

IN THE COURT OF APPEALS OF IOWA

No. 9-497 / 08-1902
Filed July 22, 2009

**IN RE THE MARRIAGE OF SANDRA WEDMORE
AND PATRICK WEDMORE**

**Upon the Petition of
SANDRA WEDMORE,**
Petitioner-Appellant,

**And Concerning
PATRICK WEDMORE,**
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady,
Judge.

Sandra Wedmore appeals the district court's ruling in her dissolution
proceeding. **AFFIRMED.**

Gregg Geerdes, Iowa City, for appellant.

John C. Wagner of John C. Wagner Law Offices, P.C., Cedar Rapids, for
appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

Sandra Wedmore initially claims the district court erred in entering a nunc pro tunc order concerning the parties' decree of dissolution. She further alleges the court erred in allowing Patrick to continue living in the residence until it is sold. We affirm.

I. Background Facts and Proceedings.

The district court entered its decree of dissolution on May 13, 2008. The decree stated in part:

The Court's division of property is set out at Exhibit "A" as attached and incorporated herein. It includes, *inter alia*, the following findings: . . . (5) the net marital share of the Jefferson Pilot account is \$4,346—the remainder is attributable to Sandra's inheritance from her mother.

Thereafter, each party filed Iowa Rule of Civil Procedure 1.904 motions, neither of which had to do with the Jefferson Pilot account. Patrick subsequently filed an application for an order nunc pro tunc on October 10, 2008, which stated in part:

There is reference made in the third full paragraph at page 4 to a Jefferson Pilot account. The marital share of said account is found by the Court to be in the amount of \$4,346.00. The Court then makes reference to the remainder of said account as being attributable to Sandra's inheritance from her mother rather than a gift from Respondent [Patrick]'s mother. The Respondent does not deny that the marital share is in the amount of \$4,346.00 and the Respondent does not object to said marital share being awarded to Petitioner, but certainly Respondent should retain the balance of the account which was attributable to the gift from his mother.

The district court entered its order with regard thereto on October 28, 2008, granting Patrick's application. The court's order is set out below:

Patrick requests that the Court strike the portion of its Decree that finds that the non-marital share of the Jefferson Pilot account (now Lincoln Financial) was attributable to Sandra's

inheritance. He claims the record shows that the non-marital funds are attributable to a gift from his mother instead.

“[A] nunc pro tunc order can be used only to correct obvious errors or to make an order conform to the judge’s original intent.” *Graber v. Iowa Dist. Court*, 410 N.W.2d 224, 229 (Iowa 1987). The dual functions of the order are “(1) to ‘show now what was done then’ and (2) to correct an omission where no judgment had been entered due to ‘ministerial error or oversight by the court.’” *In re Marriage of Bird*, 332 N.W.2d 123, 124 (Iowa App. 1983) (quoting *Wirtanen v. Provin*, 293 N.W.2d 252, 255 (Iowa 1980)). “Moreover, the power of the court to make a nunc pro tunc order is inherent and is not lost by the mere lapse of time.” *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995).

Based on a review of the exhibits and my notes of the testimony presented, I am convinced that my finding that the non-marital portion of the Jefferson Pilot account was attributable to Sandra’s inheritance was erroneous. Sandra’s own testimony was that the Jefferson Pilot account was not attributable to that inheritance. The documentation supports that it was attributable to Patrick’s gift from his mother.

IT IS THEREFORE ORDERED:

Respondent’s Motion for Order Nunc Pro Tunc is granted. The Court’s findings at page four that: “(5) the net marital share of the Jefferson Pilot account is \$4,346—the remainder is attributable to Sandra’s inheritance from her mother,” is stricken and is replaced as follows: “(5) the net marital share of the Jefferson Pilot account is \$4,346—the remainder is attributable to funds Patrick received from his mother.”

The remainder of the Court’s Decree remains as entered.

Sandra now appeals, alleging the district court erred in entering this nunc pro tunc order.

II. Merits.

We conduct a de novo review of dissolution and equity proceedings. See Iowa R. App. P. 6.4 (2008); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). In this case, although we note the issue of the Jefferson Pilot (now Lincoln Financial) account may have been more properly raised in a rule 1.904 motion, we conclude the court properly entered a nunc pro tunc order correcting its error in the decree.

A nunc pro tunc order can be used to correct obvious errors or to make an order “conform to the judge’s original intent.” *Graber v. Iowa Dist. Ct.*, 410 N.W.2d 224, 229 (Iowa 1987). The factors to be considered to determine the propriety of a nunc pro tunc order are: (1) intent of the trial judge; (2) whether the mistake is an “evident mistake”; and (3) the time elapsed from the decision to the application. *In re Marriage of Bird*, 332 N.W.2d 123, 124 (Iowa Ct. App. 1983). It has been recognized that the intent of the trial judge is “crucial to the determination of whether a nunc pro tunc order is appropriate to ‘correct’ a record.” *Graber*, 410 N.W.2d at 229.

There are two factors present here that lead us to conclude that the decision as originally entered did not conform to the judge’s original intent. First, the court clearly stated in the nunc pro tunc ruling that an evident mistake was made. Second, Sandra testified the remainder of the Jefferson Pilot account was not attributable to her inheritance from her mother. The judge’s action in granting the nunc pro tunc application was simply to correct an evident mistake in the record. We further find no error in the court’s ruling in the decree with regard to Patrick’s continuing to reside in the marital home until it is sold.

We have carefully reviewed the record, the contentions of the parties, and the court’s resolution of these issues. Giving appropriate deference to the fact findings of the district court, see Iowa R. App. P. 6.14(6)(g), we find no error in and agree with the district court’s resulting judgments. We therefore affirm those judgments. See Iowa Ct. R. 21.29(1)(d), (e).

Both Sandra and Patrick request appellate attorney fees. An award of attorney fees is not a matter of right but rests within the discretion of the court. *In*

re Marriage of Benson, 545 N.W.2d 252, 258 (Iowa 1996). The court considers the financial positions of the parties and whether the party making the request was obligated to defend the trial court's decision on appeal. *Id.* We decline to award attorney fees in this case. Costs on appeal are taxed to Sandra.

AFFIRMED.