

**IN THE COURT OF APPEALS OF IOWA**

No. 8-367 / 07-1799  
Filed August 13, 2008

**IN RE THE MARRIAGE OF RONALD J. AVERY  
AND DEBBIE A. AVERY**

**Upon the Petition of  
RONALD J. AVERY,**  
Petitioner-Appellee,

**And Concerning  
DEBBIE A. AVERY,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Thomas N. Bower, Judge.

Debbie Avery appeals the district court's ruling in her dissolution proceeding. **AFFIRMED.**

Gary Boveia of Boveia Law Firm, Waverly, for appellant.

Thomas Langlas of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Huitink, P.J., and Mahan and Miller, JJ.

**MAHAN, J.**

This case was originally filed on June 25, 2008. Subsequent to that filing, the respondent-appellant filed a petition for rehearing pursuant to Iowa Rule of Appellate Procedure 6.28. This court granted the petition in order to give the case further consideration on those matters raised. The decision filed June 25, 2008, is vacated and the following decision is now filed of record.

Debbie Avery appeals the district court's ruling in her dissolution proceeding. She claims the district court erred in (1) requiring her to pay Ronald Avery an equity interest in the parties' real estate; (2) failing to award sufficient reimbursement alimony; (3) imputing her income; (4) valuing and distributing Ronald's 401(k) account; and (5) awarding her \$2000 in attorney fees instead of \$5000 as she requested. She also requests \$5000 in appellate attorney fees. We affirm.

**I. Background Facts and Proceedings.**

Ronald and Debbie Avery were married in 1993 and have three children: Tyler, born in November 1990; Brandon, born in April 1994; and Cody, born in November 2006. At the time of trial, Ronald was thirty-nine years old and Debbie was thirty-eight years old.

Ronald graduated from high school and attended college courses at Loras College and Northeast Iowa Community College, but did not obtain a degree. He began working for Hy-Vee in 1991, and has participated in the Hy-Vee manager training program. Ronald has worked in various capacities at Hy-Vee since 1991, and in April 2007 he accepted a position as a Hy-Vee store director in Vermillion, South Dakota. In that capacity, Ronald's annual income is \$65,000.

Debbie has no post-high school education. She began working at Hy-Vee part-time in high school. She has worked most of the marriage in a variety of positions, including doing daycare in the home, associate teaching at North Iowa Juvenile Detention Center, associate teaching at Castle Hill and working in different capacities at Hy-Vee. The majority of Debbie's work experience has been for Hy-Vee, including five years as a health and beauty care manager before she went on medical leave in August 2006 during her pregnancy with the parties' youngest son, Cody. Debbie has remained unemployed since that time.

Ronald filed a petition for dissolution on June 7, 2006. After a trial, the court awarded Debbie the family home at 348 Norris Court, with equity of \$33,000. It further ordered Debbie to pay Ronald a one-half equity interest in the home in the amount of \$16,500, plus interest at the rate of five percent within six months of the date of Debbie's remarriage should she remarry; within six months of the graduation from high school or eighteenth birthday of the parties' youngest son; or at the time the house is sold or refinanced—whichever occurs first.

The parties agreed to joint custody of the children. The parties further agreed that the children would remain in the physical care of Debbie. The court ordered Ronald to pay child support in the amount of \$1352 per month, based on his annual salary of \$65,000 and Debbie's imputed income of \$21,320. It also awarded alimony to Debbie in the amount of \$200 per month for a period of thirty-six months. The court further ordered Ronald's Hy-Vee 401(k) account,

valued at \$50,758, to be divided equally between the parties. Finally, it ordered Ronald to pay \$2000 toward Debbie's attorney fees.<sup>1</sup>

Debbie appeals the district court's division of the parties' home, imputation of her income, valuation and distribution of Ronald's 401(k) account, and alimony and attorney fees awards. She also requests appellate attorney fees.

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

We review dissolution decrees de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

## **III. Issues on Appeal.**

### **A. Division of Real Estate.**

Debbie argues the district court erred in ordering her to pay Ronald a one-half equity interest in the parties' home at 348 Norris Court in the amount of \$16,500, plus interest at the rate of five percent.<sup>2</sup> The district court ordered Debbie to pay Ronald's equity interest upon one of the following triggering events: within six months of the date of any remarriage by Debbie, within six months of the graduation from high school or eighteenth birthday of the parties' youngest son; or at the time the house is sold or refinanced. Debbie contends that the house should be awarded to her in full considering the property she brought into the marriage; the marital contributions she made caring for the

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<sup>1</sup> The court distributed further property and debts of the parties, but those matters are not on appeal and we will not address them.

<sup>2</sup> The parties do not dispute the district court's valuation of the house.

children; the financial assistance her family provided throughout the marriage; the contribution she made to increasing Ronald's earning capacity; the desirability of awarding the family home to her; and the needs she has for the home for raising the children. We find that Debbie's argument is without merit.

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 set forth in Iowa Code section 598.21(5) (Supp. 2005). 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).

In this case, the district court's distribution of the parties' marital home is equitable given the parties' premarital assets, financial and other contributions to the marriage, and present need for the home. Debbie is allowed to keep the house without paying Ronald for his one-half interest for up to seventeen years. Further, when Debbie does have to pay Ronald, she is only obligated to pay him one-half of the house's current equity value, plus five percent interest. We find the court's distribution of 348 Norris Court is equitable and within the range of the evidence. We find no reason to alter the real estate distribution and we affirm on this issue.

## **B. Alimony.**

Debbie next argues that the district court erred in failing to award sufficient reimbursement alimony. She contends that she should be awarded \$1000 per month in reimbursement alimony rather than \$200 per month ordered by the court. Debbie argues that Ronald is able to devote all his energies to his career, while her energies are consumed by the responsibilities of raising the parties' three sons. Specifically, Debbie notes that the two oldest sons have behavioral and medical needs that require substantial time and energy and she has no family in the area to assist her.

Reimbursement alimony "is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other." *In re Marriage of Anliker*, 694 N.W.2d 535, 541 (Iowa 2005) (citations omitted). Reimbursement alimony is similar to a property award and should be fixed at the time of the decree. *Id.* It is, however, based on future earning capacity rather than a division of tangible assets. *Id.* The court's duty to look at the future earning capacity of the spouses couples closely with a concern for loss of anticipated support, which is reimbursable through alimony. *In re Marriage of Probasco*, 676 N.W.2d 179, 185 (Iowa 2004). Reimbursement alimony is therefore most appropriate in cases where one spouse has obtained education during the marriage that will lead to a well-paying career but has not worked long enough to accumulate property to be shared with the sacrificing spouse.

Alimony is not an absolute right. *Anliker*, 694 N.W.2d at 540. Whether alimony is awarded depends on the circumstances of each particular case. *Id.*

In determining whether to award alimony, the district court is to consider the factors in Iowa Code section 598.21A(1). That section allows the court to consider (1) the length of the marriage, (2) the age and physical and emotional health of the parties, (3) the property distribution, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking alimony, and (6) the feasibility of the party seeking alimony becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Iowa Code § 598.21A(1)(a)-(f). We only disturb the district court's decision if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540.

In this case, we find that the district court's alimony award of \$200 per month for thirty-six months is equitable. The marriage between the parties was moderate in length and was not devoted almost entirely to the educational advancement of one spouse. Debbie has been active in the job market during much of the marriage. She has extensive retail work experience. In particular, Debbie was the health and beauty care manager at Hy-Vee for five years before she went on medical leave in August 2006 during her pregnancy with the parties' youngest son. Since that time, Debbie has rejected two offers from Hy-Vee to return to work. The district court noted that although Debbie's "belief that she should be a stay-at-home mom is admirable, [it] is not realistic given the financial status of the parties."

Moreover, the district court left open the possibility for spousal support modification should Ronald's income soar if the Vermillion, South Dakota store shows profits. Given these facts, we cannot find that Debbie sacrificed for the

benefit of Ronald's earning capacity. The parties are in reasonably good health, their property is equitably distributed, and Debbie has an earning capacity sufficient to be self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. We conclude the district court's award of alimony is equitable and affirm on this issue.

### **C. Imputed Income.**

Debbie contends the court should not have imputed her income at \$21,320 for child support purposes because she is unemployed. Debbie argues the court should have instead imputed no income to her and awarded child support based solely on Ronald's earnings of \$65,000 annually.

Debbie has been active in the job market during much of the marriage. For the five years prior to her medical leave for birth of the parties' youngest son, Debbie was the health and beauty care manager at Hy-Vee, earning in excess of \$30,000.

Debbie argues that the district court failed to make a finding that if actual earnings were used, substantial injustice would result. *In re Marriage of Bonnette*, 492 N.W.2d 717, 722 (Iowa Ct. App. 1992). However, we conclude the district court made an appropriate finding of substantial injustice when the decree is read as a whole. The district court explained its reasoning in that portion of the decree dealing with child support as well as that portion of the decree that dealt with spousal support. Our court has stated:

While we respect a parent's wish to remain at home with his or her children, we cannot look at this fact in isolation in determining earning capacity. We reject any suggestion in *In re Marriage of Bonnette*, 492 N.W.2d 717 (Iowa Ct. App. 1992), to the contrary.

*Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa Ct. App. 1996) (citation omitted).

We find \$21,320 is a reasonable and equitable annual earning capacity. We find no reason to alter Debbie's imputed income and we affirm on this issue.

#### **D. Valuation of Ronald's 401(k)**

Debbie next argues that the district court erred in valuing Ronald's 401(k) account for purposes of distribution between the parties. The court determined the value of Ronald's 401(k) account as of June 2007 was \$50,758, and ordered that amount to be divided equally between the parties. As a result of that order, Debbie received \$25,379. Debbie contends, however, that because Ronald withdrew \$22,000 from the account following the parties' separation, she should receive \$36,096, half of the account's original balance of \$72,192. Debbie argues that Ronald withdrew the \$22,000 without consulting her and that he spent the funds for his own personal needs.

Dissipation of assets is a proper consideration when dividing marital property. *Fennelly*, 737 N.W.2d at 104. "In determining whether dissipation has occurred, courts must decide (1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances." *Id.* The first factor is an evidentiary issue. Courts may determine the alleged purpose on the basis of whether the spending spouse can show how the funds were spent by testifying or producing receipts or similar evidence. *Id.* Determination of the second factor requires courts to consider several issues: (1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure

benefited the “joint” marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure. *Id.* at 104-05.

In this case, we find that the district court’s valuation and division of Ronald’s 401(k) is equitable. Ronald provided sufficient evidence concerning his expenses and obligations. Ronald used part of the 401(k) account withdrawal to pay for marital credit card debt he became aware of after the parties’ separation. Furthermore, Ronald moved out of the family home at 348 Norris Court in February 2007 and did not take any home furnishings. Ronald paid a rental deposit and payment for an apartment in Evansdale. Soon after, he was offered a new job in Vermillion and had to find an apartment there. Six weeks elapsed between Ronald’s last pay check from Hy-Vee in Waterloo to his first pay check in Vermillion.

We conclude that the court correctly found that Ronald adequately explained the expenditures and the expenditures were the result of legitimate household expenses and marital debt. We affirm on this issue.

#### **E. Trial Attorney Fees.**

Debbie argues the court erroneously awarded her \$2000 in attorney fees, rather than \$5000 as she requested. Attorney fees are not a matter of right, but rather rest within the court’s discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court’s award of attorney fees for abuse of discretion. *Sullins*, 715 N.W.2d at 255. An award of attorney fees is based upon the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675

(Iowa Ct. App. 1997). We conclude that the district court did not abuse its discretion when it awarded Debbie \$2000 in attorney fees.

**F. Appellate Attorney Fees.**

Debbie requests attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Given the relative asset position of the parties, we deny Debbie's request for appellate attorney fees. Costs on appeal are assessed one-half to Debbie and one-half to Ronald.

**AFFIRMED.**