

**IN THE COURT OF APPEALS OF IOWA**

No. 6-195 / 05-1423

Filed May 10, 2006

**IN RE THE MARRIAGE OF CHERYL ANN ROSEBURROUGH  
AND MICHAEL J. ROSEBURROUGH**

**Upon the Petition of  
CHERYL ANN ROSEBURROUGH,**  
Petitioner-Appellee,

**And Concerning  
MICHAEL J. ROSEBURROUGH,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Marshall County, Timothy J. Finn,  
Judge.

Former wife appeals from the spousal support, property division, and  
attorney fee provisions of the decree dissolving the parties' marriage.

**AFFIRMED AS MODIFIED.**

Barry Kaplan and Melissa Nine of Kaplan & Frese, L.L.P., Marshalltown,  
for appellant.

Sharon Greer of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

**ZIMMER, P.J.**

Cheryl Roseburrough appeals from the spousal support, property division, and attorney fee provisions of the decree dissolving her marriage to Michael Roseburrough. While we affirm the district court's alimony award, we modify its property division to award Cheryl a portion of a 401(k) account that had been awarded entirely to Michael.

**I. Background Facts and Proceedings.**

Cheryl and Michael were married in 1970. Three children were born during the marriage. All of the children are now adults, and their welfare is not at issue in these proceedings. Michael was the family's primary income provider. Although Cheryl occasionally obtained part-time employment outside of the home, her primary role was as caretaker of the parties' children and residence.

The parties separated in October 2004, and Cheryl filed a petition to dissolve the parties' marriage the following month. The petition came before the district court in July 2005. At the time of trial Cheryl was fifty-three years old, possessed a ninth-grade education,<sup>1</sup> and was unemployed. She has experienced several health problems including a diagnosis of fibromyalgia with chronic pain.

Michael was fifty-four years old and in good health at the time of trial. He has a bachelor's degree and master's degree. Michael began working for Celestica (formally Motorola) in 1982. The trial court found that Michael is currently earning approximately \$74,000 per year as a production manager. The

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<sup>1</sup> After the parties' children reached adulthood and left the marital home Cheryl pursued, but did not obtain, her GED.

company Michael works for is restructuring, and the future of his employment is uncertain.

In an August 2005 dissolution decree, as modified by a post-hearing order, the district court divided the parties' property and awarded Cheryl spousal support. Cheryl received the marital home, which was valued at \$84,000. She was also assigned the remaining mortgage of \$20,600, and ordered to remove Michael as an obligor. Michael was awarded his one-half interest in a newly-acquired residence, which had no net value. Each party was awarded his or her personal vehicle and other personal property. The court also awarded each party one-half of a Celestica 401(k) account valued at \$47,846. The court directed that the parties would share equally in retirement benefits of a Motorola pension plan. This plan will generate approximately \$360 per month for each of the parties when Michael is eligible for retirement. Michael was awarded a Motorola 401(k) account, valued at \$138,838.

The court awarded Cheryl \$10,000 in cash that Michael had given her at the time the parties separated and were dividing property. According to Michael, he gave Cheryl the funds, which had originated as a gift from his father, "because we were going to get divorced" and "I figured that she would need it because of the divorce proceedings." Michael was awarded the funds remaining from a \$28,000 inheritance from his father, which totaled approximately \$11,335, as well as approximately \$1500 in funds from two bank accounts. Each party was ordered to pay indebtedness he or she had incurred since the separation, "except that Michael shall pay the VISA credit card bill (\$2588) and his dental

bills.” It appears Michael had expended at least a portion of the inherited funds on family or pre-dissolution expenses, including dental work.

Michael was ordered to pay Cheryl \$1250 per month in spousal support until either (1) November 2008, the time the current mortgage on the marital residence was scheduled to be paid off, or (2) the sale of the marital residence by Cheryl, were such a sale to occur prior to November 2008. Upon the earlier of either occurrence, Michael’s spousal support obligation was ordered reduced to \$700 per month, to be paid until either Michael’s sixty-second birthday or the death of either party. Finally, the court ordered the parties to pay their own trial attorney fees.

Cheryl appeals. She contends she is entitled to \$2000 per month in spousal support until her remarriage or the death of either party, to be secured by a \$250,000 life insurance policy. She further contends the property division is inequitable,<sup>2</sup> that the district court abused its discretion in ordering her to pay her own attorney fees, and that she should be awarded attorney fees on appeal.

## **II. Scope and Standard of Review.**

Our scope of review is de novo. Iowa R. App. P. 6.4. Although not bound by the district court’s factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

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<sup>2</sup> To the extent Cheryl is challenging the value fixed by the district court for any items of property, her challenge is without merit. The court’s valuations are within the permissible range of the evidence, and we decline to disturb them on appeal. See *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999).

### III. Spousal Support and Property Division.

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.* In determining what division would be equitable, courts are guided by the criteria set forth in Iowa Code section 598.21(1) (2005). These include the length of the marriage, each party's contribution to the marriage, the parties' respective health, and the parties' earning capacities and educational and employment backgrounds. *Id.*

An award of spousal support is used as a means of compensating the party who leaves the marriage at a financial disadvantage, particularly where there is a large disparity in earnings. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). It is a discretionary award, dependent upon each party's earning capacity and present standard of living, as well as the ability to pay and the relative need for support. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998). Courts are guided by section 598.21(3), which mandates consideration of a number of factors, such as the length of the marriage, the parties' ages and health, the earning capacity of the spouse seeking support, and that spouse's ability to become self-sufficient.

The property division and an award of spousal support should be considered together in evaluating the individual sufficiency of each. *In re Marriage of Earsa*, 480 N.W.2d 84, 85 (Iowa Ct. App. 1991). In a marriage of long duration, an award of spousal support and a substantially equal property

division may be appropriate, especially where there is a great disparity in earning capacity. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993).

In light of the foregoing considerations and the pertinent facts of this case, it is clear Cheryl is entitled to a spousal support award in addition to a share of the parties' property. This is a marriage of long duration, and Cheryl's age, health, and earning capacity make such an award appropriate. However, contrary to Cheryl's assertions, we conclude the support set by the district court is equitable.

In support of her contention that the support award should be increased, Cheryl asserts it is virtually impossible for her to be gainfully employed, given her health concerns and her lack of education and experience. We agree that Cheryl's health problems are real. However, like the district court, we conclude Cheryl is capable of employment that will, in combination with the support and property awards, be adequate to meet her needs. We reach this conclusion, in part, because we further determine the property division should be modified to award Cheryl a greater share of the parties' assets.

Under the division made by the district court it appears that, in addition to sharing equally in the Motorola pension plan, Cheryl received a property award with a net value of approximately \$117,000, and Michael received a property award with a net value of approximately \$172,000.<sup>3</sup> Cheryl contends that this

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<sup>3</sup> Our calculation of the parties' net property awards is based upon our own review of the individual assets and debts subject to division. We note that the trial court credited the existing mortgage on the marital home to Michael when making its property division, even though that debt had been specifically assigned to Cheryl. As a result, the home awarded to Cheryl by the court was assigned a value of \$84,000 when in fact it had equity of only \$63,400.

disparity is inequitable and should be resolved by awarding her one-half of the \$138,838 Motorola 401(k) account. Michael responds the division made by the district court is fair in light of the fact that Cheryl failed to obtain additional education or experience after the parties' children reached adulthood, and "given the obstructions Cheryl placed in Michael's career path" when she insisted that the parties move to back to Iowa, primarily so that Cheryl could be closer to her aging mother.<sup>4</sup>

Given that this is a marriage of thirty-five years, that Cheryl contributed extensively to the marriage, and that Cheryl's earning capacity is significantly lower than Michael's, we conclude such a large disparity in the net property division is inequitable. We do not, however, believe that Cheryl is entitled to a full one-half of the Motorola 401(k) account, because this would result in Cheryl receiving a net property award substantially higher than that received by Michael. We conclude, under the circumstances of this case, that equity dictates an approximately equal net property division. We accordingly modify the district court's decree to award Cheryl twenty percent of the Motorola 401(k) account.<sup>5</sup>

#### **IV. Attorney Fees.**

Cheryl asserts the district court erred when it ordered each party to pay his or her own trial attorney fees. Such awards are within the discretion of the district court, and should be made only if they are fair and reasonable in light of the parties' respective financial positions. *In re Marriage of Grady-Woods*, 577

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<sup>4</sup> Following their marriage, the parties moved to Arizona. The family returned to Iowa several years prior to the dissolution hearing.

<sup>5</sup> In reaching this conclusion, we note that we find no inequity in the parties' own pre-dissolution treatment of the gifts and inheritances Michael received from his father.

N.W.2d 851, 854 (Iowa Ct. App. 1998). Cheryl asserts the district court abused its discretion because Michael has superior means and she is unable to earn an income. However, as Cheryl herself notes, at the time of trial \$1100 had been paid toward her attorney fees from the parties' joint checking account. Moreover, while it may be somewhat difficult for Cheryl to obtain employment, she is not unemployable. Under the circumstances, we cannot conclude the court abused its discretion in ordering Cheryl to pay her own attorney fees.

Cheryl also requests appellate attorney fees. Such an award is discretionary and is determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We decline to award Cheryl appellate attorney fees.

#### **V. Conclusion.**

We modify the property division in this matter to award Cheryl twenty percent of the Motorola 401(k) account. The remainder of the district court's decree is affirmed. Costs of appeal are assessed equally to the parties.

**AFFIRMED AS MODIFIED.**