

IN THE COURT OF APPEALS OF IOWA

No. 8-358 / 07-0939
Filed October 1, 2008

IN RE THE MARRIAGE OF PAMELA J. HANSEN AND DALE I. HANSEN

**Upon the Petition of
PAMELA J. HANSEN,**
Petitioner-Appellee,

**And Concerning
DALE I. HANSEN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

Dale Hansen appeals from the economic provisions of the decree dissolving his marriage to Pamela Hansen. **AFFIRMED AS MODIFIED.**

Terry D. Parsons of Olsen & Parsons, Cedar Falls, and D. Raymond Walton, Waterloo, for appellant.

Jay Roberts, Waterloo, for appellee.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

EISENHAUER, J.

Dale Hansen appeals from the economic provisions of the decree dissolving his marriage to Pamela Hansen. He contends the district court abused its discretion in denying his motion for new trial. He also contends it erred in awarding alimony to Pamela. In the alternative, he argues the amount of the alimony should be reduced. Dale also contends the division of property was inequitable. Finally, he contends the court abused its discretion in awarding Pamela \$2500 in attorney fees. Pamela requests appellate attorney fees. We affirm as modified.

I. Background Facts and Proceedings. Dale and Pamela were married in 1974. On August 9, 2006, Pamela filed a petition for dissolution of the marriage. The parties' three children have reached adulthood, so the issues to be settled at trial were distribution of the property and spousal support.

At the time of trial, Pamela was fifty-one years old. She is employed at Mediacom as a dispatcher, earning \$16.28 per hour. She works an average of fifteen to seventeen hours overtime every two weeks. Although in good health, Pamela takes medication for Attention Deficit Disorder and headaches. Medical and dental insurance cost her \$380 per month.

Dale was also fifty-one years old at the time of trial. He is employed at John Deere earning twenty-seven dollars per hour and is eligible to retire. In 2006, he received a \$3300 bonus. Dale suffers from diabetes and has struggled with depression and abuse of alcohol and methamphetamines.

The parties agreed to the basic allocation of assets. However, the trial court was left to determine questions regarding valuation of certain property,

whether Pamela is entitled to spousal support, and whether Pamela should be awarded an equalization payment.

In its April 12, 2007 decree, the district court noted what it termed as “vindictiveness” by Dale. Dale had stated he would rather see Pamela dead than share in any part of his pension. It noted Dale had “chosen to list petty items in his application for property distribution” and assigned “irresponsibly high values” to items that are “worthless or essentially worthless.” The court faulted Dale for listing a \$14,000 car loan and a \$21,000 student loan debt in his application. Although both Dale and Pamela are co-signers on these loans, which were obtained to benefit two of their children, the court found neither “has been, nor in all probability will ever be liable to personally pay either of these debts.” Finally, the court cited Dale’s request to award a 401(k) account Pamela had owned and cashed in 2001. The proceeds were used to pay for repairs to the family home, bills, and living expenses while Dale was not working due to mental health and substance abuse issues.

The court valued the family home at \$120,000 and awarded it to Pamela. Dale was awarded his \$160,000 John Deere deferred compensation 401(k) plan, and was ordered to pay Pamela \$40,000 to offset the award. The court awarded Pamela one-half of Dale’s retirement pension. Finally, the court ordered Dale to pay Pamela spousal support in the amount of \$750 per month until the death of either party, or Dale’s retirement.

Dale filed a motion for new trial, alleging the district court’s ruling “was influenced by passion or prejudice.” He also alleged there was newly discovered, material evidence regarding “another bank account that the

Petitioner had in 2001 and 2002 that could have secreted money drawn from her 401k plan at the time.” The district court overruled the motion without hearing.

II. Scope and Standard of Review. We review dissolution of marriage proceedings de novo. Iowa R.App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). Although we are 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).

Our scope of review of a ruling on a motion for a new trial depends on the grounds asserted in the motion. *In re Marriage of Wagner*, 604 N.W.2d 605, 609 (Iowa 2000). To the extent the motion is based on a discretionary ground, we review it for an abuse of discretion. *Id.* An abuse of discretion is found when the trial court has clearly exercised its discretion on untenable grounds or acted unreasonably. *Id.*

III. New Trial. Dale first contends the district court erred in denying his motion for new trial.

We conclude the district court did not abuse its discretion in denying Dale's motion for new trial. With respect to the issue of any prejudice shown by the district court in its ruling, Dale complains of how the case was decided, not how it was tried. Because this court reviews the ruling by viewing the record de novo, new trial is not necessary. *Cf. In re Marriage of Wagner*, 604 N.W.2d 605, 609 (Iowa 2000) (finding a new trial need not be granted on the whole case where the error is limited to certain issues).

Dale also contends newly discovered evidence necessitates the grant of a new trial. Iowa Rule of Civil Procedure 1.1004(7) allows a party to seek a new trial on the ground material evidence was discovered which could not with reasonable diligence have been discovered and produced at trial. A party seeking a new trial on such grounds must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if a new trial is granted. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). Under Iowa law, “newly discovered evidence” sufficient to merit a new trial is evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time. *Id.* at 762-63. Motions for new trial based on newly discovered evidence are not favored. *Id.* at 762.

New trial is also not warranted on the basis of newly discovered evidence. The evidence Dale refers to is his discovery of the existence of another bank account into which Pamela “*could have* secreted money drawn from her 401k plan at that time.” (Emphasis added.) Because the secreting of money is only speculation, Dale cannot show the evidence would probably change the result if a new trial is granted.

IV. Spousal Support. Dale next contends the court erred in ordering spousal support in the amount of \$750 per month until his retirement or either party’s death.

Spousal support is not an absolute right. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). Instead, an award of spousal support depends on the circumstances of each particular case. *Id.* When determining the appropriateness of spousal support, the court must consider the length of marriage, the age and health of the parties, and the distribution of property. Iowa Code § 598.21A(1)(a)-(c) (Supp. 2005). The court also considers “(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other.” *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (citation omitted).

Here, the parties were married for over thirty-three years. They were fifty-one years of age at the time of dissolution and still working, although Dale had the ability to retire. Dale earns twenty-seven dollars per hour and receives an annual bonus from his employer. Pamela earns \$16.28 per hour and works some overtime. Although Pamela must now pay \$380 per month to maintain health and dental insurance, Dale has coverage at no charge to him. In considering the long duration of the marriage, the parties’ respective earnings, and their expenses, we conclude an award of spousal support in the amount of \$750 per month until either party’s death or Dale’s retirement is warranted.

V. Property Distribution. Dale contends the property distribution is inequitable. His claim centers largely upon the district court’s valuation of the marital home and the \$40,000 equalization payment he was ordered to make to Pamela.

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 Bonnette*, 584

N.W.2d 713, 714 (Iowa Ct. App. 1998). Equitable distribution does not necessarily mean an equal division of property, nor does it mean a percentage division of the property. *Id.* In making this assessment, we consider the factors set forth in Iowa Code section 598.21(1). We use the date of trial as the most appropriate date to value assets, while recognizing the need for flexibility in making equitable distributions based on the unique circumstances of each case. *In re Marriage of Campbell*, 623 N.W.2d 585, 588 (Iowa Ct. App. 2001).

The district court awarded each party their personal property. Dale was awarded five vehicles, with a total value of approximately \$29,300. Pamela was awarded accounts totaling \$32,200 and her personal credit card debt in the amount of \$7500. Dale's retirement pension was ordered to be divided roughly equally, taking into account the year that Dale worked prior to the marriage.

The parties agreed that Pamela should receive the marital home, which the court valued at \$120,000. The parties also agreed Dale would receive his Deere & Company 401(k) plan, valued at \$160,000. In order to offset the difference in the value of the marital home and Dale's 401(k) plan, the court ordered Dale to pay Pamela \$40,000 to equalize the property distribution.

We conclude this award was equitable. Although Dale argues the home should have been valued at least \$132,000, we conclude the district court's valuation was within the permissible range of the evidence and decline to disturb it on appeal. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999) (holding we will defer to the trial court when valuations are accompanied with corroborating evidence). In order to offset the difference between the home's

value and the value of Dale's 401(k), a \$40,000 equalization payment is equitable.

In the alternative, Dale requests that the property distribution be equalized through a QDRO, as Pamela originally requested. Because Pamela does not object, we modify the decree to allow the \$40,000 be allocated to Pamela from the 401(k) by way of a QDRO.

VI. Attorney Fees. Finally, Dale contends the district court abused its discretion in awarding Pamela \$2500 in her trial attorney fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Awards of attorney fees must be fair and reasonable and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994). Based on the parties' respective earnings, we conclude the district court was within its discretion to award Pamela \$2500 in trial attorney fees.

VII. Appellate Attorney Fees. Pamela requests this court award her "additional attorney's fees of \$2,500 . . . because of the nature of this appeal and the extensive time involved in it." 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 Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). 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. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

After considering the property distribution and the parties' earnings, we decline to award Pamela appellate attorney fees.

VIII. Conclusion. We modify the district's decree to provide an equalization payment through the QDRO of Dale's 401(k), we affirm in all other respects. Costs of this appeal shall be paid by Dale.

AFFIRMED AS MODIFIED.