FILED
SEP 22 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-351 / 94-1434

IN RE THE MARRIAGE OF VIRGINIA R. BICE AND GERALD D. BICE

Upon the Petition of
VIRGINIA R. BICE,

Appellant/Cross-Appellee,

And Concerning
GERALD D. BICE,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Boone County, Joel E. Swanson, Judge.

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

John D. Jordan of Jordan, Mahoney & Jordan, P.C., Boone, for appellant.

G. Michael Kealhofer of Spellman, Spellman, Spellman, Spellman, Kealhofer & Spellman, Perry, for appellee.

Heard by Sackett, P.J., and Habhab and Huitink, JJ.

HUITINK, J.

Gerald and Virginia Bice were married in 1953. Gerald was sixty-one years of age at the time of trial, and Virginia was fifty-nine. Gerald has a high school education and has farmed most of his life. Gerald supplemented his income by driving a school bus, earning $8421 in 1993. Virginia also has a high school education. She began work as a cook for the Woodward-Granger school district in 1974 and later obtained another full-time job as a secretary for the State of Iowa. Virginia earned $21,537 in 1993.

The Bices owned a 42.6 acre farm in Boone County. Two acres of the property were occupied by the parties' homestead, an attached garage, farm and livestock buildings, and grain bins. Approximately 19.6 acres of the farm were tillable while the remainder was pasture. Gerald rented an additional five hundred acres of farmland.

In 1989 Gerald was involved in an automobile accident. He received a $74,000 settlement. He purchased a $25,000 annuity with part of the proceeds of the settlement, gave $2000 to Virginia, and used the balance to pay farm debts. Gerald received a permanent back injury and was unsure whether he would be able to farm and drive the school bus.

For the last six or seven years of the parties' marriage, Gerald and Virginia lived in the same house but were essentially separated. Both kept separate bank accounts and

were responsible for their own accumulated debts. On November 23, 1993, Virginia filed the present dissolution action.

At trial, Gerald requested that he be awarded the farm equipment and farmland so he could continue his farm operation. The district court found the Bices had accumulated $321,244 in assets and $88,338 in debts, including $28,000 owed to Virginia's mother. The court awarded Virginia the parties' homestead, including the garage and farm buildings, valued at $120,000. The remaining real estate, valued at $38,000, was awarded to Gerald along with any outstanding indebtedness. Virginia was also awarded one-fourth of the livestock, her IPERS account, one-half of corn in storage valued at $3675, various savings bonds and stock valued at $600, her John Deere savings account valued at $1100, and a $30,000 equalization payment from Gerald, for a total of $262,421.

Gerald was also awarded one-half the value of the cattle valued at $4800, farm equipment valued at $82,000, a life insurance policy valued at $7150, a car valued at $5000, and one-half the value of the corn in storage valued at $3675. He was ordered to pay a $21,000 debt to the Perry State Bank, a $20,800 debt to DeWitt Implement, $14,000 representing one-half the debt owed to Virginia's mother, and the $30,000 equalization payment. Gerald received a net property distribution of $47,514.07.

Gerald subsequently filed a rule 179(b) motion, arguing that the distribution of debts and assets was inequitable and that there was no separate appraisal of the farm

building site. He additionally maintained that he wanted to continue farming, but that if he was not to be given full credit for his personal injury settlement, from which he could buy out Virginia's interest, and if his IPERS accounts were not valued according to his CPA's method, the real estate should be sold and the proceeds divided equally. The district court granted the rule 179(b) motion, ruling that both parties' IPERS accounts should be divided evenly. The court ruled that the method of distribution should be based on a formula related to the number of years during the marriage in which the party contributed to the retirement plan and the total number of years worked to become eligible for pension benefits. The court also modified its earlier property division by ordering the entire real estate to be sold and the proceeds divided evenly. Gerald was additionally awarded the proceeds from the 1994 crop year. Virginia has appealed, and Gerald cross-appeals.

Virginia argues the district court erred in amending its decree pursuant to a rule 179(b) motion. She argues that Gerald's request for sale of all the real estate is tantamount to offering new evidence, since he originally requested these assets to continue farming. Virginia also maintains the property division was inequitable. She claims the amendment pursuant to the rule 179(b) motion awarded Gerald $36,080 more in assets. She further notes Gerald was awarded the proceeds from the 1994 crop year even though the expenses of that crop were shared evenly. Virginia also contends the district court erred in setting aside Gerald's annuity valued at $26,713. On

cross-appeal, Gerald contends the district court erred in failing to award him alimony. He argues that since Virginia still earns over $21,000 from her job, and he will earn only $8000 from his job as a bus driver, he should be awarded alimony. He also argues that he should be awarded credit for the full amount of his personal injury settlement.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We are not bound by the trial court's factual determinations, but give them considerable weight particularly when the credibility of witnesses is implicated. Iowa R. App. P. 14(f)(7).

We initially disagree with Virginia's characterization of Gerald's 179(b) motion. Contrary to her suggestion, Gerald's arguments concerning the financial implications of the decree did not include "new evidence." We accordingly find no error resulted from the district court's decision to modify its judgment based on Gerald's 179(b) motion.

The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

According to Virginia's calculations, Gerald will receive approximately $38,000 more property than she will. Gerald acknowledges receipt of approximately $11,000 more property than Virginia. The difference is explained by the different asset values used by each party and Virginia's inclusion of a $26,000 annuity the court set off to Gerald.

Although Gerald received a greater property award than Virginia, we do not find this disparity inequitable. Although Gerald is not disabled, his physical condition limits the prospects of increased earnings. As a result, he will earn less than Virginia and will need the income from these assets to maintain his subsistence. We accordingly affirm the district court's property division.

Both parties dispute the district court's disposition of Gerald's remaining personal injury settlement proceeds. Virginia claims a share of the remaining $26,000 while Gerald seeks a set off of the entire $74,000 he received. Settlement proceeds do not automatically belong to the injured spouse. *In re Marriage of McNerney*, 417 N.W.2d 205, 208 (Iowa 1987). Their disposition depends on the circumstances unique to each case. *Id.* We believe the trial court equitably resolved this issue. Virginia benefited both directly by receiving $2000 of the settlement and indirectly from the application of settlement proceeds towards joint liabilities. Gerald's entitlement to the balance is justified for the same reasons he has received a slightly greater amount of the other assets. The district court is also affirmed on this issue.

We, like the district court, are unable to find any merit in Gerald's request for alimony. Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). When determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). Neither Gerald's needs nor Virginia's earning capacity justify an award of alimony. We also affirm on this issue.

The district court awarded each party one-half of the other's IPERS benefits earned during the marriage. Although we are unable to determine the precise consequences resulting from this award, we believe they work to Virginia's substantial disadvantage. The refund value of Virginia's IPERS account is approximately $14,000. If she retires at age sixty-five, she will have a variety of options including monthly benefits. Gerald is also eligible for IPERS benefits. His benefits have a current refund value of $2800 with retirement options similar to Virginia's. Under the decree, Virginia will be required to subsidize Gerald's retirement because she will receive a larger monthly benefit. We find this particularly unfair in view of Gerald's receipt of more property and the set off of his personal injury annuity. The district court's decree is accordingly modified to provide that each party shall receive his or her own IPERS benefits.

Virginia also requests an award of appellate attorney's fees. 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 Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). We determine each party should pay his or her own attorney's fees and one-half of the court costs.

The decision of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.