IN THE COURT OF APPEALS OF IOWA

No. 8-062 / 96-1664

IN RE THE MARRIAGE OF LARRY DEAN McCOLLUM AND ROBERTA MARIE McCOLLUM

Upon the Petition of
LARRY DEAN McCOLLUM,
Appellee/Cross-Appellant,

And Concerning
ROBERTA MARIE McCOLLUM,
Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Roberta McCollum appeals the property distribution of the decree dissolving the parties' marriage, and Larry McCollum appeals the district court order granting a new trial. **AFFIRMED IN PART AND MODIFIED IN PART.**

Dan T. McGrevey, Fort Dodge, for appellant.

William H. Habhab, Fort Dodge, for appellee.

Considered en banc.

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VOGEL, J.

Roberta McCollum appeals the property distribution and award of attorney fees in the parties' dissolution of marriage decree. Larry McCollum cross-appeals the district court's order granting a new trial, in addition to the alimony and child support obligations imposed. We find that a modification of the property division is warranted and adjust the child support to give Larry credit for disability payments received by the children, but otherwise affirm.

Background facts. Larry and Roberta McCollum were married on February 14, 1970. They had five children together and Larry adopted a child from Roberta's former relationship. At the time of the divorce, only of the two children remained at home, Brett, born in 1979, and Patricia, born in 1980.

The district court entered a decree dissolving the parties' marriage on August 22, 1996. The court made a property division and found that the parties had agreed to joint custody with Roberta receiving primary physical care. Due to a misinterpretation of the submitted exhibits, the court found that neither party had requested alimony and that the parties had agreed that the Social Security benefits received by the children due to Larry's disability would satisfy his child support obligation. The court also awarded Roberta $500 in attorney fees. Roberta appealed from the property division and attorney fee findings.

In February of 1997, Roberta filed a petition pursuant to Iowa Rule of Civil Procedure 252(b), seeking to vacate and modify the decree or obtain a new trial based

on the trial court's error in finding the parties had agreed on the issues of child support and alimony. The district court, acknowledging its mistake, sustained Roberta's petition but determined that a new trial would consist of the court's review of the record. The court subsequently ordered Larry to pay $585 per month in child support, to be reduced to $452 per month when only one child qualified for support. The court further ordered that Larry pay Roberta $400 per month in alimony upon the termination of his child support obligation. Both parties filed 179(b) motions which the court denied.

Larry appealed the court's order sustaining Roberta's petition for a new trial. Roberta cross-appealed on the same issues addressed in her original appeal, property division and attorneys fees. The two appeals were consolidated on June 20, 1997.

Scope of review. 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, 453 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Property division. Roberta contends the district court made several errors in making the property division.

The parties to a marriage are entitled to a just and equitable share of the property accumulated during the marriage. *In re Marriage of Starcevic*, 522 N.W.2d

855, 857 (Iowa App. 1994). The determining factor is what is fair and equitable to both parties under each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21. *Id.*; *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Roberta first contends that the court wrongly determined that the house in which Larry has resided since their separation was not marital property. She argues that Larry purchased the house with funds she alleges were withdrawn from a joint account. However, there was insufficient evidence introduced at trial to prove that the funds were used to purchase the property. While all documents relating to the sale indicate that Larry was the purchaser of this property, the deed shows his parents as the title holders. In addition, Larry's mother testified at trial that she provided the funds for the purchase of the home. While the nature of this transaction certainly raises suspicions, the trial court was in the best position to ascertain witness credibility. We will not disturb its finding on this issue.

Next Roberta argues that the district court erred in valuing the parties' rental property. She asserts the court used a tax assessment value for the rental property and a fair market value for the homestead, and that the same method of valuation should have been used for both. Although not specifically articulated in the decree, it appears the court valued the homestead between $80,000 and $82,000 and valued the apartment house at approximately $20,638.[1] We find the values to be within the

[1] We assume this valuation based upon the court's award of a net $7000 to Roberta. Assigning an equal $7000 share of the house's equity to Larry plus the $6638 mortgage

permissible range of evidence and will not disturb them on appeal. *See In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994).

Finally, Roberta contends that the court made an inequitable distribution because it failed to take into account $5000 in marital funds that Larry admitted he used to furnish his new residence and $3000 that she was gifted by her mother. She further argues that the court should have awarded her the homestead. Instead, the court ordered that Roberta be allowed to remain in the residence until the last child attained her majority or graduated from high school, whichever occurs last, after which the house was to be sold and the proceeds divided between the parties.

After reviewing the record, we find that a modification of the property division should be made to take into account the $5,000 Larry spent on furniture and retains as his personal property, and to give Roberta credit for the $3000 gift from her mother.[2] We find that an equitable division of the parties' assets would be as follows:

Property	Larry	Roberta
Apartment house	$20,638	
1986 Oldsmobile		$2,500
1988 Ford Ranger	$3250	
1981 Cadillac	$1450	
Furniture/Appliances in the parties' possession	$5000	$2000

amounts to a $20,638 value.

[2]Although the trial court did not assign specific values to all the parties' assets, we infer that the court was attempting to make an equal division of the property. We modify in this instance to give effect to the trial court's intention.

Cash[2]	$1800	
Apartment house mortgage	($6638)	
subtotal	$25,550	$4,500
Homestead sale net proceeds: ½ remainder of net proceeds	 X	1st $24,050[3] X
TOTAL	$25,550 + X	$28,550 + X

Since the youngest child turns eighteen in September of 1998, we assume that the sale of the homestead is imminent. To better balance the distribution, we find that the net proceeds from the sale of the homestead should be divided such that Roberta receives the first $24,050, with the remainder to be split equally between the parties.

II. Attorney fees. Roberta asserts that she incurred $2,242.10 in trial attorney fees and that the district court's award of $500 was insufficient under the circumstances.

Ordinarily, an award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Francis*, 442 N.W.2d 59, 67 (Iowa 1989); *see also* Iowa Code § 598.36 (1997). We find the district court properly considered the parties' relative financial

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[2] Although not specifically mentioned in the decree, the remaining balance in the parties' savings account was granted to Larry under the personal property portion of the decree and should be considered in making an equitable distribution. The best information available in the record indicates there was approximately $1800 in the account at the time of trial.

[3] This number includes the $3000 gift Roberta received from her mother, for which she should be given credit.

circumstances in awarding attorney fees to Roberta. We find no abuse of discretion and therefore affirm the district court's award of $500 to Roberta.

Roberta further requests $2,500 in appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). 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 district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa App. 1997). Upon review of the parties' financial situations, we award $1,000 in appellate attorney fees to Roberta. We assess costs on appeal to Larry.

III. Cross-appeal. Larry appeals the district court order sustaining Roberta's petition for a new trial. He contends the court did not have jurisdiction to consider the petition because Roberta did not satisfy the requirements of Iowa Rules of Civil Procedure 252 and 253. However, we find Larry failed to preserve error on this issue. Larry through his counsel fully participated at the hearing on Roberta's petition without voicing a complaint as to improper procedure. His 179(b) motion was likewise devoid of any mention of this issue. Matters not raised in the trial court will not be considered on appeal. *In re Marriage of Okonkwo*, 525 N.W.2d 870, 872 (Iowa App. 1994).

IV. Alimony. Larry contends the court erred by awarding alimony in light of the property division, his disability and Roberta's earning capacity.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa App. 1996). We consider alimony and property distribution together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa App. 1994). Before awarding alimony, the district court must consider the factors listed in Iowa Code section 598.21(3).

Larry and Roberta were married for twenty-six years. Roberta, age fifty-two at the time of trial, has an eighth grade education and limited employment opportunities. She currently earns $5.20 per hour working part-time in a grocery store. Larry, age fifty-one at the time of trial, is a high school graduate who worked at a grocery store until suffering a disabling injury in 1986. However, by combining Social Security payments, disability payments, and monthly rental income, Larry earns approximately three times that of Roberta. Given the length of the marriage and the disparity in both income and income potential, we find the award of alimony to be appropriate and therefore affirm the court's award.

V. Child support. Larry further challenges the amount of child support, contending the district court should have ordered the social security payments the children receive due to Larry's disability be credited against his child support obligation. Roberta concedes this point. *See Newman v. Newman*, 451 N.W.2d 843, 844 (Iowa 1990); *Potts v. Potts*, 240 N.W.2d 680, 682 (Iowa 1976). The trial court

added to Roberta's net monthly income of $704 the social security disability payments on behalf of the children before calculating the percentage of Larry's net monthly income. This was incorrect. On our de novo review, we find Roberta's net monthly income is $704 and Larry's net monthly income is $1949. According to the child support guidelines, for two children, Larry's child support obligation is 32.2% of his net monthly income, or $628. From that, we subtract $374 (Social security disability payment for the children at $187 x 2) to set Larry's child support obligation for two children at $254 per month. When only one child qualifies for support, Larry's obligation shall be $271 ($1949 x 23.5% = $458 - $187). These amounts are retroactive to the date in the district court's amended order, March 1, 1997.

Having considered all arguments properly before us on appeal, we affirm in part and modify in part.

AFFIRMED IN PART AND MODIFIED IN PART.

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

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

I concur in part and dissent in part. The property division made by the trial court was equitable. Unlike the majority, I believe it should be affirmed.

In all other respects, I concur with the majority.

Huitink, J., joins this partial dissent.