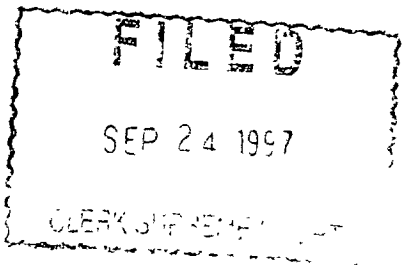
IN THE COURT OF APPEALS OF IOWA

No. 7-261 / 96-0311
Filed September 24, 1997

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IN RE THE MARRIAGE OF MARY SHIRLEY HICKEY AND PAUL ROBERT HICKEY



Upon the Petition of
MARY SHIRLEY HICKEY,
Appellee,

And Concerning
PAUL ROBERT HICKEY,
Appellant.

Appeal from the Iowa District Court for Page County, Timothy O'Grady, Judge.

Respondent appeals from the entry of the dissolution decree. **AFFIRMED.**

Scott H. Peters of the Peters Law Firm, Council Bluffs, for appellant.

Michael J. Winter, Council Bluffs, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

Paul Robert Hickey (Paul) appeals the property settlement, alimony, and attorney fee provisions of the decree dissolving his marriage to Mary Shirley Hickey (Mary). Mary cross-appeals the property settlement, alimony, and attorney fee provisions of the dissolution decree. We affirm.

I. Background Facts and Proceedings.

Paul (age seventy-five at time of trial) and Mary (age sixty-nine at time of trial) were married in 1957. It was the third marriage for each of them. They had one child, Tammy, who is now an adult. Paul also adopted Laverne, Mary's son from a previous marriage. Paul brought the family home and four trucks into the marriage. Since the marriage, Paul has worked in his own lime rock and gravel hauling business. Mary has not worked outside the home since 1973, but did work briefly recordkeeping for Paul's business. At the time of trial, Mary's health was not good. She had open heart surgery twelve years before trial and suffers from serious tremors and shakes.

Paul, wounded during World War II, was receiving a full-military disability pension of $1059 per month at the time of trial. Paul was also receiving monthly social security benefits of $902 at the time of trial. Paul estimates his net monthly income from his hauling business at $150. His 1994 tax return shows an adjusted gross income of $8279 ($689 per month average). Mary receives monthly social security benefits of $309.

An issue at trial was whether a Primcor Government Securities Income Fund, from which Paul withdrew $66,960.04 on July 25, 1995, was marital property. An August 14, 1995 injunction enjoined the parties from spending marital assets from July 20, 1995, through the dissolution proceedings. In its December 20, 1995 dissolution decree, the trial court stated Paul's demeanor at trial suggested the Primcor Government Securities Income Fund money was secreted somewhere. The court treated the money as a marital asset, awarding it to Paul. The court also treated the family home, valued at $24,500, as a marital asset, awarding it and other property worth a total of $55,648 to Mary. Paul was awarded property valued at $152,586. The court ordered Paul to pay Mary $48,469 to make the property award equitable. The court also ordered Paul to pay permanent alimony of $800 per month and $2000 for Mary's attorney fees.

On Paul's post-trial motion, the court decreased the judgment against him from $48,469 to $40,619, to reflect the reduction of marital assets due to the parties' release of a $15,700 note owed to them.

On appeal, Paul requests the court reduce his alimony obligation to $300 per month for three years, reduce the property settlement redistribution award from $40,619 to $20,000, strike the trial court's award of $2000 for attorney fees, and deny Mary's request for appellate attorney fees. Mary cross-appeals requesting an increase in the property settlement redistribution award to her from $40,619 to between $48,000 and $50,000, an increase in permanent alimony from $800 to $1200 per

month, an additional $1000 award for attorney fees, and a $2000 award for appellate attorney fees, plus costs of the proceedings.

II. Standard of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the trial court's findings of fact, but we do give them deference because the trial court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Property Settlement.

We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1987); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984).

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); *In re Marriage of Johnson*, 499 N.W.2d 326, 328 (Iowa App. 1993). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable under the circumstances. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code § 598.21(1)(1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Paul argues the trial court erred in including $66,960.04 he withdrew from the Primcor Government Securities Income Fund on July 25, 1995, in the marital property. We disagree. In the absence of contrary evidence, we assume, as the trial court did, that the Primcor Fund is marital property. The trial court issued a writ of temporary injunction on August 14, 1995, to enjoin the parties from dissipating marital assets through the dissolution proceedings. The injunction was effective on July 20, 1995, and subsequent dates. Paul violated the injunction by withdrawing the money on July 25, 1995. Thus, the trial court properly included the $66,960.04 in the marital property.

Iowa law does not give credit to a party for the value of the property owned prior to the marriage. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). Instead, the property brought to the marriage by each party is a factor to consider together with the other relevant factors in determining an equitable property division. *Id.*; Iowa Code § 598.21(1)(b)(1995). We agree with the trial court's decision that, to be equitable, the home should be included as a marital asset.

IV. Cross-Appeal of Property Distribution.

On cross-appeal, Mary contends the trial court should have included as marital property money from other accounts which was spent prior to trial. We disagree. "It is the net worth of the parties at the time of trial which is relevant in adjusting their property rights." *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989)(citation omitted). Mary offers no proof that the money existed at the time of

trial or was withdrawn in violation of the trial court's writ of temporary injunction. We decline to disturb the trial court's property distribution. The trial court's property distribution is sufficient compensation for Mary's equitable share of the marital assets.

V. 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 the relative needs of the other." *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983)(citation omitted).

We consider alimony and property division 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); *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App. 1984). An alimony award is justified when the distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking alimony who also has a need for support. *In re Marriage of Weiss*, 496 N.W.2d 785, 787 (Iowa App. 1992). Following a marriage of long duration, we have affirmed awards of both alimony and substantially equal property distribution,

especially where the disparity in earning capacity has been great. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). The court should also consider the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. *In re Marriage of Debbler*, 459 N.W.2d 267, 270 (1990); Iowa Code § 598.21(3)(f).

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Rehabilitative alimony is awarded to support an economically dependent spouse through a limited period of retraining. *Id.* The duration of this type of award depends on the particular needs of the dependent spouse. *Id.* at 63. Traditional or permanent alimony in contrast is usually payable for life or for so long as the dependent spouse is incapable of self-support. *Id.* at 62. The purpose of a traditional or permanent alimony award is to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued.

We find an award of traditional or permanent alimony is appropriate in this case. Paul and Mary were married thirty-eight years. There is a great disparity in the parties' earning capacities. There has been no showing that Mary is able to work outside the home. Accordingly, the alimony award in this case meets the objective of providing Mary with the financial support she would have received from Paul had the marriage continued. We decline to disturb the award.

VI. Cross-Appeal of Alimony.

On cross-appeal, Mary argues her alimony award should be increased from $800 per month to $1200, because the trial court failed to account for Paul's monthly military disability payments of $1059 in assessing alimony. It is true that this type of disability payment may be considered in assessing alimony or support. *In re Marriage of Howell*, 434, N.W.2d 629 (Iowa 1989). However, in light of the property distribution and her social security income, alimony of $800 per month is sufficient to support Mary at a standard of living comparable to what she enjoyed during the marriage. Thus, we affirm the trial court's alimony award.

VII. Attorney Fees

Paul contends the trial court erred in awarding Mary $2000 in 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). To overturn an award, the complaining party must show that the trial court abused its discretion. *Id.* Awards of attorney fees must be for fair and reasonable amounts, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982). Because we find no evidence the trial court abused its discretion in awarding attorney fees, we affirm the award of $2000 to Mary.

VIII. Cross-Appeal of Attorney Fees.

On cross-appeal, Mary argues the trial court should have awarded her an additional $1000 in attorney fees. We disagree. We find the trial court's award of $2000 was fair and reasonable.

Mary has requested $2000 in attorney fees to defend this appeal. An award of attorney fees on appeal is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). Although she successfully defended the trial court's decision on appeal, she has not prevailed on her cross-appeal. We accordingly limit Mary's award of appellate attorney fees to $500.

AFFIRMED.