets. See Iowa Code § 598.21(1)(l) (1995).

A premarital asset is not otherwise set aside like gifted and inherited property. Instead, it is a factor to consider, together with all the other circumstances, in making an overall division. Its impact on the ultimate distribution will vary with the particular circumstance of each case. Furthermore, in considering accumulations to premarital assets, we do not limit our focus to the parties' direct contributions or physical efforts to the increase. Instead, we broadly consider the contributions of each party to the overall marriage, as well as all other factors. Iowa Code § 598.21(1) (1995). Financial matters make up but a portion of a marriage, and must not be emphasized over the other contributions made to a marriage in determining an equitable distribution. Moreover, this concept extends well beyond physical contributions to the accumulation of property, and does not lend itself to record keeping. *In re Marriage of Hass*, 538 N.W.2d 889, 893 (Iowa App. 1995).

Darcy and Dallas Shear acquired assets during the course of their marriage through the joint efforts of both spouses. During their seven-year marriage, Darcy and Dallas materially and substantially modified the house. These projects increased the house's living area by 50% and more than doubled its value. Darcy directly participated in some of the construction. She participated indirectly in the house's expansion and modification by paying for the parties' living expenses during this activity. Darcy is entitled to a just and equitable share of all the marital assets,

including the house and its significant modifications. To ignore the substantial improvements to the house during the marriage would work an injustice.

Each partner in the marriage is entitled to a portion of the increase in home equity which occurred during the marriage. *In re Marriage of Campbell*, 451 N.W.2d 192, 195 (Iowa App. 1995). The able trial court's determination that Darcy was not entitled to a portion of the increase in value of the dwelling based on its conclusion that the marriage was one of convenience and not a "giving, loving, affectionate, sacrificial or dedicated" one is misplaced. While this observation may be supported by the evidence, such criteria is not contained in Iowa Code section 588.21(1) for consideration by the court in ordering division of property. *See* Iowa Code § 598.21(1) (1995). We do not reward or punish either party on the basis of fault. *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977); *Locke v. Locke*, 246 N.W.2d 246, 257 (Iowa 1976); *In re Marriage of Luebbert*, 400 N.W.2d 80, 83 (Iowa App. 1986); *In re Marriage of Helmle*, 514 N.W.2d 461, 463 (Iowa App. 1994). Similarly, the courts are not in an appropriate position to judge the character, strength, or value of any particular relationship or to use its judgment in such areas as a guide in the division of assets. Although the parties separated several times during the marriage, there is no legal basis to calculate Darcy's share of property based on her occupancy of the lake house. To hold otherwise invites litigation concerning fault and

the reasons for such a marriage. Darcy is entitled to one-half of the increased value in the residence.

Considering all the relevant factors, we modify the decree to award Darcy property totaling \$17,838 or approximately one-half of the parties' total net gain of property during the marriage. The factors primarily responsible for our division include the set off to Dallas of \$37,000 in assets brought into the marriage by him (\$22,000 house brought to the marriage, plus the \$15,000 lot purchased with inherited and pre-marital property).² The house valued at \$73,000 less the mortgage of \$5,200 and premarital or gift considerations of \$37,000 leaves \$30,800 more in assets than the trial court considered. The property distribution made by the trial court will remain the same, except Darcy's cash settlement shall be \$15,000. Dallas shall pay Darcy this in equal annual amounts over three years, without interest, beginning March 1, 1997. In the event Dallas fails to pay any installment on the due date, the entire balance shall be due and shall collect interest at the rate of 10% per annum from the due date of the entire remaining sum.

II. Attorney Fees. Darcy and Dallas both seek attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests with the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390

² No allowance has been made for speculative matters such as a real estate commission or income taxes.

(Iowa App. 1987). 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. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). Darcy earns over \$16,000 per year from her employment with the Principal Financial Group. Dallas earns over \$10,000 annually as a carpenter. Under the circumstances of this case, we order each of the parties to pay their own attorney fees for this appeal. The costs of this appeal are taxed to Dallas.

AFFIRMED IN PART, REVERSED IN PART.