

IN THE COURT OF APPEALS OF IOWA

No. 9-280 / 98-1545

Filed May 26, 1999

**IN RE THE MARRIAGE OF PAMELA DIANE BEAVERS
AND ROBERT SELDON BEAVERS**

Upon the Petition of
PAMELA DIANE BEAVERS,
Appellant,

And Concerning
ROBERT SELDON BEAVERS,
Appellee.

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

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

William Glass, Keosauqua, and J.W. McGrath of McGrath & McGrath, P.C.,
Keosauqua, for appellant.

J. Bryan Schulte of Bauer, Schulte, Hahn, Swanson & Brown, Burlington, for
appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

HUITINK, P.J.

Pamela Beavers appeals various economic provisions of the parties' dissolution decree. We affirm.

I. Background Facts and Procedure.

Robert and Pamela Beavers were married in October 1964. There are no children affected by this appeal. Robert was sixty-two and Pamela was fifty-three years of age at the time of trial.

Pamela is a high school graduate. Since graduation from high school, Pamela has been a homemaker and has also obtained substantial work experience as a bank teller and terminal manager in the trucking industry. Until her retirement in 1994, Pamela worked as a teller at Firststar Bank for eighteen years.

Robert is also retired. Robert served in the United States Air Force from 1954 through 1976. Upon leaving the armed forces, he worked at the Iowa Army Ammunition Plant in Middleton, Iowa, for approximately fourteen years.

On August 1, 1997, Pamela filed a petition for dissolution. At trial, the disputed issues included alimony, the fair market value of the marital home, Pamela's medical insurance needs, division of Robert's two pensions, the divisibility of two certificates of deposit, and the equitable division of other marital assets.

In its decree, the district court assigned a fair market value of \$85,160 to the marital home and awarded it to Pamela. The court awarded her 26.7 percent of Robert's military pension, but did not award her a share of his lifetime pension

benefits from the Iowa Army Ammunition Plant (IAAP). The court also set aside two certificates of deposit to Robert as inherited property. The district court's property distribution resulted in a net award of \$224,554 to Pamela. Robert's net property award was \$212,000. The court declined to award Pamela alimony. Robert was ordered to pay \$350 of Pamela's trial attorney fees.

On appeal, Pamela challenges the district court's (1) failure to award alimony; (2) set-off of two certificates of deposit as inherited property; (3) valuation of the marital residence; (4) failure to divide Robert's IAAP retirement benefits and other property; and (5) award of attorneys fees. Robert also requests an award of appellate attorney fees.

II. Scope of Review.

Our review of the economic provisions of a divorce decree is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 852 (Iowa App. 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).

III. Alimony.

When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of O'Rourke*, 547

N.W.2d 864, 866 (Iowa App. 1996)(citation omitted). 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).

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) (1997). *See In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983).

Robert is retired and his subsistence is dependent upon social security and modest pensions. Pamela is nine years younger than Robert and continues to enjoy a significant earning capacity (\$16,000 per year). She was also awarded a portion of Robert's military pension, death benefits from his IAAP pension, and a greater property award. Under these circumstances, an award of monthly alimony is not justified.

IV. Property Distribution.

The partners to 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). 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) (1997). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Generally, gifts or inheritances received by a party during the marriage are not subject to a property division unless the failure to do so would be inequitable to the other party. *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 659 (Iowa 1989); Iowa Code § 598.21(2). There are a variety of factors a court must weigh to determine how such property should be treated. *Muelhaupt*, 439 N.W.2d at 659. The length of the marriage is an important factor in considering when gifted or inherited property should be divided. *Id.* The ultimate question is whether the property distribution was equitable. *In re Marriage of Clark*, 577 N.W.2d 662, 664 (Iowa App. 1998).

A. *Certificates of Deposit.*

Pamela asserts the district court erred in setting aside to Robert two certificates of deposit valued at approximately \$18,000 as inherited property. The most substantial and reliable testimony concerning these CDs came from Robert's sister, Elsie Joan Trail. Trail assisted Basil Beavers, Robert's father, in all financial matters during his declining years. She testified the contested CDs were transferred to Robert as part of Basil's estate planning. There is no evidence contradicting Basil's donative intent or the terms of this transfer. In addition, division of the CDs is unnecessary to accomplish an equitable property division. We affirm on this issue.

B. Value of the Beavers' Home.

The record includes an appraisal by Edwin Menke which valued the marital residence at \$81,000. Menke's appraisal was based in part on an outdated real estate tax assessment of \$75,840. Robert initially represented the house was worth \$87,500. At trial, Robert amended his valuation to \$85,160, based entirely upon the most recent real estate tax assessment by the Henry County Assessor's Office. When confronted with a more recent real estate tax assessment at trial, Pamela's expert acknowledged the higher assessment would be a relevant factor to consider in fixing the market value of the property at the time of trial. The district court accepted the \$85,160 figure and used it to divide the parties' assets. We find the valuation by trial court was well within the permissible range of the evidence and we will not disturb it on appeal. *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973).

C. IAAP Retirement Benefits.

We initially reject Robert's claim Pamela has failed to preserve this issue for appeal by filing the required post-trial motion. *See* Iowa R. Civ. P. 179(b). The record indicates Pamela was awarded \$216.80 monthly benefits from the IAAP annuity, payable upon Robert's death. Under these circumstances, a 179(b) motion was not a prerequisite to appeal the equity of the court's division of the IAAP benefits. *See, e.g., In re Marriage of Davis*, 462 N.W.2d 703, 704 (Iowa App. 1990)(citation omitted).

Pension benefits are treated as marital property and are properly subject to equitable division. *In re Marriage of Mott*, 444 N.W.2d 507, 510-11 (Iowa App. 1989). As noted earlier, Robert's IAAP Retirement annuity includes both lifetime and death benefits. Robert was awarded the \$433.59 monthly lifetime benefit, and Pamela was awarded the monthly \$216.80 survivor benefit for the remainder of her life. Robert's lifetime benefit has been presumably discounted by the actuarial value attributed to Pamela's death benefit. Under these circumstances, we find the district court's further division of the lifetime benefits would be inequitable because it would compromise the parties' shared interest in reasonable retirement security. We also note Robert was not awarded a portion of Pamela's \$19,753 retirement account earned while she was employed by Firststar Bank. We affirm on this issue.

D. Other Issues.

The record indicates the district court misstated the actual cost of Pamela's health insurance benefits. The decree is accordingly modified to reflect the actual \$933.00 quarterly cost of this premium.

We decline to address Pamela's claim to a portion of Robert's silver coin collection. Pamela has failed to preserve this issue by filing a 179(b) motion alerting the district court to the omission of this asset from the property division. *See In re Marriage of Davis*, 462 N.W.2d at 704.

V. Attorneys Fees.

Pamela asserts the trial court erred in ordering Robert to contribute only \$350 toward her attorney fees. She contends Robert exacerbated the amount of attorney fees necessary at trial by his failure to disclose substantial financial holdings. She also asserts he is more capable of paying her attorney fees, given the property he received pursuant to the decree. Both parties request an award of appellate attorney fees.

A. Trial Attorney Fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). The decree results in Pamela receiving approximately \$13,000 more in marital assets than Robert. She also leaves this marriage virtually debt free. Based upon these considerations, we cannot find the district court abused its discretion in setting its attorney fee award. We affirm the award.

B. Appellate Attorney Fees.

Both parties request attorney fees on appeal. 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. *Id.* Each party shall pay their own appellate attorney fees.

AFFIRMED.

No. 98-1545. [9-280] IN RE MARRIAGE OF BEAVERS

Appeal from the Iowa District Court for Henry County, William L. Dowell, Judge. **AFFIRMED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Huitink, P.J. Sackett, C.J., takes no part. (8 pages \$3.20)

Robert and Pamela Beavers were married in October 1964. In its decree, the district court assigned a fair market value of \$85,160 to the marital home and awarded it to Pamela. The court awarded her 26.7 percent of Robert's military pension, but did not award her a share of his lifetime pension benefits from the Iowa Army Ammunition Plant (IAAP). The court also set aside two certificates of deposit to Robert as inherited property. The district court's property distribution resulted in a net award of \$224,554 to Pamela. Robert's net property award was \$212,000. The court declined to award Pamela alimony. Robert was ordered to pay \$350 of Pamela's trial attorney fees.

Alimony. Robert is retired and his subsistence is dependent upon social security and modest pensions. Pamela is nine years younger than Robert and continues to enjoy a significant earning capacity (\$16,000 per year). She was also awarded a portion of Robert's military pension, death benefits from his IAAP pension, and a greater property award. Under these circumstances, an award of monthly alimony is not justified.

Certificates of Deposit. The most substantial and reliable testimony concerning these CDs came from Robert's sister, Elsie Joan Trail. She testified the contested CDs were transferred to Robert as part of Basil's estate planning. There is no evidence contradicting Basil's donative intent or the terms of this transfer. In addition, division of the CDs is unnecessary to accomplish an equitable property division.

IAAP Retirement Benefits. Robert's IAAP Retirement annuity includes both lifetime and death benefits. Robert was awarded the \$433.59 monthly lifetime benefit, and Pamela was awarded the monthly \$216.80 survivor benefit for the remainder of her life. Under these circumstances, we find the district court's further division of the lifetime benefits would be inequitable because it would compromise the parties' shared interest in reasonable retirement security.