IN THE COURT OF APPEALS OF IOWA

No. 6-720 / 96-0126

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FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF GRETCHEN KAY HERVEY AND LEO WAYNE HERVEY

Upon the Petition of
GRETCHEN KAY HERVEY,

Petitioner-Appellant,

And Concerning
LEO WAYNE HERVEY,

Respondent-Appellee.

Appeal from the Iowa District Court for Van Buren County, William L. Dowell, Judge.

Petitioner appeals various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

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

John B. Martin, Bloomfield, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ.

HABHAB, C.J.

Leo and Gretchen Hervey were married on March 5, 1983. There were no children born to the marriage, although both have adult children from prior marriages. Leo was sixty-one years of age at the time of trial and Gretchen was fifty-two.

Gretchen is a licensed cosmetologist, certified medication aide, and certified nurse's aide. She is presently employed at Boone County Home Health Care Center at a rate of $6 per hour and works approximately thirty-three to forty hours per week.

Leo has been a self-employed carpenter for forty years. He works at an hourly rate of $15 per hour; however, his work is seasonal and subject to weather conditions. Leo's income ranged from a low of $4446 in 1983 to a high of $16,940 in 1992. Included in this income were sums earned through a gun shop Leo opened in 1977 out of his home.

During the course of the marriage, Leo was the primary income earner. This income was used to support themselves and Gretchen's daughter, Dorothy. Leo's aunt, Opal Stark, began living with the family in 1984. After her death in 1993, Leo and Gretchen each received approximately $92,000 in inheritance. Leo purchased a vehicle valued at $13,100 with his inheritance. He deposited $72,000 in the Farmers State Bank. Gretchen also purchased a vehicle valued at $14,500 with funds from her inheritance. She testified she "loaned" her son approximately $40,000. This loan was allegedly secured by four "promissory notes" which contained no terms of

repayment nor interest on the loan. Gretchen also paid for $4000 worth of new cabinets in her son's home. She bought a snow blower, stereo, personal computer, and vacationed. The remainder of her inheritance she allegedly spent on personal living expenses. She currently pays one-half the mortgage on her son's home in the amount of $312 per month.

Gretchen left the marital home on March 31, 1994. She cashed out an individual retirement account (IRA) she had acquired during the marriage. She closed several bank accounts after the parties' separation, including one for $7816.23 which she transferred to a bank in Boone and another for $4702.31. She additionally closed out a $7920.84 savings account at Norwest Bank in Des Moines.

Following trial, the district court entered its decree. Each party was awarded assets pursuant to a stipulation of assets and liabilities entered into by the parties. Each party was responsible for his/her own debts incurred after March 30, 1994. Gretchen was awarded $5200 in order to equalize the property division. Leo was ordered to make payments on this amount in the sum of $100 per week. Gretchen has appealed.

Gretchen argues the property division was inequitable. She argues the decree fails to take into consideration the substantial disparity between Leo's social security benefits accrued during the marriage and her own. She further maintains the $15,969 in IRA's awarded to Leo should have been divided as marital property. She asserts

Leo's gun shop increased in value during the marriage. She requests an additional property award of $45,000. She also requests alimony in the amount of $500 per month, and trial and appellate attorney fees.

I. Division of Property. It is a fundamental principle that parties to a marriage are entitled at the time of a divorce to a just and equitable share of the property accumulated from their joint efforts. *In re Marriage of Wiedemann*, 402 N.W.2d 744, 747 (Iowa 1987). What constitutes a just and equitable award depends on the particular circumstances of each case, after consideration of all the recognized criteria. *In re Marriage of Hanson*, 475 N.W.2d 660, 662 (Iowa App. 1991); *see* Iowa Code § 598.21(1) (1995). The division of marital debts inheres in the property division. *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). We consider the factors set forth in Iowa Code section 598.21(1) when fashioning an equitable division of property.

a) Social Security Benefits. At trial Gretchen provided expert testimony valuing Leo's social security benefits accrued during the marriage at $24,564. Gretchen's were valued at $4490. She requests that we award her an additional $10,000 to account for this disparity. We decline her request.

Leo argues that should Gretchen meet the eligibility requirements set forth in the Social Security Act to be eligible for benefits, the difference in benefits would be only $11,268.88. He points out that in *In re Marriage of Boyer*, 538 N.W.2d 293

(Iowa 1995), the social security benefit difference was over $65,000 and concerned a marriage of almost nineteen years. Leo contends the facts of this case are distinguishable from *Boyer* in that the parties were married only twelve years. He also argues Gretchen was only fifty-two at the time of trial and has another ten to thirteen years of earning capacity; as such he maintains the alleged disparity between benefits received by each party upon retirement is merely speculative.

State courts are without power to directly or (by way of set off) indirectly divide social security benefits in their formulation of economic terms and dissolution decrees. *Boyer*, 530 N.W.2d at 295; *see* 24 Am.Jur.2d *Divorce and Separation* § 910 (1983). However, in *Boyer* the court went on to note:

> [A] state court is not required to pretend to be oblivious of the fact that one party expects benefits that will not be enjoyed by the other. This contrasting economic security *can* be weighed as a factor in fixing the economic terms of a dissolution decree.

Boyer, 530 N.W.2d at 293 (emphasis added).

We find the trial court did not err in failing to indirectly divide the accumulated social security benefits between the parties. The court in *Boyer* pointed out:

> There is a crucial difference between: (1) adjusting property division so as to indirectly allow invasion of benefits; and (2) making a general adjustment in dividing marital property on the basis that one party, far more than the other can reasonably expect to enjoy a secure retirement.

Boyer, 530 N.W.2d at 296.

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Gretchen argues that in light of the Social Security Act's eligibility requirement she may "never receive any benefit derived from Leo's social security benefits whose accrual can be attributed to the years of their marriage unless they are considered now." We find, in essence, what Gretchen asks us to do is to adjust the property division to indirectly allow invasion of Leo's benefits. She would thereby be able to circumvent the Act's requirements for eligibility.[1]

In affirming the trial court's decision in allowing adjustment of the property division in light of the disproportion in benefits, the court in *Boyer* noted:

> Although perhaps not controlling, we note that the disproportion in social security benefits was not the only factor for the adjustment; the court was first prompted by its desire "to equalize the property distribution."

Boyer, 530 N.W.2d at 296.

In the case at hand we find there is no reason to award Gretchen further property in light of the speculative disparity in social security benefits. Moreover, we find no need to make such an award to "equalize the property distribution." *See id.*

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[1] The Social Security Act provides a specific avenue for divorced persons to obtain social security benefits. *In re Marriage of Boyer*, 538 N.W.2d 293, 295 (Iowa 1995).

> A divorced spouse of an individual entitled to social security retirement or disability benefits qualifies for such benefits if he or she: (1) applies for such benefits; (2) is at least sixty-two years old; (3) is not entitled to his or her own primary benefits in an amount equal to or greater that one-half due his or her spouse; and (4) is not married.

42 U.S.C.A. §§ 402(b)(1)(A)-(D), 402(c)(1)(A)-(D) (West 1991); *see Boyer*, 538 N.W.2d at 295.

The record reflects that both parties have received sizeable inheritances of approximately $92,000 each. The trial court noted:

> [S]imultaneously with [Gretchen's] seeking a dissolution of marriage she was also awarded approximately $92,000. In spite of her protestations to the contrary, such sums are available to her from which she can pay her attorney fees. The court is not satisfied that the promissory notes represent legitimate obligations, but is more inclined to believe that [Gretchen] is perpetrating a fraud upon the court.

The court also took note of the fact the parties left the marriage "in as good a position as they entered [it]. . . . Gretchen is leaving the marriage with a greater level of education and, therefore, a greater earning capacity than when she entered [it]."

The record reflects an equitable distribution of the property has taken place and that each party has the means by which to enjoy a secure retirement. We find that to grant Gretchen's request and award her an additional $10,000 would improperly permit invasion of Leo's benefits; as such, her request in this regard is denied.

b) Individual Retirement Accounts. The record reveals at the time of trial Leo's individual retirement accounts (IRA's) totaled $15,969. Leo contributed approximately $11,000 during the marriage while the parties were residing together. He contributed $4000 after the separation, $2000 of which was from the inheritance he received from Opal.

Gretchen contributed $2000 to her IRA during the marriage. She withdrew $2777 from the IRA soon after the parties separated. Although it did not expressly label the award to Gretchen in the amount of $5200 as an award of the appreciated

value of the parties' IRA's, the trial court noted the purpose of the award was to "equal[ize] the division of the net assets of the parties."

An equitable property division of the appreciated value of the property is a function of the tangible contributions of each party and not the mere existence of the marital relationship. *In re Marriage of Hass*, 538 N.W.2d 889, 893 (Iowa App. 1995). We find the trial court made an equitable award in respect to the distribution of the contributions and appreciated value of the parties' IRA's. We find Gretchen is not entitled to a further award of the value of the parties' IRA's.

*c) **Gun Shop.*** Leo gave testimony at trial that his gun shop was worth only approximately $7000 at the time of the parties' marriage and had not increased in value. The record reveals the shop generated little revenue during the marriage. Gretchen had little to do with the shop's operation. Gretchen maintains the shop increased in value from $3000 at the time of the marriage to $10,000 at the time of trial. The trial court did not make a specific valuation of the shop in the final decree.

In reconsidering its valuation pursuant to Gretchen's rule 170(b) motion, the trial court made the following finding:

> [Gretchen] complains concerning the valuation of [Leo's] gun shop. The only evidence in the record were the statements of the parties. [Gretchen's] statements were highly speculative, based upon her lack of knowledge of the operation. [Leo's] statements were more persuasive as he was more familiar with the operation of the gun shop, and the value prior to and at the conclusion of the marriage. The court, therefore, used the best and most reliable information available from the evidence.

In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). We note Gretchen had very little to do with the operation of the gun shop. Her estimates were based upon the inventory and Leo's checking account. We find the trial court's valuation of the shop was well within the permissible range of the evidence and we decline to disturb it on appeal.

d) Miscellaneous Personalty. Iowa Code section 598.21(1) states, "the court shall divide all property, except inherited property or gifts received by one party, equitably between the parties. . . ."

Gretchen testified the following items were gifted to her by Opal before her death:

1) One set of blue flowered dishes;
2) Striped sofa;
3) Antique wash stand with towel bar;
4) Antique chifforobe with drawers.

She also maintains that as Opal had devised her personal property to her and Leo in equal shares, she was also entitled to a deep freeze and ten silver dollars.

In determining whether inherited property is divisible as marital property, the controlling factors are the intent of the donor and the circumstances surrounding the inheritance or gift. *In re Marriage of Liebich*, 547 N.W.2d 844 (Iowa App. 1996). Placing inherited property into joint ownership does not, in and of itself, destroy the separate character of the property. *Id.*

The record reveals Gretchen provided extensive personal care for Opal before her death. Leo does not argue the above items were gifts to Gretchen but counters, "Perhaps the dispute as to these items could have been resolved had Gretchen discussed her desire to leave Leo and hadn't simply packed up her Thunderbird and taken off."

We find equity warrants an award of items one through four listed above to Gretchen and we modify the decree accordingly. We affirm the trial court's award of the silver dollars and deep freeze to Leo.

II. Alimony. Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *Id.* "The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3)." *State v. Khalsa*, 542 N.W.2d 263, ___ (Iowa App. 1995); *see In re Marriage of Hayne*, 334 N.W.2d 347, 350 (Iowa App. 1983). The ability of one spouse to pay alimony must be balanced against the needs of the other spouse. *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa App. 1995). The division of property is also considered. *See In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976).

In our de novo review of the record and after considering the factors listed in Iowa Code section 598.31(3), we affirm the trial court's denial of Gretchen's request of alimony.

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III. Attorney Fees. Gretchen argues the trial court abused its discretion in failing to award her trial attorney fees. She requests an award for these fees in the amount of $2500. Both Leo and Gretchen seek an award of appellate attorney fees.

a) Trial Attorney Fees. In declining Gretchen's application for trial attorney fees, the trial court noted:

> The issues in this proceeding were not that difficult, nor should they have been that time consuming causing inordinate amounts of legal expenses. Gretchen is employed and living with her son. Gretchen has available to her substantial assets from which she can pay her legal expenses. Gretchen should not be permitted to use her dealings with her son as a method of dissipating her assets so as to give the impression she is entitled to an award of attorney fees, as well as spousal support. Under all of the facts and circumstances in this proceeding, the court finds and concludes that Leo should not be required to make any contribution to Gretchen's attorney fees.

In its ruling on Gretchen's 179(b) motion the court stated:

> The court notes that simultaneously with [Gretchen's] seeking a dissolution of marriage she was also awarded approximated $92,000. In spite of her protestations to the contrary such sums are available to her from which she can pay 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). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay and the fees must be fair and reasonable. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). To overturn the decision of the trial court, Gretchen must establish the trial court abused its discretion in denying her request. *See Id.*

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In our de novo review, in considering the circumstances present between the parties, we affirm the trial court's denial of Gretchen's request for attorney fees. We find the trial court's decision was equitable and was not an abuse of discretion.

b) Appellate Attorney Fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 679, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties, we find equity does not warrant an award to either party.

AFFIRMED AS MODIFIED.