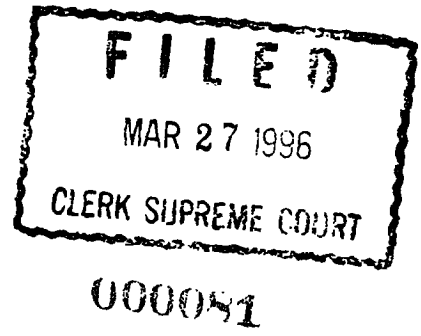
**IN THE COURT OF APPEALS OF IOWA**




No. 6-014 / 95-0073

**IN RE THE MARRIAGE OF KENNETH LYNN NELSON AND JANIE NELSON**

Upon the Petition of
**KENNETH LYNN NELSON,**

Appellant,

And Concerning
**JANIE NELSON,**

Appellee.

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Appeal from the Iowa District Court for Jefferson County, Phillip R. Collett, Judge.

Kenneth Nelson appeals certain economic provisions in the parties' dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Marion H. Pothoven, James Q. Blomgren, and Randall C. Stravers of Pothoven, Blomgren & Stravers, Oskaloosa, for appellee.

Heard by Habhab, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the second judicial district serving on this court by order of the Iowa Supreme Court.

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**HUITINK, J.**

Kenneth Nelson appeals certain economic provisions of the decree dissolving his marriage to Janie Nelson. We affirm as modified.

Kenneth and Janie Nelson were married in 1984. Both had been married and divorced previously and had children from their prior marriages. No children were born to the parties during the marriage.

Before Ken and Janie were married, Ken asked Janie to sign an antenuptial agreement releasing any claim she may have to property Ken owned before the marriage or personally acquired during the marriage. Ken stated at the time that he would not marry Janie if she refused to sign the agreement. The pertinent provisions of that agreement are as follows:

> Wife agrees. . .that she will not claim or demand or receive or take any right, title or interest in the property of husband or make any claim thereto, in the event of the termination of the marriage of the parties. . . in any property which [husband] now owns or which he may hereafter at any time own, become seized or possessed, or have any interest therein; and wife does hereby waive, renounce, release and relinquish any and all rights of every kind character and nature that she might have in the property of husband at all times from this time forward or in any property which he may acquire hereafter.

Janie consulted with an attorney in regard to the agreement and, against the attorney's advice, signed it.

In 1993 Ken filed a petition for dissolution of marriage. The district court refused to enforce the antenuptial agreement in regard to the limitations it placed on

Janie's interest in property acquired through the parties' joint efforts during the marriage. Among the property subject to division the court included rental property (one-third of which Ken inherited and two-thirds of which he purchased from his sisters during the marriage), a farm home built during the marriage, Ken's IRA, Janie's IRA, and Ken's pension from his employment at John Deere. Janie made no claim to property acquired by Ken before the marriage, nor did she claim an interest in any property value increases which occurred on Ken's property during the marriage.

The district court awarded Janie the rental property, her IRA, her personal property, and a car and was held responsible for the debt on each. Ken was awarded the remaining assets and ordered to pay all indebtedness not given to Janie, including Janie's debt on several credit cards. Ken was also ordered to pay Janie an equalization payment of $10,000 and $1,000 of her attorney's fees. Following the district court's denial of Ken's motion to reconsider, he appeals.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Whelchel*, 476 N.W.2d 104, 106 (Iowa App. 1991).

Ken first contends the district court erred in failing to fully enforce the parties' antenuptial agreement. Antenuptial agreements are favored in the law and should be liberally construed to carry out the intentions of the parties. *In re Marriage of Van Brocklin*, 468 N.W.2d 40, 45 (Iowa App. 1991). Antenuptial agreements will be upheld if they result in fairness between the parties and are entered into fairly, freely, and understandingly. *Id.* Whether an antenuptial agreement is reasonable is determined at the time the agreement is executed and not when enforcement is sought. *In re Estate of Ascherl*, 445 N.W.2d 391, 392 (Iowa 1989). When an antenuptial agreement is not unfair on its face, the party claiming its invalidity has the burden of proving fraud, overreaching, or deceit. *Id.*

The district court concluded the parties' antenuptial agreement was unenforceable to the extent it limited Janie's interest in property acquired during the marriage. We agree. Our review of the record reveals that while some of the parties' assets may have been purchased primarily with money Ken earned, Janie contributed to the marriage both financially and through her homemaking and child care services for the parties' children. Contributions by a husband and wife may differ in function, but where both are necessary for the success of the marital unit itself, a distribution of marital property should be substantially equitable. *See In re Marriage of Schissel*, 292 N.W.2d 421, 423 (Iowa 1980) (awarding one-half of marital property to wife based on her contributions as a wage earner, homemaker, and mother). As a result, we conclude

it would be unfair to construe the antenuptial agreement to limit Janie's interest in property acquired by the parties during the marriage.

Ken next contends that even if the district court properly limited enforcement of the antenuptial agreement, the court's division of the parties' property was inequitable. He claims that based on the value of the property awarded to each party and the liabilities assigned, it was error for the district court to require him to pay Janie a $10,000 equalization payment. Specifically, he contends the district court improperly valued the farm home at $20,000, improperly included his entire pension as a marital asset, and failed to deduct the inherited value of the rental property as belonging to Ken alone.

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)(1993). *In re Marriage of Estlund*, 344 N.W.2d 276, 289 (Iowa App. 1983).

While we agree with the district court's determinations as to the rental property and farm home, we find the district court erred in distribution of Ken's John Deere retirement fund. Pension benefits, whether vested or unvested, are treated as marital

property in Iowa, and therefore subject to equitable division between the parties in dissolution cases. *In re Marriage of Imhoff*, 461 N.W.2d 343, 344 (Iowa App. 1990). Setting aside a portion of a party's retirement fund which has accrued prior to marriage, however, is fair in determining an equitable division of property. *In re Marriage of Hornung*, 480 N.W.2d 91, 95 (Iowa App. 1991). The district court order included Ken's entire John Deere retirement fund, totaling more than $43,000, as a marital asset. At the time of trial, Ken had been employed at John Deere for twenty-seven years, ten of which he was also married to Janie. Based on these figures, only 10/27 of Ken's $43,000 retirement fund should have been included as a marital asset. *See id.* (setting forth guidelines for calculating pension benefits as marital asset). Accordingly, the proper marital asset value of Ken's retirement fund is $16,000 rather than $43,000. Appellant suggests this deficiency should be resolved by eliminating Ken's obligation to make a $10,000 equalization payment. We agree. The district court's order is therefore modified to eliminate Ken's $10,000 equalization payment. The district court's property distribution, absent the equalization payment, is equitable.

Finally, Ken contends the district court erred in requiring him to pay $1,000 of Janie's trial attorney 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). Having considered these factors, we conclude the trial court did not err in ordering Ken to pay $1,000 toward Janie's trial attorney fees.

Janie also requests appellate attorney fees. Such an award is discretionary and we consider various equitable factors in making this determination, including the parties' respective abilities to pay. *In re Marriage of Eilers*, 526 N.W.2d 566, 570 (Iowa App. 1994). Based on these considerations, we find each party should be responsible for his or her own attorney fees on appeal.

We have considered all of the issues raised by both parties and find them to be either covered by this opinion or without merit. We modify the district court's order to eliminate Ken's $10,000 equalization payment to Janie and affirm in all other regards.

**AFFIRMED AS MODIFIED.**