

IN THE COURT OF APPEALS OF IOWA

No. 6-280 / 05-1096

Filed May 24, 2006

**IN RE THE MARRIAGE OF MARY A. HENNESSEY
AND WILLIAM R. HENNESSEY**

**Upon the Petition of
MARY A. HENNESSEY,**
Petitioner-Appellee,

**And Concerning
WILLIAM R. HENNESSEY,**
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, David M. Remley,
Judge.

Respondent appeals from provisions of the decree dissolving his marriage
with petitioner. **AFFIRMED.**

Benjamin W. Blackstock of Blackstock Law Offices, Cedar Rapids, for
appellant.

Stephen B. Jackson, Jr. and Stephen B. Jackson of Jackson & Jackson,
P.L.C., Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

HUITINK, J.

William Hennessey appeals from the economic provisions of the decree dissolving his marriage with Mary Hennessey. We affirm.

I. Background Facts and Proceedings

William and Mary were married in 1950 and separated in 1993. The parties have three adult children: George, Chris, and Joanne; and six grandchildren. At the time of trial, Mary was eighty-six years old, and William was seventy-nine years old.

Mary filed a petition for separate maintenance in August 2002. William filed an answer to the petition and a counter claim for dissolution of marriage. The parties entered into a partial stipulation setting forth their agreement with respect to the division of real estate, personal property, automobiles, attorney fees, debts, savings accounts, stocks, bonds, retirement plans, other investments, and court costs. Therefore, the only issues before the district court at trial were the division of stock in Viola-Mar, Inc., the closely-held family business; alimony; and a cash payment to Mary to equalize the property division. We limit our discussion of the facts to the sole issue raised on appeal, the district court's division of stock in Viola-Mar.

Viola-Mar was incorporated in 1981. Although some of the real estate transferred to the corporation was owned jointly by Mary and William, all of the stock (1000 shares) was issued solely to William. In 1991 the excavating business owned by William and George merged with Viola-Mar. William received an additional 360 shares of stock, and George received 240 shares. Also in 1991, commercial real estate owned by the parties and their children was

transferred to Viola-Mar. As a result of the transfer, William received an additional forty-six shares of stock. Mary and the children each received eight shares of stock. Thus, there were 1678 outstanding shares of Viola-Mar stock.

On the advice of his accountant and attorney, William began gifting Viola-Mar stock to Mary and the children on an annual basis for several years. Between 1981 and 1998, William transferred 374 shares of Viola-Mar stock to Mary. Combined with the eight shares she received earlier, Mary owned 382 shares of stock. Both William and Mary began transferring stock to their children, each party giving six shares of stock to each child annually between 1993 and 1998.

In 1999 the shareholders of Viola-Mar hired a new accountant, who encouraged William and Mary to accelerate their gift giving. A number of meetings between William, Mary, and the children, along with numerous accountants and attorneys, followed. The parties disputed the result of the meetings. According to Mary, she and William agreed to give away their remaining Viola-Mar stock to the children and grandchildren, retaining only a fraction of a share each. William contended the only agreement was that he would transfer his shares to his children and grandchildren under the terms of his will.

In December 2000 Mary transferred all her remaining stock in Viola-Mar (382 shares) to her children and grandchildren. William made no further transfers and still owned 523.8 shares at the time of trial.

Upon the advice of its accountant, Viola-Mar became a subchapter S corporation in 2002. As a result of the conversion to subchapter S, the company

shareholders are required to report corporate income based on their stock ownership. The shareholders receive a distribution from the corporation based on their stock ownership. William receives a distribution of approximately \$8780 per month. Since Mary no longer owns stock, she is not entitled to receive distributions from the corporation.

In its findings of fact, the district court set forth each party's monthly income, noting "[t]he primary difference between Bill's income and Mary's income is Bill's monthly payment from Viola-Mar, Inc., of \$8700 and his large social security payment, which exceeds Mary's by approximately \$800 per month."¹ The decree of dissolution awarded one-half of William's 523.8 shares to Mary and provided that Mary shall be entitled to receive distributions from Viola-Mar on a monthly basis based on her ownership of 261.9 shares. The district court's decree did not award alimony to either party, noting that the division of property in the partial stipulation and the decree would "provide each party with sufficient income to maintain a standard of living consistent with their standard of living during the marriage." In its ruling on William's motion pursuant to Iowa Rule of Civil Procedure 1.904(2), the district court further explained it had "considered the assets owned by the parties at the time of trial in ruling upon the disputed issues of distribution of Viola-Mar, Inc., stock and alimony."

William appeals, arguing the district court erred in disregarding his transfer to Mary of Viola-Mar stock for estate planning purposes in dividing the parties' assets. Mary requests an award of appellate attorney fees.

¹ Bill's social security payment is \$1346 per month. Mary's is \$535 per month.

II. Standard of Review

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them. Iowa R. App. P. 6.14(6)(g). We accord the trial court considerable latitude in resolving economic provisions of a dissolution decree and will disturb a ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

III. Property 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 Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). The distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (2001). *Id.*

Although William only questions the district court's division of the Viola-Mar stock, we cannot consider the issue in isolation. Instead, we must look to the economic provisions in the decree as a whole in assessing the equity of the property division. *Dean*, 642 N.W.2d at 325.

William argues his transfer of stock to Mary during the marriage, for estate tax equalization, should be included in an equitable property division. He

contends the district court erred in concluding the stock should be divided based on ownership at the time of trial.

As a general rule, “we divide the property the parties own *at the time of the dissolution.*” *In re Marriage of Duggan*, 659 N.W.2d 556, 561 (Iowa 2003). “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) (rejecting former husband’s argument that certain stock should not be considered a marital asset at all because he purchased it with borrowed money after the separation).

The district court properly considered ownership of the stock at the time of trial when determining an equitable property division. Both parties contributed substantially to the accumulation of the stock, a marital asset. The district court noted the disparity in income between the parties was due primarily to William’s payment from Viola-Mar. The court’s division of the stock served to nearly balance the parties’ incomes, and at the same time eliminated the need for alimony. *See In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998) (“Property division and alimony should be considered together in evaluating their individual sufficiency.”). Viewing the property division as a whole, we conclude the district court’s decision was equitable under the circumstances.

IV. Appellate Attorney Fees

An award of appellate attorney fees is not a matter of right, but rests within the court’s discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We 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 Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We deny Mary's request for an award of appellate attorney fees.

AFFIRMED.