

IN THE COURT OF APPEALS OF IOWA

No. 0-072 / 09-1215
Filed March 24, 2010

IN RE THE MARRIAGE OF SHIRLEY A. TRACY AND JOSEPH K. TRACY

Upon the Petition of
SHIRLEY A. TRACY,
Petitioner-Appellee,

And Concerning
JOSEPH K. TRACY,
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson,
Judge.

Joseph Tracy appeals from the economic provisions of the decree
dissolving his marriage to Shirley Tracy. **AFFIRMED.**

Robert L. Sudmeier and William N. Toomey of Fuerste, Carew, Juergens
& Sudmeier, P.C., Dubuque, for appellant.

Robert L. Day, Jr. of Day & Hellmer, P.C., Dubuque, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, J.

Joseph Tracy appeals from the economic provisions of the decree dissolving his marriage to Shirley Tracy. He contends the property division was inequitable. He also seeks an award of his appellate attorney fees.

Joseph and Shirley were married in 1993. At the time of the marriage, Shirley owned a home that was sold one year later for approximately \$62,000. The funds from the sale were used to purchase a business and adjoining residence. This property was condemned as part of a highway project, and the parties received reimbursement in the amount of \$127,000, plus approximately \$70,000 for relocation expenses. With this money, the parties purchased a new residence.

During the marriage, Shirley also received significant monthly gifts from her mother up until her mother's death in 2004. Her mother left the bulk of her estate to Shirley. Shirley put \$250,000 of her inherited monies into a joint investment account. Expenditures were made from this account to improve the parties' home. Eventually, Shirley moved the money to a bank account in her name alone. At the time of trial, the account was valued at approximately \$152,000.

Shirley filed for dissolution in 2008. The parties stipulated to the values of their assets and liabilities and whom should receive each. A trial was held for the narrow purpose of determining (1) whether a credit card debt assigned to Joseph should have been considered a marital liability and (2) whether Joseph was entitled to an equalization payment and, if so, in what amount. The district court

determined no equalization payment should be made, and it is from this ruling Joseph appeals.

We review dissolution proceedings de novo. Iowa R. App. P. 6.907 (2007). We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(g).

In allocating the parties' assets and debts, the court strives to make a division that is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution; rather, the decisive factor is what is fair and equitable in each particular case. *Id.* The court considers the factors listed in Iowa Code section 598.21(5) (2007) in determining what is equitable. This includes the length of the marriage, the property brought into the marriage by each party, the parties' contribution to the marriage, their age and physical and emotional health, the parties' earning capacities, other economic circumstances, and other factors relevant to an individual case. See Iowa Code § 598.21(5). Gifted and inherited property is not to be divided. *Id.*

In considering the relevant factors, we conclude the equities do not require Shirley to make an equalization payment to Joseph. Joseph and Shirley were the only witnesses called to testify. As noted by the trial court, "The testimony of both parties for good or ill is lacking in specificity, very little verification."

Although Shirley received more in assets, the trial court found the difference reflects the amount of gifted and inherited property she received during the marriage. Shirley also entered the marriage with considerably more in assets than did Joseph. On our de novo review we agree with the trial court's findings. Because the economic provisions of the dissolution decree are equitable, we affirm.

Joseph requests an award of his 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 Ct.App.1997). We decline to award Joseph his appellate attorney fees. Costs of the appeal are assessed to Joseph.

AFFIRMED.