

FILED

DEC 21 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-520 / 88-1562

**IN RE THE MARRIAGE OF LEROY EDWIN DIETRICH AND
VIRGINIA JEANNE DIETRICH**

115

Upon the Petition of
LEROY EDWIN DIETRICH,

Appellee,

And Concerning
VIRGINIA JEANNE DIETRICH,

Appellant.

Appeal from the Iowa District Court for Dubuque County,
Roger F. Peterson, Judge.

The respondent wife appeals various economic provisions
of a dissolution decree. **AFFIRMED AS MODIFIED.**

Mary Browne McCuskey of Clemens, King & McCuskey,
Dubuque, for appellant.

Douglas Pearce of Kintzinger, Van Etten, Setter, Pearce
& Scott, Dubuque, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

SCHLEGEL, J.

Appellant wife appeals various economic provisions of a dissolution decree. We affirm as modified.

Leroy and Virginia Dietrich were married in May 1985. It was the second marriage for both. Leroy was 58 years old at the time of trial and Virginia was 55 years old. Leroy works at Flexsteel as a traffic manager, and earns approximately \$46,000 per year. Virginia was unemployed during the marriage, having quit work at Montgomery Wards in 1984.

The parties began dating in 1983. Virginia moved in with Leroy shortly after Leroy's divorce from his first wife. At the time the parties began living together, Leroy had brought into the relationship various items from his previous marriage, namely a 1984 Oldsmobile, \$6,458.96 in three IRA accounts, his home valued at \$71,780, a savings account of approximately \$5,700, a checking account of \$2,894; and other personalty.

Virginia, at the time of her marriage to Leroy, owned a home in Galena, Illinois valued at \$39,000, a 1977 Buick Skylark, a DuPaCo credit union account, a Shearson and Edwards account, and an account with Keystone Provident valued at \$26,330.

During the parties' marriage Virginia began selling off items of personalty from the Galena residence in order to help with maintenance expenses. Most of the proceeds were

deposited into Virginia's own accounts, but some were deposited into the parties' joint account. Leroy also expended funds on the upkeep of the Galena home.

The parties separated in March 1987. At the time of the separation there was \$16,355.91 in a joint checking account. Leroy withdrew all but \$1,017.85 from said account and moved into an apartment, while Virginia remained in Leroy's home. Leroy voluntarily paid Virginia \$200 per month during this separation.

Trial was held in April 1988. The trial court awarded Leroy his home, the 1984 Oldsmobile, his Flexsteel retirement accounts which were valued at \$64,018.43 and \$11,854.39, his IRA accounts, his three bank accounts, and other items of personal property. Virginia was awarded her home in Galena, her automobile, \$27,000 in securities and IRA accounts, a grandfather clock, \$5,000 cash settlement, and \$200 per month alimony for one year.

Virginia subsequently filed a rule 179(b) motion requesting the trial court to amend its findings and conclusions to reflect a more equitable division of marital assets. Virginia also filed an application for stay, requesting that she be allowed to remain in Leroy's home temporarily due to her heart condition and mental state at the time. Virginia also filed a motion for new trial on the basis that her heart condition was newly-discovered evidence. Both motions were denied by the trial court. Virginia filed her notice of appeal on October 25, 1988.

While this matter was pending on appeal, Justice Harris entered an order granting Leroy's motion for a limited remand so that the district court could rule on the clarity of paragraph nine of its decree, which granted the parties their own personal property, save the grandfather clock which was awarded to Virginia. On remand the trial court clarified its position as to which items of property each was to receive.

On appeal, Virginia argues that the joint checking account and Flexsteel retirement accounts should have been considered marital property, and she should therefore receive a portion thereof. Virginia contends that the retirement account and 401(k) plan awarded to Leroy were either all or partly accumulated during the marriage, and should be divisible. Virginia additionally argues that she should have been awarded other items of furniture awarded to Leroy. Virginia also argues that the trial court should have made allowances for the property she had already sold to pay expenses on her Galena home, and requests that her alimony award be raised to \$1,000 per month for five years. Virginia additionally requests attorney fees both for trial and on appeal.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by

these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Virginia contends the trial court's division of property was inequitable. 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 distribution of the property of the parties should be that which is equitable under the circumstances 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 marriage in this instance was of relatively short duration. The trial court recognized this but failed to take into consideration the accumulations during the marriage in two retirement funds. The largest fund consisted of a retirement plan, which had a value prior to the marriage of \$49,500, and during the marriage increased to a value of \$64,000--an increase of over \$14,000. Admittedly, this plan was accumulated during his 35 years at the same employer, but Virginia did contribute to the family for two years and therefore the increase should at least be considered. The second fund is a 401K plan, which

Leroy totally accumulated during the marriage. The approximate value of this plan is \$13,000. Once again the short duration of the marriage does not require an exact split but it at least requires consideration of these accumulations. Virginia worked in the home for two years and helped Leroy to make those accumulations. The accumulations in these accounts require an additional cash award in order to provide an equitable distribution. We modify the property distribution and award Virginia an additional \$5,000.

Virginia also contends the alimony was insufficient. 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). 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 at 608. Additional alimony is not necessary considering the increase in Virginia's property award. The parties were only married a short time and should be allowed to continue with their lives without needless connections to each other. The trial court was correct in ordering alimony for only one year.

The division of personal property by the trial court was well within the permissible range of evidence and will not be disturbed on appeal.

Virginia contends the trial court erred in not awarding her attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that 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. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa 1982).

There is no evidence that the trial court abused its discretion by not awarding attorney fees.

Finally, Virginia requests attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). The financial positions of the parties do not require an award of attorney fees. However, the costs of this appeal are to be assessed against Leroy.

AFFIRMED AS MODIFIED.

Oxberger, C.J., concurs; Hayden, J., dissents.

HAYDEN, J. (concurring in part; dissenting in part)

I concur with the majority in all respects except for increasing Virginia's award by \$5,000, upon which I respectfully dissent. I would affirm the trial court across the board. Additionally, the costs of appeal should be taxed to Virginia.