IN THE COURT OF APPEALS OF IOWA

No. 4-458 / 94-0213

FILED
MAR 30 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GLORIA BONITA BOYER AND LARRY CHARLES BOYER

Upon the Petition of
GLORIA BONITA BOYER n/k/a GLORIA BONITA JUILFS,

Petitioner-Appellee/Cross-Appellant,

And Concerning
LARRY CHARLES BOYER,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Dale B. Hagen, Judge.

Larry Boyer appeals and Gloria Juilfs cross-appeals from the economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Thomas D. Hanson and Brenda K. O'Neil of Hanson, Bjork & Russell, Des Moines, for appellant.

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for appellee.

Heard by Donielson, P.J., Cady, J., and Perkins, S.J.*, but decided en banc.

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

CADY, J.

Larry Boyer appeals and Gloria Julifs cross appeals from the economic provisions of the parties' dissolution decree. On our review, we modify the alimony and property provisions of the decree.

Gloria and Larry were married on July 13, 1974. They had one child, Ryan, born March 24, 1976. Gloria left her clerical position at Bankers Life (now Principal) in 1976 so Larry could work there in a higher paying position. Larry continues to work for Principal and also works part-time as a mortician. His current net monthly income is $3084.

After leaving Bankers Life, Gloria worked for the State of Iowa for approximately one year before quitting to become a full-time homemaker. In 1988, she began studying to be a dental hygienist. In 1993, she was working as a dental hygienist in two part-time positions with a net monthly income of $1719. She receives no additional benefits from either part-time position. Gloria has been unsuccessful in locating a full-time position.

Gloria filed a petition for dissolution of marriage in March 1993. The parties separated in June 1993. Larry was forty-nine years old and Gloria was forty-five years old. Both parties were in good health.

The dissolution trial centered around the appropriate valuation of the parties' assets and their equitable distribution. The parties agreed that Ryan would be placed

in Gloria's primary care and that Larry would pay $622.35 per month in child support until Ryan was twenty-two or no longer attended school. Gloria sought an award of alimony of $500 per month until Larry's child support obligation ceased, and then alimony of $1000 per month.

The district court awarded Gloria property it valued at $106,095 and $695 in debt. It awarded Larry property it valued at $67,682 and $13,000 in debt. Gloria was awarded fifty percent of Larry's 401(k) and pension plans as of June 30, 1993, and any accumulation of interest on her portion until December 31, 1993. Gloria was also awarded alimony of $500 per month for ten years. "To equalize the property distribution, and also recognizing and taking into consideration the greater benefit that Larry will be getting from Social Security," Gloria was ordered to pay Larry a cash settlement of $20,000.

Larry appeals and Gloria cross-appeals. Larry asserts the trial court made significant valuation errors thus skewing the division of the parties assets and liabilities, and erred in awarding Gloria alimony.

In her cross-appeal, Gloria claims the trial court erred in failing to offset the property division by the differential in the parties' social security benefits, should have awarded her alimony of $1,000 per month for ten years after Ryan reaches age twenty-two, should have valued the pension plan and 401(k) assets as of the date of trial,

and abused its discretion in failing to award her attorney fees. Gloria also requests appellate attorney fees.

I. Scope of Review

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Brown, 462 N.W.2d 683, 684 (Iowa App. 1990). We give weight to the trial court's findings of fact, especially when considering credibility of witnesses, but are not bound by them. Iowa R. App. 14(f)(7).

II. Property Distribution

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 Hoffman, 493 N.W.2d 84, 87 (Iowa App. 1992). Iowa courts do not require an equal division or percentage distribution. In re Marriage of Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). The determining factor is what is fair and equitable in each particular circumstance. Hoffman, 493 N.W.2d at 87. The distribution of the property should be made in consideration of the criteria codified in Iowa code section 598.21(1) (1993). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

A. Date of Valuation

In her cross-appeal Gloria asserts the value of Larry's pensions and 401(k) plans should be determined at the date of trial rather than the date the parties separated. She

bases her assertion on In re Marriage of Muelhaupt, 439 N.W.2d 656, 661 (Iowa 1989).

Property settlements are within this court's equitable jurisdiction and it is not appropriate to develop a concrete rule concerning valuation dates in dissolution proceedings. In re Marriage of Hitchcock, 309 N.W.2d 432, 435 (Iowa 1981). Prior cases have little precedential value and we base our decision primarily on the circumstances of the parties before us. In re Marriage of Gaer, 476 N.W.2d 324, 326 (Iowa 1991). After reviewing the record, we find Gloria did not contribute to the growth of Larry's pension and 401(k) plans after the time of separation and therefore, their growth should not be divided between the parties. See In re Marriage of Oakes, 462 N.W.2d 730, 733 (Iowa App. 1990) (holding where the spouse had not contributed to the increase in the other's retirement account since the parties' separation, the increase in the retirement account should not be divided between them). We affirm the district court's decision to divide Larry's pension and 401(k) plans as of the date of separation.

B. Valuation

Larry asserts there is no basis in the record to support the trial court's valuation of the parties' property. He specifically contests the values placed on the marital home, the contents of the home, Gloria's

jewelry, her fur coat, and her certificate of deposit (CD).

Excepting the CD, we disagree. In determining the value of the parties' property, the trial court relied on the professional market analysis and appraisals Gloria presented at trial. The only contrary evidence Larry presented was his opinion that the replacement value of the items was higher then the fair market value established by Gloria's experts. Moreover, the court gave Larry the benefit of the doubt and valued the majority of items between the estimates asserted by Gloria and Larry. We find the trial court's valuations were supported by credible evidence in the record and will not disturb them on appeal. See In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

We find, however, the court incorrectly valued Gloria's CD. During the marriage Gloria received a gift of $24,000 from her mother. Gloria subsequently placed it in a CD. Both parties valued it at $27,000 as of June 1992, the date the parties separated. The trial court valued the asset at 24,000 and set it aside for Gloria.

In light of the evidence in the record we believe $27,000 is the correct value. Both parties agree the CD was a gift to Gloria and not subject to division as marital property. See In re Marriage of Geil, 509 N.W.2d 738, 741 (Iowa 1993) (holding gifts and inheritance received by a

party during the marriage are generally not considered marital property).

C. Equity of the Distribution

Under the dissolution decree Larry received net assets of approximately $55,000 and Gloria received net assets of approximately $105,000. This was after setting off Gloria's inheritance of approximately $27,000. To equalize the property distribution, the trial court required Gloria to pay Larry a lump sum of $20,000. This created a disparity of $10,000 which the trial court ascribed to the greater future benefit Larry will be receiving from social security due to his higher income.

Both parties contend the property division was inequitable. Larry asserts we should remedy the inequity by awarding him the entirety of his pension and 401(k) plans. Gloria contends we should consider the parties anticipated social security retirement benefits earned during the marriage and offset Larry's property settlement by the difference.

We first address Larry's request that we modify the provision of the decree granting Gloria one-half of Larry's 401(k) plan and pension. Pension plans are treated as marital property in Iowa and are subject to equitable distribution. In re Marriage of Conger, 492 N.W.2d 715, 716 (Iowa App. 1992) (citing In re Marriage of Mott, 444 N.W.2d 507, 510-11 (Iowa App. 1989)). In this case, Gloria gave up her position at Bankers Life so that Larry could

work there. She remained in the home and cared for their child for fifteen of the nineteen years the parties were married. During that time, Larry accumulated valuable retirement benefits. This mutually agreed upon arrangement constituted a "joint effort." Additionally, Gloria's current part-time positions do not provide her with a pension or 401(k) plan of her own. Under these circumstances, she is entitled to a portion of Larry's pension and 401(k) plans. We affirm the trial court's decree on this issue.

We now consider Gloria's proposal to offset Larry's current property award by the difference in the parties' future social security incomes. At trial Gloria presented expert testimony of the parties' life expectancies and respective anticipated social security benefits accumulated during the parties' marriage. According to the estimates, Gloria would receive social security benefits of $22,539 and Larry would receive benefits of $87,882. Gloria does not ask us to divide these benefits but rather to offset the difference between the parties' social security benefits against Larry's property award. She asserts this can be done by modifying the decree to eliminate the provision that Gloria pay a lump sum to Larry in the amount of $20,000 and then either (1) having Larry pay a lump sum to Gloria of approximately $10,000; or (2) by giving her a greater share of Larry's 401(k) benefits in the sum of $10,000.

We conclude federal law preempts our courts from considering social security benefits in dividing the property of the marriage. We reach this conclusion after reviewing the provisions of the Social Security Act, 42 U.S.C. §§ 301-433 (1988), the United States Supreme Court's decision in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979), cases from other states, and our appellate courts' decisions.

The Social Security Act provides a comprehensive scheme for awarding Social Security benefits to divorced spouses. A divorced spouse of an individual entitled to social security retirement or disability benefits qualifies for spousal benefits if he or she: (1) applies for such benefits; (2) is at least 62 years old; (3) is not entitled to his or her own primary benefit in an amount equal to or greater than one-half due his or her spouse; and (4) is not married. 42 U.S.C. § 402 (b)(1)(A)-(D), 402(c)(1)(A)-(D).

The Act also specifically prohibits assignment of benefits:

> [t]he right of any person to any future [social security] payment is not transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing [] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a). 42 U.S.C. § 659(a) excepts the collection of child support and alimony from the anti-assignment provision of § 407(a). In turn, 42 U.S.C. § 622(c) makes it clear the property transfers

which result from equitable distribution are not alimony. See Cruise v. Cruise, 374 S.E.2d 882, 884 (N.C. 1989).

Finally, Congress reserved the right to alter, amend, or repeal any provision of the Social Security Act. 42 U.S.C. § 1304. This reservation, therefore, permits Congress to significantly alter benefits before a potential recipient begins to receive them. See Olson v. Olson, 445 N.W.2d 1, 6 (N.D. 1989).

The United States Supreme Court's decision in Hisquierdo provides additional guidance on the issue of congressional intent to specify the distribution of social security benefits between spouses at the time of divorce. In Hisquierdo, the court resolved a similar preemption question with regard to railroad retirement benefits. Hisquierdo, 439 U.S. at 581, 99 S. Ct. at 808, 59 L. Ed. 2d at 11. Upon the dissolution of the Hisquierdo's marriage, the wife sought a portion of her husband's railroad pension or in the alternative an offsetting award of presently available community property to compensate her for her interest in her husband's expected benefits. Id. at 588, 99 S. Ct. at 80 , 59 L. Ed. 2d at 15. The Supreme Court of California held that the pension was divisible community property because benefits flowed from employment during marriage. In re Marriage of Hisquierdo, 566 P.2d 224, 228 (1977). The U.S. Supreme Court reversed. Hisquierdo, 439 U.S. at 591, 99 S. Ct. at 813, 59 L. Ed. 2d at 16. It held

California community property law was preempted by the express terms of the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231a-u. Specifically the court found 45 U.S.C. § 231m, the anti-assignment clause, demonstrated Congress' intent to preclude claims based on marital and family obligations and ensure the benefits actually reach the beneficiary.[1] Hisquierdo, 439 U.S. at 584-85, 99 S. Ct. 809-10, 59 L. Ed. 2d 12-13. The clause provides:

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

45 U.S.C. § 231m.

Although Hisquierdo involved railroad retirement benefits, the court's reasoning is applicable to this case. The court analogized the Railroad Retirement Act to the Social Security Act and found Tier I railroad retirement benefits are equivalent to those employees would receive if covered by social security. Hisquierdo 439 U.S. at 574-75, 99 S. Ct. at 804-05, 59 L. Ed. 2d at 6-7; Conger, 492 N.W.2d at 716. Furthermore, § 231m of the Railroad Retirement Act and § 407(a) of the Social Security Act contain similar language against attachment and

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1. We note that following Hisquierdo, Congress amended the Railroad Retirement Act to permit distribution of "Tier II" benefits in dissolutions. Pub. L. No. 98-76, § 419, 97 Stat. 411 (1983) (codified as amended at 45 U.S.C. 231m(b)(2) (1988)).

assignment. In re Marriage of Swan, 720 P.2d 747, 751 (Or. 1986); Richard v. Richard, 659 S.W.2d 746, 748 (Tex. App. 1983). Thus, we conclude § 407(a) and the express provision of benefits for divorced spouses demonstrate Congress' intent to preempt state law in the area of social security benefits. Like railroad retirement benefits, they cannot be distributed or used as an offset in division of marital property; to do so would do "major damage" to "clear and substantial federal interests." See Hisquierdo, 439 U.S. at 581, 99 S. Ct. at 808, 59 L. Ed. 2d at 11; Swan, 720 P.2d at 751-52; Richard, 659 S.W.2d at 749; Olson, 445 N.W.2d at 11.

The speculative nature of social security benefits is also a relevant factor in analyzing the state court's ability to consider social security benefits as a definable asset. Social security benefits are not treated as an accrued property right. Olson, 445 N.W.2d at 6 (citing Flemming v. Nestor, 363 U.S. 603, 610, 80 S. Ct. 1367, 1372, 4 L. Ed. 2d 1435, 1444 (1960). "A recipient of social security benefits has no substantive right to a certain amount of benefits based on the amount contributed to the fund by employer and employee; rather, the recipient's amount of benefits is controlled by operation of law under 42 U.S.C. § 402 (1982) . . . ." Taylor v. Director, OWCP, 967 F.2d 961, 963 (4th Cir. 1992). As a result, eligibility for social security benefits, and the amount of such benefits, do not truly depend on the

employer and employee contributions to the program through the payment of taxes. Flemming, 363 U.S. at 609-10, 80 S. Ct. at 1371-72, 4 L. Ed. 2d at 1443. Furthermore, Congress may legislatively alter, amend, or repeal the benefits program at any time, Taylor, 967 F.2d at 964; Olson, 445 N.W.2d at 6, or early death may prevent a person from receiving benefits. Any of these results would render the present value of the parties' social security benefits illusory.

Additionally, courts in other states have recognized the need to defer to the federal social security plan. Those states which have addressed the treatment of social security benefits in formulating the economic terms of the dissolution decree, have primarily concluded the Supremacy Clause of the United States constitution precludes states from intervening in the allocation of social security benefits. See Pleasant v. Pleasant, 632 A.2d 202, 206 (Md. App. 1993); Olson, 445 N.W.2d at 11; Swan, 720 P.2d at 749; Cruise, 374 S.E.2d at 884; Richard, 659 S.W.2d at 749; Umber v. Umber, 591 P.2d 299, 301-02 (Okl. 1979); but see Pongonis v. Pongonis, 606 A.2d 1055, 1058 (Me. 1992); In re Marriage of Knipp, 809 P.2d 562, 564 (Kan. App. 1991); Hogan v. Hogan, 796 S.W.2d 400, 406-07 (Mo. App. 1990).

We acknowledge that our appellate courts, without specifically addressing the issue confronted in this case, have permitted social security benefits to be considered in making a property award. See In re Marriage of Miller, 475

N.W.2d 675, 678 (Iowa App. 1991); In re Marriage of Woodward, 426 N.W.2d 668, 671 (Iowa App. 1988); Locke v. Locke, 246 N.W.2d 246, 254 (Iowa 1976). In Locke, our supreme court remanded a dissolution action to the district court and directed it to consider, among other things, the "presence or absence" of social security benefits in arriving at the property division. In Woodward, we observed that the wife removed herself from the job market during the marriage with resulting loss of social security, in deciding that a partial award of the husband's pension benefits would not terminate upon her remarriage or cohabitation. In Miller, we tacitly considered the husband's greater social security contributions during the marriage in finding that the trial court's allocation of property was equitable.

We do not believe these prior cases, or any other Iowa case resolves the issue, or establishes authority for courts to consider the disparity in expected social security benefits in making a property division. Locke was decided three years prior to Hisquierdo, and provides no contemporary support for the claim. Woodward and Miller did not address social security benefits in the context of property division. The presence of social security was discussed in both cases with reference to the issue of how pension payments should be divided. There is no contemporary authority from our courts that social security

benefits may be considered in awarding property in a dissolution action.

Our supreme court has permitted military retirement pay to be considered in dividing the property of a marriage. In re Marriage of Schissel, 292 N.W.2d 421, 424-427 (Iowa 1980). An important basis for this holding, however, was the finding that the federal legislation establishing military retired pay did not, unlike the federal legislation governing railroad retirement pay involved in Hisquierdo, evince a congressional intent to preclude state courts from considering such pay in formulating property settlements. Id. As noted earlier, the legislation which precluded state courts from considering railroad retirement pay in Hisquierdo is similar to the language of the Social Security Act. Thus, Schissel cannot be read to authorize consideration of social security benefits in dividing property.

Our appellate courts have also permitted social security benefits to be considered in determining an award of alimony. See, In re Marriage of Bethke, 484 N.W.2d 604, 608-09 (Iowa App. 1992); In re Marriage of Earsa, 480 N.W.2d 84, 86 (Iowa App. 1991); In re Marriage of Wiedemann, 402 N.W.2d 744, 749 (Iowa 1987); In re Marriage of Voss, 396 N.W.2d 801, 804 (Iowa App. 1986); In re Marriage of Jones, 309 N.W.2d 457, 460 (Iowa 1981). This treatment, however, does not support the position that the benefits can also be considered in dividing property.

We readily acknowledge that property division and alimony have common elements and are considered together in evaluating their individual sufficiency. See In re Marriage of Alexander, 478 N.W.2d 420, 423 (Iowa App. 1991). Yet, this principle does not merge the two concepts or eliminate a separate analysis. Property rights and alimony are distinguishable, and have differing purposes. In re Marriage of Murray, 213 N.W.2d 657, 659 (Iowa 1973). A property division is based upon the right to a just and equitable share of the property of the marriage, while alimony is primarily awarded as an allowance to a spouse in lieu of the legal obligation of support created by marriage. Knipfer v. Knipfer, 259 Iowa 347, 352, 144 N.W.2d 140, 143 (1966). It may be necessary to consider the presence of social security benefits in determining alimony to help project a realistic picture of the future needs and financial abilities of the parties. See In re Marriage of Campbell, 204 N.W.2d 638, 639 (Iowa 1973). Once considered in determining alimony, however, it has no impact on the equities of the property subject to the division. An equitable property division is placed at risk by using social security benefits as a factor in the analysis.

Congress has, unmistakably, preempted state dissolution laws in enacting its own scheme for providing social security benefits for divorced spouses. Since social security benefits cannot be divided, we believe it would

also be improper to consider them in the overall property division. The Supremacy Clause should not be circumvented by doing indirectly what is clearly directly prohibited.

We conclude that social security benefits may only be considered as they impact alimony. This will best assure equity is achieved in a decree and will give symmetry and integrity to our governing legal principles.

Accordingly, we reject Gloria's suggestion that we offset the difference in the parties' future social security benefits against Larry's property award. We further hold the trial court improperly considered the value of the parties social security benefits in the property division. If the social security benefits are excluded the difference in the parties' property awards is approximately $50,000. In order to create a more equitable distribution, we modify the trial court's order and require Gloria to pay a lump sum of $25,000 to Larry.

III. Alimony

Larry argues the trial court erred in granting Gloria alimony of $500 per month for ten years. He asserts Gloria has sufficient resources to support herself and Ryan in a comparable manner to that enjoyed during the marriage. In support of his contention Larry points to Gloria's net monthly income of $1719 per month, the $625 per month child support payment and the property settlement.

In response Gloria argues the $500 per month alimony is necessary to compensate for the difference between the

parties' incomes and to pay for health insurance and other benefits she does not receive from her two part-time employers. Gloria also requests alimony be increased to $1000 per month when she no longer receives child support for Ryan.

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). It may be used to remedy inequities in a marriage and to compensate a spouse who leaves the marriage at a financial disadvantage. Geil, 509 N.W.2d at 738. When determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Imhoff, 461 N.W.2d 343, 345 (Iowa App. 1990) (citing Estlund, 344 N.W.2d at 281). Alimony is an allowance to a former spouse in lieu of the other spouse's legal obligation for support. See Hitchcock, 309 N.W.2d at 437.

Upon reviewing the facts in this case, we find the trial court's award of $500 per month is excessive. Despite being out of the workforce for almost fifteen years, Gloria is self-supporting and has established herself in a profession she enjoys. Gloria earns gross annual income of $27,960 as a dental hygienist. Additionally, she was awarded a debt-free home and car and

substantial assets including one-half of Larry's retirement and 401(k) plans.

While there is a disparity in earning capacity between the parties, it is not great. Larry earns a gross annual income of approximately $39,000. From this income he must pay child support of $622.35 per month, a monthly car payment of $675, and $500 per month on jointly incurred debts.

In light of the parties' earning capacities and Larry's ability to pay, we believe the alimony should be reduced to $200 per month. This amount will help Gloria pay for health insurance and establish a retirement plan until she is able to locate full time employment.

V. Attorney Fees

Gloria also argues the trial court erred in failing to require Larry to pay a portion of her attorney fees. We disagree.

Iowa trial courts have considerable discretion in awarding attorney fees. Giles, 338 N.W.2d at 546. To overturn the court's decision, the complaining party must show the trial court abused its discretion. Id. We find no abuse of discretion in this case. The trial court properly declined to award attorney fees.

We also decline to award attorney fees on appeal. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.

All judges concur except Sackett, and Huitink, JJ., who concur in part and dissent in part.

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

I dissent in part from that portion of the majority's opinion that holds future social security benefits should not be considered in property division under Iowa Code section 598.21(1).

First, the legislature has spoken on the issue.

Iowa Code section 598.21 titled, Orders for disposition and support, in part, provides:

> 1. Upon every judgment of annulment, dissolution or separate maintenance the court shall divide the property of the parties and transfer the title of the property accordingly
>
> . . . .
>
> i. Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.

Iowa Code § 598.21(1)(i) (1993). The clear statutory language is contrary to the majority's holding.

In Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 99 S. Ct. 802, ---, 59 L. Ed. 2d 1, 11, the court says, "State family and family-property law must do 'major damage' to clear and 'substantial' federal interests before the supremacy clause will demand that state law be overridden."

I would point out there is a long line of Iowa cases both preceding and following the United States Supreme Court's decision in Hisquierdo, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979), which holds the absence of presence of social security benefits is an issue to be considered by the court in framing the financial clauses of a dissolution. See In re the Marriage of Wiedemann, 402 N.W.2d 744, 749 (Iowa 1987)[1]; In re Marriage of Jones, 309 N.W.2d 457, 460 (Iowa 1981); In re Marriage

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[1] Here the court said in discussing alimony, "Martin [husband] undoubtedly will receive a much higher rate of social security than Judith [wife] will." Wiedemann, 402 N.W.2d at 749. The majority dismisses Wiedemann by suggesting social security benefits may still be considered on issues on alimony. What the majority misses in this analysis is the courts have historically considered property and alimony together in assessing their equity

of Schissel, 292 N.W.2d 421, 427 (Iowa 1980); Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978)[2]; In re Marriage of Ralston, 242 N.W.2d 269, 271-72 (Iowa 1976); In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972); Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968); In re Marriage of Bethke, 484 N.W.2d 604, 608-09 (Iowa App. 1992) (we said: "we look at the presence or absence of social security benefits in analyzing the equity of the financial aspects of a dissolution."); In re Marriage of Earsa, 480 N.W.2d 84, 86 (Iowa App. 1991) (where in assessing alimony issue, we said: Her [wife's] earning capacity has been similar to Mark's [husband's]. She has, therefore, during the marriage made similar FICA contributions. Her social security coverage is for both disability and retirement."); In re Marriage of Miller, 475 N.W.2d 675, 678 (Iowa App. 1991) (in addressing property division issues, we said: "In making this determination, we consider, as we did earlier, the fact that his social security contributions exceed Barbara's [wife's]; In re Marriage of Woodward, 426 N.W.2d 668, 671 (Iowa App. 1988); In re Marriage of Voss, 396 N.W.2d 801, 804 (Iowa App. 1986) (court considered wife had little or not payments to an FICA account in her own name and, while she had dependency benefits because

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[2] The majority, while recognizing the holding in Locke was that the case was remanded for the trial court to consider, among other things, the "presence or absence of social security benefits", distinguished Locke because it was decided prior to Hisquierdo. What the majority has missed is Locke was cited and not distinguished by the court in In re Marriage of Jones, 309 N.W.2d at 460. Jones not only was decided after Hisquierdo but the court in Jones said as to military retirement pay, "Without attempting to divide the retired pay itself, the trial court in that case, [citing In re Marriage of Schissel, 292 N.W 2d 421 (Iowa 1980)], in its property division, took the future retired pay into consideration and added an estimated sum, $8000, to the wife's side in adjusting the parties' equities. We deemed this also to be an appropriate way to handle pension benefits, Jones, 309 N W.2d at 460 (citing Schissel, 292 N.W 2d at 427), and we found no interference with federal law which would run afoul, Hisquierdo v Hisquierdo, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979) .

With these decisions charting our course, we hold that the trial court could not split the military retired pay itself, but properly took it into consideration in requiring Charles to Pay Geraldine monthly sums of money. Jones, 309 N.W.2d at 460 (citing Schissel, 292 N.W.2d at 427)

The majority's reasons for distinguishing Locke are without basis.

the marriage lasted over ten years, she can collect only if she remains single, if she and her husband are both sixty-two, or if she is sixty and her husband is deceased. Furthermore, she has no coverage for her own disability -- as items to be considered in arriving at the amount necessary for her support.

While I agree social security is not divisible and its receipt is dependent on survival, the cited authorities convince me future social security benefits are other factors to be considered in reaching equity in a dissolution as to both property and alimony, which are under Iowa law considered together in assessing their fairness. See Earsa, 480 N.W.2d at 85. We consider the property division and alimony together in evaluating their individual sufficiency; they are neither made nor subject to evaluation in isolation from one another. Id.; In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

Furthermore, the majority's attempt to overrule the prior line of cases and establish a rule that social security benefits not be considered in Iowa is based on a theory that was clearly rejected by the Iowa Supreme Court in In re Marriage of Jones, 309 N.W.2d 457 (Iowa 1981), which charts the court course on government pensions, including social security, and concludes social security and pensions paid by the federal government relate to "'any other relevant factors' which bear upon an equitable solution of financial issues." Id. at 460. See also In re Marriage of Yates, 365 N.W.2d 49 (Iowa App. 1985), where we said:

> Without considering the effect of a statutory change on a modification, we determine that the Iowa court has consistently determined that public and private pensions as well as social security benefits as a form of pensions and military retired pay could be considered by the Iowa courts in framing the financial clauses of dissolution decrees. (Cites omitted).

Yates, 365 N.W.2d at 51. We also said:

> While the statutory change may alter the device of payments by allowing the Iowa courts to utilize the pension for payment of benefits and protection of spouses the new law made change in the basic equitable

> principles of equitable distribution concerning pensions clearly established in Iowa statutory and common law

Id. at 51.

I find the property division equitable and would affirm it. I would concur withe the majority on the alimony issue.