

IN THE COURT OF APPEALS OF IOWA

No. 6-508 / 95-1052

**IN RE THE MARRIAGE OF DANIEL PURVES
ALLEN AND VIRGINIA RUTH ALLEN**

Upon the Petition of
DANIEL PURVES ALLEN,
Petitioner-Appellee-Cross-Appellant,

And Concerning
VIRGINIA RUTH ALLEN,
Respondent-Appellant-Cross-Appellee.

Appeal from the Iowa District Court for Wapello County, James D. Jenkins,
Judge.

Respondent appeals, and petitioner cross-appeals, from various economic
provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

H. Michael Neary of H. Michael Neary Law Office, P.C., Ottumwa, for
appellant.

J. Terrence Denefe of Kiple, Kiple, Denefe, Beaver & Gardener, Ottumwa, for
appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

Respondent appeals from various economic provisions of the parties' dissolution decree. She contends the district court should have included petitioner's profit sharing plan as marital property. She also requests attorney fees. Petitioner cross-appeals.

Daniel and Virginia Allen were married in 1984. It was the second marriage for both parties. Each had children from their previous marriages. At the time of trial, Daniel was forty-eight years of age and Virginia was forty-three. They have one child together, Emily, born October 21, 1986.

Daniel has a B.A. degree in microbiology and earns net income of \$2739 per month as assistant chief technologist and microbiology supervisor at Laboratory Control in the Ottumwa Regional Health Center. Virginia has a B.S. degree and earns \$1097 net income per month as a medical technologist at the Southeast Iowa Blood Center. Both are in good health.

In 1990, Daniel received inheritances of \$10,000 and \$30,000 from his grandmother and grandfather.

Daniel filed a petition for dissolution on July 6, 1994. Following trial, the district court entered its decree. The district court found that Daniel's profit sharing and pension plan at Laboratory Control amounted to \$175,309.14 and \$25,540.95,

respectively. The court also found Virginia had a pension plan worth \$6422.66 from a prior employer in Missouri. The court ruled the pensions were not marital assets and awarded each party their individual accounts.

Daniel was awarded net marital property valued at \$55,736.18 and Virginia was awarded property valued at \$55,601.34. Virginia was awarded the marital residence and its debt. Virginia was awarded physical care of Emily. Daniel was ordered to pay child support in the amount of \$565 per month. The court did not award alimony. Virginia has appealed and Daniel has cross-appealed.

Virginia contends the district court erred in failing to include Daniel's profit sharing as a marital asset. She requests the court award her one-half the pension. In his cross-appeal, Daniel argues the district court erred in: (1) including his inherited property in the marital property subject to division; (2) failing to take into consideration the tax aspects of the distribution of the pension plan; and (3) not awarding him the Iowa and federal income tax exemptions for the parties' minor child.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). 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).

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) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

I. Profit Sharing and Pension Plans. Virginia contends the district court erred in failing to include Daniel's profit sharing plan in the list of marital assets. The court found the contributions to the plan during the parties' marriage came solely from Daniel's employer and was not a marital asset. The court awarded Daniel's profit sharing plan at Laboratory Control amounting to \$175,309.14 plus his pension plan of \$25,540.95 to him in its entirety. Daniel argues if the profit sharing/pension plans are to be divided, the amount accumulated before the marriage should not be included in its division. The amount of appreciation on the premarital amount should also be excluded.

Under Iowa law pension benefits are characterized as marital assets, subject to division in dissolution actions just as any other property. *In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993). The valuation and division of

pension benefits has nevertheless become the subject of considerable litigation in recent years. *In re Marriage of Benson*, 545 N.W.2d 252, 255, (Iowa 1996).

We determine Daniel's profit sharing/pension plan should be included in the division of property, excluding the premarital amount. The parties dispute the premarital value of the profit sharing and pension plans that should be used in the division. The plans are valued on a June 30 year-end basis. On June, 30, 1983, the profit sharing plan had a value of \$24,369.55. The value increased to \$30,031.87 on June 30, 1984. The pension plan had a value of \$2,913.47 on June 30, 1983, and \$4,051.36 on June 30, 1984. Virginia argues the 1983 values should be used and Daniel claims the 1984 values would be a more accurate value.

The parties were married in March 1984. There is not sufficient evidence for this court to interpolate the figures to find a March value. We do not know if the plans grew at a regular pace, therefore, we will use the June 30, 1984 value of the plans since it is closest to the date of marriage.

The parties agreed the pension plan was worth \$25,540.95 and the profit sharing plan was worth \$175,309.14 at trial. We modify the decree and order the parties to present to the district court Qualified Domestic Relation Orders ¹ (QDRO) equal to \$10,744.80 and \$72,638.64 (50% of \$ 21,489.59 and \$145,277.27 -- the

¹ The QDRO shall be in a form approved by the Plan Administrator pursuant to Internal Revenue Code section 401(a)(13) and ERISA section 206(d)(3).

growth of the pension and profit sharing plans during the marriage). Daniel is entitled to one hundred percent of any increase in the pension benefits accruing after the marriage.

Daniel claims since the appreciation earned during the marriage on these premarital assets were fortuitous and was not due to the efforts of the parties, Virginia should not receive any of the appreciation. We disagree. While marriage alone is not enough, *see In re Marriage of Hass*, 538 N.W.2d 889, 893 (Iowa App. 1995), the length of the marriage is a major factor to consider on a claim of property owned prior to the marriage. *See In re Marriage of Wallace*, 315 N.W.2d 827, 831 (Iowa App. 1981).

The parties were married eleven years. Virginia quit her employment in Missouri and moved to Iowa to marry Daniel. She left full-time employment to work part-time with no benefits and raise their child. We find it equitable to award Virginia one-half of the entire amount of profit sharing/pension benefits acquired during the marriage. Virginia will retain her pension earned prior to the marriage at her job in Missouri. She has no pension which accumulated during the marriage to divide among the parties.

With this modification we believe the district court's division of Daniel's profit sharing/pension benefits to be equitable.

II. Inheritance. Daniel next argues the district court erred in including his inherited property as marital assets. He asserts the court should set aside to him the \$40,000 inheritance he received. “[P]roperty inherited by either party or gifts received by either party prior to or during the marriage . . . is the property of that party and not subject to a property distribution . . . except upon a finding that refusing to divide the property is inequitable.” *In re Marriage of Mental*, 359 N.W.2d 505, 506 (Iowa App. 1984); *see also* Iowa Code § 598.21(2) (1993).

When gifts and inheritance become so commingled with and transformed into the marital property, it is difficult to set aside a sum equal to the gift and inheritance. *See In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992). Daniel received inheritance of \$40,000 during the parties’ marriage. A portion of this money was placed in an American Express/IDS account. The parties purchased a \$12,000 Plymouth Voyager minivan with part of the inheritance, and also purchased a \$7000 boat and trailer. The parties additionally purchased a Pontiac Grand Am for \$9600 and a life insurance policy for Virginia.

Under the decree the Voyager and life insurance policy were set aside to Virginia, the boat/trailer and Pontiac were awarded to Daniel. There is insufficient evidence in the record to determine what portion of the IDS accounts are attributable to the inheritance. The district court included the IDS accounts as marital property

and divided them equally among the parties. We affirm the district court's division of the inherited property.

III. Dependency Deduction. Daniel additionally argues the district court erred by not awarding him the Iowa and federal income tax exemptions for Emily. The trial court's findings of fact, conclusions, and decree are silent as to which party is granted the dependency exemptions for the federal and Iowa income tax returns.

Our supreme court held if primary care remains in one parent, and the noncustodial parent is current on all child support obligations, then the noncustodial parent may be awarded the dependency exemptions. *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990); *In re Marriage of Pothast*, 539 N.W.2d 199, 203 (Iowa App. 1995); *In re Marriage of Miller*, 475 N.W.2d 675, 679 (Iowa App. 1991). Daniel claims since he is current on all of his support obligations, he should be awarded the exemption.

In *In re Marriage of Feustel*, 467 N.W.2d 261 (Iowa 1991), the court recognized that “[f]or tax years beginning after December 31, 1984, the Tax Reform Act of 1984 provides that the parent having custody of a child for the greater part of the year will generally be treated as having provided more than one-half of a child's support and will be entitled to the dependency exemption.” *Id.* at 263. There are three exceptions to this rule. See *In re Marriage of Staton*, 511 N.W.2d 418, 422 (Iowa App. 1993).

The custodial parent may release his or her claim to the exemption for the year to the noncustodial parent. *See* I.R.C. § 152(e)(2). For this exception to apply, the custodial parent must sign a written declaration that he or she will not claim the child as a dependent for the year, and the noncustodial parent must attach the written declaration to his or her return. *Id.* Second, the general rule shall not apply in any case where over half the support of the child is treated as having been received from a taxpayer under a multiple-support agreement. I.R.C. § 152(e)(3). Finally, a third exception is provided by Internal Revenue Code section 152(e)(4). That section provides that a child shall be treated as having received over half of his or her support during a calendar year from the noncustodial parent if prior to 1985 the parents agreed by instrument the noncustodial parent shall be entitled to the exemption, or if the noncustodial parent provides at least \$600 in support of the child during the calendar year. *Feustel*, 467 N.W.2d at 263 (citing I.R.C. § 152(e)(4)(A)).

Daniel pays \$565 per month child support for Emily. We modify the decree to give Daniel the federal and state tax exemptions for the child provided he is fully current in his child support each year on December 31. Virginia shall each year sign and execute the required forms for Daniel to claim the deduction on both his federal and state income tax returns for Emily for the preceding calendar year.

The trial court's findings of fact, conclusions of law, and decree are also silent with respect to medical support for Emily. We also modify the decree to require

Daniel to continue to provide health and accident insurance for Emily and any medical expenses not covered by the insurance will be paid one-third by Virginia and two-thirds by Daniel.

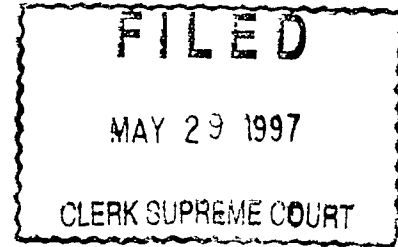
IV. Attorney Fees. Finally, Virginia claims she should have received attorney fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay and the fees must be fair and reasonable. *Id.* To overturn the decision of the trial court, Virginia must establish the trial court abused its discretion. *Id.* After awarding Virginia a percentage of Daniel's profit sharing/pension plan, we find Virginia is able to pay for her own attorney fees at trial.

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STREIT, J.

An opinion was filed on this case by this court on April 30, 1997. Petitioner-appellee's petition for rehearing was granted and the opinion filed is amended by substituting this opinion herein in its place.

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With this modification we believe the district court's division of Daniel's profit sharing/pension benefits to be equitable.

In ordering a QDRO for the Laboratory Control pension, there is a difference of \$25,000 in property distribution between the parties. We determine a substantially equal division of property is equitable and Virginia is ordered to pay \$12,500 to Daniel. Said amount shall be paid on or before the 1st day of July after Emily graduates from high school, if the house is sold, or Virginia ceases to live there, whichever first occurs. No interest shall accumulate during this time period. After Emily graduates from high school, if the \$12,500 has not been paid in full, interest shall accrue at the rate of ten percent per annum on the amount owed, commencing on July 1st following Emily's graduation. Daniel shall hold a lien on the homestead until the amount owed is paid.

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be awarded depends on the respective abilities of the parties to pay and the fees must be fair and reasonable. *Id.* To overturn the decision of the trial court, Virginia must establish the trial court abused its discretion. *Id.* After awarding Virginia a percentage of Daniel's profit sharing/pension plan, we find Virginia is able to pay for her own attorney fees at trial.

AFFIRMED AS MODIFIED.