

IN THE COURT OF APPEALS OF IOWA

No. 4-606 / 94-806

**FILED**

APR 28 1995

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF MARLENE FAYE ALLEN AND  
RICHARD K. ALLEN**

Upon the Petition of  
**MARLENE FAYE ALLEN,**

Appellant,

And Concerning  
**RICHARD K. ALLEN,**

Appellee.

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Appeal from the Iowa District Court for Story County, Gary L. McMinimee,  
Judge.

Marlene Allen appeals various economic provisions of the parties' dissolution  
decree. **AFFIRMED.**

Thomas J. Cahill of Cahill Law Offices, Nevada, for appellant.

Richard O. Parker of Parker Law Firm, Nevada, for appellee.

Considered by Donielson, C.J., and Hayden and Sackett, JJ.

**DONIELSON, C.J.**

Marlene and Richard Allen were married in 1961. None of their children were minors at the time of the dissolution decree.

In 1962, the parties moved to a 160-acre farm in Story County owned by Marlene's mother, Erma Rietz. The parties rented the farm from Erma until 1972 when Erma asked them to purchase the farm for \$80,000. For tax reasons, Erma sold Marlene and Richard the south eighty acres of the farm for \$48,000 and gave them the north 80 acres. The house is on the south eighty acres. Marlene and Richard signed a demand promissory note to Erma for the remainder of the \$80,000 purchase price.

The parties ran the farm themselves until about 1989, when Richard experienced back problems. They now have the land custom farmed. The land may be rented for \$115 per acre.

Beginning in 1972, Richard also worked a job off the farm. He is currently the parts manager at Ryerson Implement in Nevada. In 1993 he earned \$20,937 from this employment. Marlene did not work outside the home until 1989. Most recently, she was employed at Iowa State Redi-mix as a secretary. In 1993 she earned \$15,043. At the time of the dissolution hearing, she had been laid off and was not looking for other employment.

Marlene and Richard separated in 1992. Richard filed a petition for dissolution of their marriage in March 1993. The district court entered a dissolution decree on April 19, 1994. The court determined the parties purchased the farm for less than fair market value, and to that extent, the 1972 farm transaction was in part a gift. However, the court concluded that to the extent a portion of the farm had been a gift, it was a gift to both the parties. The court divided the parties' property about equally and ordered Richard to pay Marlene alimony of \$75 per month until 2005 or

the death of either party. Marlene received the south 80 acres of the farm, which includes the family home. The district court concluded that each party should pay their own attorney fees and ordered Richard to pay the costs of the action. Marlene now appeals.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 311, 332 (Iowa 1992).

II. Marlene contends the property division was not equitable to her. She states the north eighty acres of the farm was a gift solely to her and should have been set aside. She argues that only the south eighty acres, which the parties purchased, were subject to division.

The partners in 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). The Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each particular circumstance. *Id.*

Iowa Code section 598.21(1) (1993) states, "the court shall divide all property, except inherited property or gifts received by one party, equitably between the parties." The intent of the donor and the circumstances of the gift or inheritance control whether the gift or inheritance is to be set off in the dissolution. *In re Marriage of Hoffman*, 493 N.W.2d 84, 89 (Iowa App. 1992).

In the present case, we agree with the district court's conclusion that the gift was made to both parties. Both Richard and Marlene were active in the farm operation. The deed which gave them the north eighty acres was made out to Richard

and Marlene. Furthermore, this deed was only part of the total transaction in which Erma transferred the 160-acre farm to the parties for \$80,000. We determine the entire farm was properly considered as marital property.

Marlene recognizes the district court attempted to equalize the property distribution. We conclude this result is fair under the circumstances of the case. We affirm the division of property between the parties.

**III.** Marlene claims the district court should have awarded her a greater amount of alimony. She points out that she was unemployed at the time of the dissolution hearing, and was uncertain whether she would be rehired. She also points out that she has only a few years of work experience. Furthermore, Marlene states that she has few employment skills. She believes these factors show the present award of alimony was insufficient.

Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an absolute right; an award depends upon the circumstances of each particular case. *In re Marriage of Whelchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). When determining the appropriateness of alimony, the court should consider the earning capacity of each party. *In re Marriage of Oler*, 451 N.W.2d 9, 13 (Iowa App. 1989).

We find Marlene has the ability to earn annual income of at least \$15,000, which is what she was earning before she was laid off. In addition, Marlene may receive rent from the south eighty acres of the farm. In view of these facts, we affirm the award of alimony of \$75 per month until September 2005.

**IV.** Marlene contends the district court abused its discretion by not awarding her trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. To overturn an award the complaining party must show that the trial court abused its discretion. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App.

1991). We find no abuse of discretion in the present case. The parties received a nearly equal amount of property, and we find each has the ability to pay his or her own trial attorney fees.

Marlene also seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *Id.* For the reasons discussed above, we find each party should pay his or her own attorney fees for this appeal.

We affirm the district court on all issues raised in this appeal. Costs of the appeal are assessed to Marlene Allen.

**AFFIRMED.**