

IN THE COURT OF APPEALS OF IOWA

No. 8-717 / 07-2058
Filed September 17, 2008

**IN RE THE MARRIAGE OF LARRY JO SEBERS
AND KAREN SUE SEBERS**

**Upon the Petition of
LARRY JO SEBERS,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
KAREN SUE SEBERS,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, Fae Hoover-Grinde,
Judge.

Larry Sebers appeals, and Karen Sebers cross-appeals, from the district
court's decree dissolving their marriage. **AFFIRMED ON APPEAL; AFFIRMED
AS MODIFIED ON CROSS-APPEAL AND REMANDED.**

Curtis Denbeste of Howes Law Firm, P.C., Cedar Rapids, for appellant.

Anne Lavery of Mullin & Lavery, L.C., Cedar Rapids, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

MAHAN, P.J.

Larry Sebers appeals the district court's ruling in the parties' dissolution proceeding, arguing the district court incorrectly awarded alimony. Karen Sebers cross-appeals, arguing the court erred in (1) determining the amount of the alimony award and (2) failing to divide Larry's General Mills pension. She also requests appellate attorney fees. We affirm the district court's ruling with regard to the alimony award; however, we modify the decree with regard to division of Larry's General Mills pension and remand to the district court for further proceedings.

I. Background Facts and Proceedings.

Larry and Karen Sebers were married in 1990 and have one adult child.¹ The parties have been separated since January 2006. At the time of trial, Larry was forty-seven years old and Karen was fifty-one years old. Neither party has any physical or mental limitations.

For the past nine years, Larry has been employed by General Mills as a cereal production worker. His annual income, including overtime, is approximately \$90,000. For the past three years, Karen has been employed by Advanced Technical Sales, Incorporated in a clerical position.² At the time of trial, she was working up to thirty hours per week at eleven dollars per hour, earning approximately \$17,000 annually. Karen originally worked twenty hours per week and she hopes to get to full-time status eventually, with health insurance and 401(k) benefits.

¹ There are no minor children who will be affected by this action.

² Karen earned an administrative secretary certification from Hamilton Business College in 1986.

Larry filed a petition for dissolution on February 2, 2006. At trial, Larry disclosed that he had a pension from General Mills.³ After a trial, the court ordered Larry's 401(k), Karen's IRA, and Larry's Diamond V Mills pension to be split equally between the parties. Although the parties agreed to split Larry's General Mills pension, the court did not provide for disposition of this asset in the decree.⁴ The court further awarded Karen \$1500 per month until the first of the following occurs: Karen dies, remarries, begins receiving Social Security income, or earns an annual gross income of at least \$40,000 per year. Finally, it ordered both parties to pay their own attorney fees.⁵ Larry appeals the district court's alimony award. Karen cross-appeals the amount of the court's alimony award and the court's failure to divide Larry's General Mills pension. 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).

³ Larry had not disclosed this asset in his financial affidavit.

⁴ Karen filed a motion to enlarge or amend judgment on November 27, 2007, requesting the court to amend the decree to provide for division of Larry's General Mills pension. The court did not rule on this motion prior to December 7, 2007, when Larry filed this appeal.

⁵ The court divided other marital property in the decree, but those distributions are not at issue on appeal.

III. Issues on Appeal and Cross-Appeal.

A. Alimony.

Larry argues that Karen should not be awarded \$1500 per month until she dies, remarries, begins receiving Social Security income, or earns an annual gross income of at least \$40,000 per year. He contends the court erred by (1) computing the alimony award based on Karen's part-time annual salary of \$10,682.57 when her actual income is approximately \$17,000 annually; (2) including Larry's overtime wages when his overtime is not consistent or mandatory; and (3) using the parties' marital standard of living in awarding alimony when the parties agree they lived beyond their means during the marriage. He argues the award of traditional alimony is excessive and creates no incentive for Karen to become self-supporting.

On cross-appeal, Karen argues the court should have awarded her more than \$1500 per month in alimony. She alleges that (1) Larry has provided no child support for the parties' son; (2) Larry has been the primary wage earner throughout the parties' marriage, and his salary has been four to seven times more than Karen's salary since 1999; (3) Larry's retirement can be more easily rebuilt than Karen's; (4) Karen's expenses far exceed her available income; and (5) Larry may seek a modification of the parties' decree if he does not receive as many overtime hours and his salary changes. Karen further alleges the tax consequences of the alimony payments require a higher amount of alimony to

equal the amount Karen receives before the house is sold while Larry makes the mortgage loan payments.⁶

Alimony is not an absolute right. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). 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) (2007). That section allows the court to consider the property division in connection with the alimony award. *In re Marriage of Probasco*, 676 N.W.2d 179, 184 (Iowa 2004). We only disturb the district court's decision if there is a failure to do equity. *Anliker*, 694 N.W.2d at 540; see Iowa Code § 598.21A(1).

With regard to Karen's salary, although the court did note Karen's annual gross income of \$10,682.87, the court also acknowledged that Karen has recently earned gross pay ranging from \$10,000 to \$19,000 annually. With regard to Larry's salary, we agree with the court's inclusion of overtime in determination of his salary. Although Larry's overtime may decrease or cease in the future, at the time of trial Larry was working overtime, had consistently worked overtime in years prior to the dissolution, and presented no evidence that he was unable to continue working overtime. Therefore, Larry's overtime was

⁶ In the decree, the court ordered Larry to begin the alimony payments on the first day of the first month following the sale of the parties' marital home. Prior to that time, Larry was to make the payments on the two mortgages on the home, totaling approximately \$1367 per month. Karen argues she should receive \$1850 in alimony after the home's sale in order to receive the same amount of benefit she receives from Larry's mortgage loan payments. With an alimony award of \$1850, Karen contends that the net payment to her after taxes would be approximately \$1350—nearly equal to the mortgage loan payments.

not uncertain or speculative and the court was correct in considering it in setting the amount of alimony. *In re Marriage of Schriener*, 695 N.W.2d 493, 500-01 (Iowa 2005); see *In re Marriage of Brown*, 487 N.W.2d 331, 334 (Iowa 1992) (considering overtime in determining the amount of child support due when the “overtime has been consistent, will be consistent, and is somewhat voluntary” and when the “overtime pay is not an anomaly or speculative”); *In re Marriage of Elbert*, 492 N.W.2d 733, 735 (Iowa Ct. App. 1992) (finding the *Brown* overtime analysis equally applicable to the calculation of alimony).

With regard to the parties’ marital standard of living, the court noted that both the parties lacked the ability to manage household finances; “appeared to spend money without regard to the cash flow in the family budget”; and struggled to pay bills “because of the parties’ spending habits.” Although there is no specific analysis by the court as to how it reached the alimony award amount, we do not find the court set the amount of alimony intending to maintain an excessive standard of living.

After property distribution, Larry and Karen have comparable assets. The parties, however, have disparate annual incomes. Larry’s annual income is approximately \$90,000 while Karen’s annual income is approximately \$17,000. Although Larry has been the primary financial supporter of the family, Karen has worked outside the home throughout the marriage. The parties incurred substantial consumer debt during their marriage, and the court determined “neither party possesses the financial savvy to adequately manage the family’s income.” Although the court did not determine whether the parties should be

able to maintain the same standard of living, the parties agreed they lived beyond their means during their marriage. Given the parties' work experience, the distribution of their property, the difference in their income, and the length of their marriage, we conclude the district court's award of alimony is equitable. Because we find the court's award of alimony equitable, we will not address Karen's contentions that the amount of alimony awarded should be higher.

B. Larry's General Mills Pension.

Karen argues the district court erred in failing to divide Larry's General Mills pension in the dissolution. With regard to the parties' retirement accounts, the court noted the following in the decree:

In addition to his 401(k), Larry will be eligible for a pension through General Mills in the event he retires from that company. No evidence was presented regarding the current or future value of that pension. Larry proposes to pay Karen \$40,000 from his 401(k) and to sign over to Karen all benefits from his Diamond V pension as well as one-half of the General Mills pension while allowing her to maintain 100 percent of her own pension. Karen requests that the pension be divided equally and that the Court order Larry to pay alimony to her until the date she retires (67 years of age).

The court, however, did not mention the General Mills pension in its division of the parties' retirement accounts:

Retirement Accounts: Larry's 401(k) and Karen's IRA are awarded one-half to each party as of September 18, 2007. Larry's attorney shall prepare a Qualified Domestic Relations Order (QDRO) for division of these assets. This QDRO shall be prepared promptly and delivered to Karen's attorney for approval as to form and content. This QDRO shall then be presented to the court by Karen's attorney and may be signed by any judge of this court.

Larry's pension from Diamond V Mills is also awarded one-half to each party as of September 18, 2007. Larry's attorney shall prepare a Qualified Domestic Relations Order (QDRO) for division of these assets. This QDRO shall be prepared promptly and delivered to Karen's attorney for approval as to form and content.

This QDRO shall then be presented to the court by Karen's attorney and may be signed by any judge of this court.

Upon our review, we find that the General Mills pension, to the extent accumulated during the marriage, should be divided equally between the parties. We therefore modify the decree with regard to Larry's General Mills pension. The case is remanded to the district court for further proceedings consistent with this decision.

C. Appellate Attorney Fees.

Karen 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 and the award of alimony, we deny Karen's request for appellate attorney fees. Costs on appeal are assessed one-half to Larry and one-half to Karen.

AFFIRMED ON APPEAL; AFFIRMED AS MODIFIED ON CROSS-APPEAL AND REMANDED.