

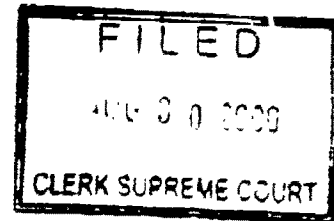
**IN THE COURT OF APPEALS OF IOWA**

No. 0-437 / 99-2041  
Filed August 30, 2000

**IN RE THE MARRIAGE OF CONNIE LOU KAPELUCK  
AND GREGORY PAUL KAPELUCK**

Upon the Petition of  
**CONNIE LOU KAPELUCK,**  
Petitioner-Appellant/Cross-Appellee,

And Concerning  
**GREGORY PAUL KAPELUCK,**  
Respondent-Appellee/Cross-Appellant.



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Appeal from the Iowa District Court for Crawford County, Robert C. Clem,  
Judge.

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

Robert L. Brink of Eller, Brink & Sextro, Denison, for appellant.

Julie A. Schumacher of Mundt, Franck & Schumacher, Denison, for  
appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

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**VAITHESWARAN, J.**

Connie and Gregory Kapeluck divorced after thirty-one years of marriage. Both parties challenge the dissolution decree. Connie asserts she should have received more in property and alimony, while Gregory maintains the district court should not have awarded her any alimony or trial attorney fees. We affirm as modified.

***I. Background Facts and Proceedings***

Connie and Gregory married and had two children, both of whom are adults. For approximately two years after each child was born, Connie stayed at home to care for the children. For most of the remainder of the marriage, she worked as a registered nurse. At the time of trial, fifty year old Connie had given up nursing for a siding sales position, which she expected would yield \$1,000 per month in gross commissions. She owned an unencumbered home valued at \$40,000 and had a pension fund worth \$27,000.

Gregory was fifty-one years old at the time of trial. After the parties married, he earned a bachelor's degree in business administration, then began working in business management positions until a heart condition rendered him disabled. In 1997, Gregory began receiving close to \$3,000 per month in social security and long term disability payments. He also received a retroactive lump sum payment of \$12,000 which he used to repay a private disability insurer. At the time of trial, Gregory owned two retirement funds: (1) a Dean Witter fund valued at \$42,354 and (2) an American Express fund valued at \$70,509.

Following trial, the district court: (1) distributed \$103,837 of the parties' property to Connie and \$150,650 to Gregory; (2) ordered Gregory to pay Connie

alimony of \$500 per month for 48 months and (3) required Gregory to pay \$1500 toward Connie's attorney fees. Connie appealed and Gregory cross-appealed.

## ***II. Standard of Review***

Our de novo review of divorce proceedings requires us to examine the entire record and adjudicate rights anew on issues properly presented. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa App. 1999). We give weight to the district court's fact findings, but are not bound by them. *In re Marriage of Dieger*, 584 N.W.2d 567, 568 (Iowa App. 1998).

## ***III. Property Distribution***

Connie maintains the district court inequitably divided the parties' property because, according to her calculations, Gregory received approximately sixty percent of the marital property. Property is to be distributed equitably, after considering the factors set forth in Iowa Code section 598.21(1).<sup>1</sup> *Vieth*, 591 N.W.2d at 640. "Equitable distribution does not necessarily mean an equal division of property, nor does it mean a percentage division of the property." *In re Marriage of Bonnette*, 584 N.W.2d 713, 714 (Iowa App. 1998). Instead, we consider what is fair and equitable in each circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa App. 1996).

Connie primarily objects to the district court's allocation to Gregory of all his retirement benefits. She maintains these benefits are to be treated as marital

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<sup>1</sup> These factors include: the marriage length, property the parties brought into the marriage, contributions by the parties to the marriage, age and health of the parties; contribution of one party to the education, training or increased earning power of the other; award of the home to the party with primary physical care; alimony award, economic circumstances of each party, including pension benefits, vested or unvested, and future interests; tax consequences, written agreements made by the parties, terms of a prenuptial agreement, and any other factors deemed relevant by the court. Iowa Code § 598.21(1) (1997).

property and divided equitably. We agree. See *In re Marriage of Kurtt*, 561 N.W.2d 385 (Iowa App. 1997). Although Connie received an unencumbered home and car in addition to home furnishings and other personal property, the retirement funds assigned to her totaled only \$27,000 as compared to \$112,863 allocated to Gregory. The record suggests contributions to all the pensions were accumulated during the marriage. Cf. *In re Marriage of Klein*, 522 N.W.2d 625, 628 (Iowa App. 1994) (holding court should not have committed pension funds that accrued after the dissolution). Therefore, we believe the district court acted inequitably in depriving Connie of a portion of Gregory's pensions and Gregory a portion of Connie's pension. We believe equity mandates reallocation of all the funds, not just one fund. Accordingly, we modify the decree to provide for an equal division of each of the three pension funds. The parties shall present to the district court a qualified domestic relations order designed to achieve this result.

#### **IV. Alimony**

Connie maintains the district court's alimony award was inadequate. Gregory counters the court should not have awarded her any alimony. In determining an appropriate alimony award, we consider the factors set forth in Iowa Code section 598.21(3) (1997).<sup>2</sup> *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996). We consider property and alimony awards together. *In re Marriage of Van Regenmorter*, 587 N.W.2d 493, 495 (Iowa App. 1998).

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<sup>2</sup> These factors include: the marriage length; the age and health of the parties, property distribution, education of the parties; the earning capacity of the spouse seeking alimony, feasibility of attaining self-sufficiency, tax consequences, mutual agreements by the parties regarding financial or service contributions; terms of a prenuptial agreement; any other factors deemed relevant by the court. Iowa Code § 598.21(3) (1997).

In light of our reallocation of the pension funds, we conclude an alimony award is unnecessary. . Connie herself asked the district court to award her alimony only if the court did not allocate to her the \$42,354 contained in one of Gregory's retirement funds. Our equal division of the pension funds would afford her approximately the same amount she asked the trial court to award. Accordingly, we conclude an alimony award is unnecessary.

#### ***V. Trial and Appellate Attorney Fees***

Gregory maintains the district court should not have ordered him to pay \$1500 toward Connie's attorney fees. A fee award is a matter of discretion *Dieger*, 584 N.W.2d at 570. We have reviewed the parties' financial statements and conclude the district court did not abuse its discretion in ordering Gregory to pay a portion of Connie's fees.

Both parties seek appellate attorney fees. Like the district court, we have discretion to order payment of appellate fees. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We consider the parties' financial positions and whether the party making the request was obligated to defend the trial court's decision on appeal. *Id.* In light of our disposition on the merits, we decline to make a fee award to either party.

#### ***VI. Disposition***

The district court's judgment is affirmed as modified. The parties are ordered to prepare a qualified domestic relations order to reflect equal division of the three pension funds. The alimony award is eliminated. Costs are divided equally between the parties.

**AFFIRMED AS MODIFIED.**

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