IN THE COURT OF APPEALS OF IOWA

No. 5-527 94-1242

IN RE THE MARRIAGE OF B. MARIE BRADY-HOLMES and CHARLES W. HOLMES

Upon the Petition of
B. MARIE BRADY-HOLMES,

Petitioner-Appellant.

And Concerning
CHARLES W. HOLMES,

Respondent-Appellee.

FILED
DEC 22 1995
CLERK SUPREME COURT

Appeal from the Iowa District Court for Lee County, William L. Dowell, Judge.

Petitioner appeals various economic provisions of the parties' dissolution decree. **AFFIRMED.**

John P. Roehrick of Roehrick, Hulting & Moisan, Des Moines, for appellant.

Thomas T. Skewes of Johnson & Skewes, Fort Madison, for appellee.

Heard by Sackett, P.J., Huitink, J., and Schlegel, S.J.*

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

SACKETT, P.J.

Petitioner-appellant B Marie Brady-Holmes challenges the economic provisions of a decree dissolving her marriage. Marie contends she should have been awarded spousal support, she did not receive an equitable distribution of the property, she should have been awarded additional pension benefits, and she should have additional fees for her trial attorney. She also asks we award her attorney fees on appeal. We affirm.

Marie, forty-two years old at the time of trial, and respondent-appellee Charles W. Holmes, forty-six at the time of trial, were married on December 31, 1988. At the time of the marriage, Charles, a dental school graduate, had an established dental practice in Fort Madison. Marie held a master's degree in public administration and had been working at the Iowa State Penitentiary prior to the marriage. Marie had two minor children from her first marriage who she brought with her into this marriage. These children are now adults. No children were born to this union.

At the time of the marriage, Charles had a personal residence free of debt; Marie had a home with a mortgage indebtedness of about $60,000. Charles paid off the mortgage on Marie's home and paid for substantial improvements made to it. The home, debt free and valued at $100,000 at the time of the dissolution, was in excellent condition. The trial court awarded each party their respective homes. Marie was awarded twenty-five percent of Charles's pensions and a judgment of $18,000 to be paid at $1500 per month. Marie's request for spousal support was denied.

Marie first contends she should have been awarded spousal support and contends the trial court applied a fault concept in denying it to her.

The trial court found Marie had mental health problems which she was not willing to treat.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Fleener*, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party and (2) their present standards of living and ability to pay balanced against their relative needs. *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981).

This was a short-term marriage. Marie has two college degrees. Charles provided the majority of the support during the marriage, including the support for Marie's two teenage children. Charles helped Marie's son with college expenses. Marie receives a pension of $1100 per month through a prior husband. There is no evidence Marie made any particular sacrifices during the marriage. Marie gave up her job just prior to the marriage and seeks to blame Charles for this fact. Marie was working at an Iowa prison and had filed a suit against Warden Nix accusing him of

harassment. The record does not support a finding Marie quit her job to make sacrifices for Charles. Rather, she traveled extensively and did not live with Charles during the last year of the marriage. Marie and Charles are about the same age. Marie has been gainfully employed in the past and, with her education, should be able to find employment in the future. Her health and financial condition under the decree are as they were prior to the marriage. We look to these factors in considering her claim of alimony. We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1987); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

Marie next contends the pension was not properly divided. 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 Havran*, 406 N.W.2d 450, 452 (Iowa App. 1987). The trial court gave Marie about twenty-five percent of Charles's pension finding he had contributed to the fund for about sixteen years and he and Marie lived together about four years. Marie contends he had only funded the pension for fourteen years and therefore she should have fifty percent of 35.71 percent of the pension. Marie contends they were married five years and four months and that figure should be used.

Charles argues it was a fifteen-year pension because even though the fund was paid in the following calendar year that represented earnings in the proceeding calendar year and Charles contributed to the pension for sixteen years. Charles also

argues Marie should not receive five years' credit where she purposely absented herself from Charles's home after four years. The partners in the 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). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *Estlund*, 344 N.W.2d at 280.

We agree assets are valued as of the date of the dissolution. Pension benefits are subject to equitable distribution. *In re Marriage of Hornung*, 480 N.W.2d 91, 95 (Iowa App. 1991); *In re Marriage of Mott*, 444 N.W.2d 507, 510 (Iowa App. 1989).

The question we address is not whether Marie actually received fifty percent of the pension benefits Charles accumulated during the marriage. The question is whether the property division when taken as a whole is fair. *See In re Marriage of Lattig*, 318 N.W.2d 811, 814 (Iowa App. 1982) (the ultimate question, as it always has been, is whether the distribution of the property is equitable). There are not fixed percentages for the division of assets. *See also In re Marriage of Oakes*, 462 N.W.2d 730, 733 (Iowa App. 1990), where wife was not given an increase in funds accrued in retirement account during separation.

Looking at the allocation of assets as a whole, we find Marie was treated equitably. We affirm the property division.

Marie contends she should have additional trial attorney fees. Charles paid $3000 pursuant to the provisions of the decree dissolving their marriage. Marie contends she should have been awarded an additional $7500 for trial attorney fees. She also asks we award her attorney fees on appeal.

Iowa trial courts have considerable discretion in awarding attorney fees and costs in dissolution actions. *In re Marriage of Moorhead*, 224 N.W.2d 242, 245 (Iowa 1974); *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* Awards of attorney fees must be for fair and reasonable amounts, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *Id.* An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *See In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987).

We affirm the trial court on the issue of attorney fees. We award no attorney fees on appeal.

AFFIRMED.