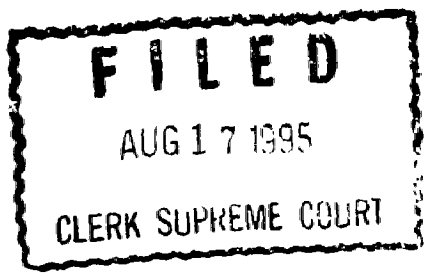
IN THE COURT OF APPEALS OF IOWA

No. 5-217 / 94-739

IN RE THE MARRIAGE OF MARY ELIZABETH HEBER AND GERALD GEORGE HEBER



Upon the Petition of

MARY ELIZABETH HEBER,

Appellant,

And Concerning

GERALD GEORGE HEBER,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, Lawrence Fautsch, Judge.

Mary Heber appeals the property division provisions of the parties' dissolution decree. **AFFIRMED.**

Jay P. Roberts of Beecher, Rathert, Roberts, Field, Walker & Morris, P.C., Waterloo, for appellant.

Jeffrey C. Peterzalek of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Sackett, P.J., and Huitink, J., and McCartney, S.J.*

* Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

Gerald (Jerry) and Mary Heber were married in 1969. There are two children from the marriage, William and Tammy. In March 1993 Mary filed a petition for dissolution of marriage.

Mary was forty-five at the time of trial. She works full-time as a severe and profound disabilities pre-school teacher and in 1992 her annual salary was $24,460. Tammy lives with Mary and planned to begin college at the University of Northern Iowa (UNI) in the fall of 1994.

Jerry was fifty-one at the time of trial. He retired in December 1991 from John Deere where he had worked for thirty-two years. In January 1992 Jerry began to receive his pension, $2000 per month. He occasionally does odd jobs for nominal compensation. Jerry lives with William in a house located at 1144 Kern Street. William attended UNI for three years and now attends Hawkeye Community College. He pays for school through loans.

At trial, four residential properties were discussed: (1) the parties' marital home located at 1220 Virginia Street; (2) a house that is rented out located at 1229 Virginia Street; (3) a house located at 1236 Walker Street in which Jerry has a one-half remainder interest; and (4) a house at 1144 Kern Street in which Jerry and William live.

Ownership of the house located at 1144 Kern Street was disputed. Jerry, William, and Jerry's father, Ben, testified that the house was a gift to William from

Ben. The house is titled in William's name. Ben testified that he paid $29,500 for the house. Jerry pays for insurance, taxes, and maintenance on the house. Jerry also pays for utilities and pays Ben $200 a month for rent. Jerry testified that he pays his father because no one owes him a place to live.

Mary testified that in November 1992, five months before Jerry moved out of the marital home, she found a note in Jerry's handwriting listing a realtor's phone numbers and the price of $39,500 with a $4500 down payment. Mary believed that Jerry purchased the house on Kern Street with marital assets.

The district court awarded Mary the property at 1220 Virginia Street, valued at $34,900 with a $8851 debt. Jerry was awarded his one-half remainder interest in the Walker Street house, valued at $20,000, and the rental house located at 1229 Virginia Street, valued at $24,900 with a $9000 debt. The court found that the Kern Street house was not a marital asset. Jerry was awarded all of his interest in his pension plan.

Mary filed a rule 179(b) motion requesting, among other things, the court find that the gift of the house on Kern Street to William was a sham, that she is entitled to a portion of Jerry's pension, and that Jerry should be ordered to pay Tammy support until she graduates from high school and then consider ordering him to pay some amount for her college expenses. Mary also filed a motion to re-open the record and present additional testimony. The court denied both motions.

Mary appeals. She argues (1) she should have been awarded 23/32 (years of marriage over years of Jerry's employment at John Deere) of one-half of Jerry's pension, (2) the court should have considered the Kern Street house as a marital asset in distributing property, and (3) the court should have ordered Jerry to pay some amount of support for Tammy while she attends college and should have ordered him to pay support for Tammy until she graduates from high school. Mary requests trial and appellate attorney fees.

Jerry notes that subsequent to the trial and before the hearing on her rule 179(b) motion, Mary mailed the court a document entitled, "Introduction of Evidence." This document is the subject of a motion to strike submitted with the appeal.

We affirm.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the findings of fact made by the trial court, but we do give them deference because the trial court had an opportunity to view first-hand the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). This rule is particularly helpful in passing on matters of credibility.

The testimony with regard to the Kern Street house was in dispute. Mary asserts that this transaction was a sham and that Jerry bought the property from monies secreted by him over the years. However, her testimony was denied by son William and Jerry's father. The trial court found that the transaction was not a sham

and that the property, conveyed to son William by his grandfather Benjamin, was a bona fide transaction. Jerry had removed himself from the marital home and needed a home for himself and for his son William. The trial court agreed with that testimony and we are not of a disposition to disturb those findings on appeal.

Mary seeks approximately three-eighths of the present value of the John Deere pension plan received by Jerry. It is the position of the appellee (Jerry) that error was not preserved on this issue, the trial court having awarded to the appellee his pension in toto.

The matter was tried on or about January 18, 1994, almost a year after the filing of the petition by the appellant, Mary. On February 8, 1994, the trial court entered its judgment and decree. Thereafter, on February 17, 1994, petitioner filed her rule 179(b) motion, asking the court to alter or amend its findings of fact through amendment and enlargement. Such motion was denied by the trial court in its order entered of record April 8, 1994, except that it ordered Jerry to maintain health insurance for Tammy. The same rule 179(b) motion contained a second count requesting that the court re-open the record to allow additional testimony regarding an injury petitioner had suffered in a fall and which apparently occurred immediately after trial. The trial court, on April 25, 1994, summarily overruled such request to re-open the record.

The motion to amend and enlarge findings of fact constituted further argument by the petitioner as to what the evidence portrayed. The trial court properly overruled

such motion. Similarly, the trial court appropriately overruled the motion to re-open the record. Although the injury was described as a serious elbow injury in a letter dated January 27, 1994, the only indication of permanency related to Mary's ability to "do physical work [which] is likely to be permanently compromised" does not speak to her ability to continue as a teacher, her normal occupation.

The trial court did acknowledge that the John Deere pension would be considered marital property. It is not mandatory, however, that the pension rights be allocated between the parties, but it does depend upon the total circumstances of the cause. *In re Marriage of Williams*, 421 N.W.2d 160, 167 (Iowa App. 1988). Here, the trial court found that both parties had relatively equal monthly income, that Mary received a greater portion of the marital property (but excluding property gifted to Jerry), and that the respondent is unable to be gainfully employed because of physical problems. Respondent argues that such an allocation of his monthly pension would under these circumstances constitute alimony which is not indicated in any event. It should be also noted that the petitioner will receive a stipend from the Iowa Public Employee Retirement System to which contributions have been made by her and on her behalf and that similarly she will receive social security benefits. The trial court further concluded that it would be improper to allocate any portion of these pension benefits to petitioner since during the marriage she was able to attend college and obtain her degree. She has worked away from the home or attended college during a number of the marriage years.

Under these circumstances, we are similarly not disposed to structure the property settlement in any fashion other than as the trial court.

Mary further is aggrieved by the fact that the court did not order Gerald to contribute to the college education expenses for their daughter, Tammy. Tammy is estranged from her father and that is a factor to be taken into account. *In re Marriage of Baker*, 485 N.W.2d 860, 862 (Iowa App. 1992). Tammy resides with her mother whose income is equal to and approximately the same as the respondent's income. Their son, William, resides with the respondent. The respondent suffers physical disabilities and, given the financial circumstances of the parties, we do not think post-high school education support is warranted and agree with the trial court on that issue.

Each party seeks to have his or her attorney fees assessed to the other. Such award is not a matter of right but rests within the discretion of the court. *In Re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine that each party has the ability to pay his or her own attorney fees and therefore we deny these requests.

Although the respondent asserts that error has not been preserved on some of the foregoing issues, we prefer to deal with them as set forth above.

As a consequence of the foregoing, the judgment and decree of the trial court is affirmed. Court costs of the appeal are assessed one-half to each of the parties.

AFFIRMED.