

IN THE COURT OF APPEALS OF IOWA

No. 8-300 / 97-1761

**IN RE THE MARRIAGE OF SALLY JANE TAYLOR AND STEVEN PAUL
TAYLOR**

Upon the Petition of
SALLY JANE TAYLOR,
Appellee,

And Concerning
STEVEN PAUL TAYLOR,
Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

Steven appeals certain economic provisions in the parties' dissolution of marriage decree. **AFFIRMED.**

Richard D. Raymon, Cedar Rapids, for appellant.

Karen A. Volz of Ackley, Kopecky & Kingery, Cedar Rapids, for appellee.

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

VOGEL, J.

Steven Taylor appeals from certain economic provisions in the parties' dissolution of marriage decree. We concur with the district court's determinations and therefore affirm.

Background facts. Steven and Sally Taylor were married in 1974. They had two children; however, only Katherine, born in May of 1980, was a minor at the time of their dissolution of marriage trial. The parties agreed that Sally should have primary physical care of Katherine and Steven would be allowed liberal visitation.

On August 18, 1998, the district court filed a judgment and decree dissolving the parties' marriage. In addition to making a property division, the court ordered Steven to pay \$581 per month in child support and \$300 per month in alimony, to be increased to \$500 per month following the termination of his support obligation for Katherine. The alimony is to terminate upon Sally's death, remarriage or cohabitation, or until she receives pension and Social Security benefits. Steven appeals.

Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 453 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

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I. Retirement plans and life insurance valuations. Steven first argues the court erred in valuing his 401(k) plan and IRA at the time of trial, August of 1997, rather than the time of separation, September of 1996.¹

Partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa App. 1995). To make an equitable distribution of assets, the court must first determine what assets are available to be allocated between the spouses. To do this, the court must identify and value the assets of the parties, both jointly and separately. The value of the assets then should be determined as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa App. 1994); *In re Marriage of Klein*, 522 N.W.2d 625, 628 (Iowa App. 1994). Assets are then equitably, not necessarily equally, divided under the circumstances after considering the criteria delineated in Iowa Code section 598.21(1). *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa App. 1997).

Steven argues that Sally made no contributions to the growth of these assets during the time between their separation and trial, and therefore the 401(k) and IRA accounts should be valued from the date of separation. However, the growth in these

¹ The precise value of these assets on the date of separation and date of trial were not produced in the record. The best information available is as follows: Steven's IRA had a value of \$39,668.88 on November 29, 1996, and had increased to a value of \$41,499.78 by June 30, 1997. Steven's 401(k) had a value of \$22,356.98 as of October 4, 1996, and had increased to a value of \$23,871.58 by April 4, 1997.

assets was mainly due to investment return and market upsurge, and not from contributions made by Steven or Sally during that time. We have held that similar increases in the value of assets of marital property are correctly valued as of the date of trial. *See Id.*

Steven also argues the court erred in assigning an \$18,000 value to his life insurance policy, its value at the time of separation, rather than giving it its value at the time of trial, \$908. However, the court found that Steven had withdrawn funds without Sally's knowledge and disposed of the bulk of this asset in reaction to her filing for divorce. Conduct of a spouse which results in the loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable division of property. *See In re Marriage of Johnson*, 350 N.W.2d 199, 202 (Iowa 1984); *In re Marriage of Williams*, 421 N.W.2d 160, 164 (Iowa App. 1988); *In re Marriage of Burgess*, 568 N.W.2d 827, 828 (Iowa App. 1997). Moreover, in making the distribution, the court took into consideration the \$2,575 of marital debt Steven paid off with part of the money. The court correctly valued the life insurance at the time of the trial, but also considered the earlier value and how, as marital property, it was dissipated by one party. We find no error in the court's equitable property allocation.

We further decline to disturb the district court's entry of a qualified domestic relations order (QDRO) in response to Steven's request to pay Sally a cash settlement.

The preferred method of valuation of a pension benefit is to divide the plan through a qualified domestic relations order which in essence separates the pension rights into two separate accounts. This allows the court to allocate other assets equitably and assures similar retirement security for both spouses. *McLaughlin*, 526 N.W.2d at 344.

II. Child support. Steven next argues the court erred in calculating his child support obligation. He contends the court should not have considered his prior overtime wages because he will unlikely have overtime income in the future.

Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes; however, if overtime pay appears to be an anomaly or is uncertain or speculative, a deviation from the child support guidelines may be appropriate. See *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992); *In re Marriage of Close*, 478 N.W.2d 852, 854 (Iowa App.1991). A parent's child support obligation should not be so burdensome that the parent is required to work overtime to satisfy it. *Brown*, 487 N.W.2d at 333; *Close*, 478 N.W.2d at 854.

Steven has worked for UPS throughout the parties' marriage and admitted at trial that some overtime has always been mandatory and that he has consistently taken advantage of additional overtime offered in the past. We find the court correctly included overtime as part of Steven's gross income.

Steven further argues that the court erred in failing to calculate Sally's income based on a forty-hour week and in determining her earning capacity.

It is appropriate to consider earning capacity rather than actual earnings in applying the Uniform Child Support Guidelines. *In re Marriage of Raue*, 552 N.W.2d 904, 906 (Iowa App. 1996) (citation omitted). However, this approach requires a finding that the use of actual earnings would create a substantial injustice or adjustments are necessary to provide for the needs of the children and to do justice between the parties. *Id.*

Sally developed a house-cleaning business and began working for the first time in more than twenty years shortly after the parties separated. While she has been relatively successful in her business, it has not become a full-time job. As Sally has no extensive history of earnings, we find no error in the court's application of Sally's current earnings to the child support guidelines. Should Sally's income increase substantially in the future, Steven can petition to modify his support obligations.

III. Alimony. Steven argues the court erred in ordering him to pay alimony to Sally. Alternatively, Steven requests that alimony be reduced to \$150 per month and end when Katherine graduates from high school.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa App. 1996). Alimony may be used to remedy inequities in a marriage and compensate a

spouse who leaves the marriage at a financial disadvantage. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). We consider alimony and property distribution together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another. *McLaughlin*, 526 N.W.2d at 345. Before awarding alimony, the district court must consider the factors listed in Iowa Code section 598.21(3).

Sally and Steven were married for approximately twenty-three years. Steven, aged forty-eight at the time of trial, has worked for UPS since the parties' marriage in 1974 and receives substantial benefits through his employment. Sally, aged forty-six at the time of trial, stopped working early in the marriage when the parties' first child was born. She has only recently reentered the work force and earns approximately one-fifth as much as Steven. Steven argues that the marital assets Sally received and her working income leave her in a similar financial situation as before their dissolution. However, after reviewing the facts and the record, we conclude the award of alimony is appropriate. We decline to modify the district court's initial award nor the increase upon the termination of Steven's child support obligation.

IV. Attorney fees. Sally requests appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). 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 district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa App. 1997). Upon review of the parties' financial situations, we award \$1,000 in appellate attorney fees to Sally. We assess costs on appeal to Steven.

Having reviewed all arguments properly before us on appeal, we affirm the district court.

AFFIRMED.