

IN THE COURT OF APPEALS OF IOWA

No. 3-186 / 92-1112

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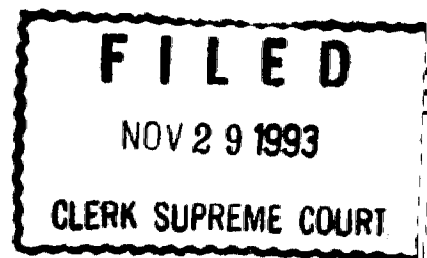
IN RE THE MARRIAGE OF JOHN A. GALLARDO
AND FRANCES M. GALLARDO

Upon the Petition of
JOHN A. GALLARDO,

Appellant,

And Concerning
FRANCES M. GALLARDO,

Appellee.



Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

The petitioner husband appeals various economic provisions of the district court's decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Jerry R. Foxhoven, Des Moines, for appellant.

Susan L. Ekstrom, Des Moines, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab,
JJ. Donielson, J., takes no part.

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OXBERGER, C.J.

John and Frances Gallardo were married in 1956. The parties had five children, all of whom are presently adults.

John was fifty-nine years old at the time of the dissolution hearing. John injured his back in 1980 while working for Firestone Tire & Rubber Company. In workers' compensation proceedings he was determined to have a 50% industrial disability. See Gallardo v. Firestone Tire & Rubber Co., 482 N.W.2d 393, 397 (Iowa 1992). Firestone required John to take medical retirement. John will receive \$1,352 per month in medical disability retirement benefits from Firestone until he reaches the age of sixty-two, and then his benefits will be reduced by 50%. John is presently employed as a customer service representative with Amoco, where he earns \$18,300. John's total net monthly income from his disability benefits and earned income is \$2,027.

Frances was fifty-seven years old at the time of the dissolution hearing. The parties own Gallardo's Taco Villa in West Des Moines as a partnership. Frances and one of the parties' daughters work full-time in the restaurant. In 1989 the business had income of \$19,524 and in 1990 the business had income of \$19,395. However, in 1991, income was down and Frances testified her net income from the business was about \$500 per month.

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The parties own three parcels of real estate. The marital residence at 530 6th Street in West Des Moines was worth approximately \$57,500, and had a mortgage of about \$42,000. The parties owned a rental property at 6200 Gordon, which was being rented to their daughter. This property was worth about \$45,630, and had a mortgage of \$16,800. They also own a house at 221 7th Street which was uninhabitable. It had a value of \$10,800, and a mortgage for the same amount. The parties also owed the Veterans' Administration \$29,000 for a rental property which the VA had foreclosed upon.

The district court issued a decree of dissolution for the parties on June 2, 1992. The court awarded Frances the restaurant, the marital residence, a vehicle, her life insurance policy, her bank accounts, and household goods. John was awarded the rental property on Gordon and the house on 7th Street, a vehicle, his life insurance, his credit union accounts, and his workers' compensation claim, worth about \$1,000. John was ordered to pay all of the parties' debts except for the mortgage on the marital residence. Frances was awarded total net assets worth about \$39,300 and John was awarded total net assets worth about \$17,240.

The district court awarded Frances one-half of John's disability benefits, which would be \$676 per month. In addition, John must pay Frances permanent alimony of \$300 per month. John was ordered to pay \$500 towards Frances's attorney fees. John appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. John first contends the property division was inequitable to him. He claims the marital residence and restaurant were worth more than the value claimed by Frances. He also claims the district court should not have awarded Frances one-half of his disability benefits.

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 Russell, 474 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular case. Id.

We find the values placed on the marital assets is well within the permissible range of the evidence and we will not adjust them.

The supreme court has previously determined that military disability benefits are not marital property subject to division. In re Marriage of Howell, 434 N.W.2d 629, 632 (Iowa 1989). The court stated that while disability benefits may not be considered marital property, they may be considered in the equitable granting of alimony or support. Id. at 633.

We determine John's disability benefits should not be considered marital property. We note that Firestone required John to take medical retirement. The purpose of the benefits are to compensate John for his disability, and should not be considered compensation for past services rendered. We therefore modify the portion of the dissolution decree awarding Frances one-half of John's disability benefits from Firestone. John shall be awarded 100% of these disability benefits. Except for this modification, we affirm the property distribution.

III. John also asks us to eliminate his alimony obligation. He believes that Frances's net income from the restaurant is greater than \$500 per month and that she has the ability to earn a greater amount of money.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Whelchel, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). Also, the ability of the one spouse to pay should be balanced against the needs of the other spouse. Id.

In the present case, John's net monthly income is \$2,027, while Frances's is about \$500. We determine John has the ability to pay alimony and Frances needs the support to maintain a reasonable lifestyle. We affirm the award of alimony.

IV. Frances seeks attorney fees for this 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We order John to pay \$500 towards Frances's attorney fees for this appeal.

In summary, we have modified the dissolution decree to eliminate the provision granting Frances one-half of John's disability benefits from Firestone. John is awarded 100% of these disability benefits. We have affirmed the district court on all other issues. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.