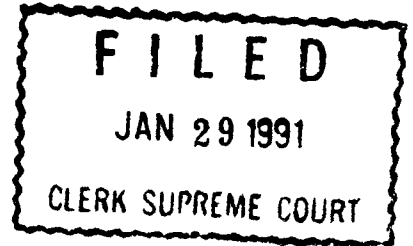


IN THE COURT OF APPEALS OF IOWA

No. 0-411 / 90-0024



IN RE THE MARRIAGE OF MICHAEL L. MELVIN AND
LINDA J. MELVIN

Upon the Petition of

MICHAEL L. MELVIN,

Appellant,

And Concerning

LINDA J. MELVIN,

Appellee.

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Appeal from the Iowa District Court for Clinton County,
L. D. Carstensen, Judge.

Husband appeals economic provisions of divorce decree.

AFFIRMED.

Gary J. Rolfes of Mayer, Mayer, Lonergan & Rolfes,
Clinton, for appellant.

Edward J. Kross of Shaff, Van Scoy, Sivright & Kross,
Clinton, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab,
JJ.

HABHAB, J.

Michael and Linda were married in 1982. They have three children: Leah born October 13, 1983; Jeffrey born July 29, 1987; and Scott born August 22, 1988. This was Linda's second marriage. She has primary care of two children born during her previous marriage.

Michael is a thirty-three-year-old high school graduate. He works as a computer control manager, earning a net monthly income of \$2500. Linda is a thirty-nine-year-old college graduate. She is a school teacher earning a net monthly income of \$1250 and is working towards a Master's degree.

At the time the parties were married, Michael had two bank accounts in the total sum of \$10,176. A portion of this money was used for marital living expenses. During the marriage, Michael transferred a portion of the marital assets into custodial accounts for two of his children. After separation, he withdrew substantial sums from those accounts.

The parties agreed as to joint custody of the children with their physical custody to Linda. The court divided the property. The court ordered Michael to restore the amounts he withdrew from the children's custodial accounts. The court allowed Michael to take one child as an exemption for income tax purposes.

Michael appeals the property division. First, he contends that the district court improperly considered his

premarital bank accounts as divisible marital assets. Next, Michael claims that the court improperly determined that the children's custodial accounts constituted transfers under the Iowa Uniform Transfers to Minors Act, Iowa Code

chapter 565B. He also argues the court erred by requiring him to pay \$7800 in cash to Linda to equalize the property division. Michael further requests a tax exemption for two of the children. Lastly, he claims that the court failed to adequately consider the income tax consequences of the property division. Linda requests an award of appellate attorney fees.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The partners in the marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

I. Premarital Assets. Michael first contends the trial court erred in considering his premarital assets as divisible marital assets. He argues that since the length of the marriage was of such short duration it would be more equitable to not split the bank accounts. However, length of marriage is just one factor to be considered when determining how assets should be separated. In re Marriage of Wallace, 315 N.W.2d 827, 830 (Iowa App. 1981).

In this case, the assets in question were used to pay marital bills. Counsel for Michael asked him what became of the \$10,000 in premarital assets and he stated:

"It went to the marriage, I guess. As far as I paid for all the marriage and the honeymoon, and it went to starting a life together, I guess."

The record indicates that Michael maintained the account and Linda contributed to the account. After thoroughly reviewing the record, we find the trial court did not err in refusing to set aside \$10,000 to Michael in premarital assets.

II. Transfers to Minors. Michael also asserts the trial court erred in finding the children's bank accounts constituted transfers under the Iowa Uniform Transfers to Minors Act. Michael contends that the absence of the words "Under the Iowa Uniform Transfer to Minors Act" is fatal to establishing this type of custodial account.

We, however, agree with the trial court that Michael is to restore all monies withdrawn by him from the children's accounts. While Michael may now be contending that he did

not intend for the monies in his children's accounts to qualify under the Act, he testified at trial to the fact that he transferred the money for tax deferral reasons and that the interest generated by the accounts was taxed to the children.

But even if Michael had established that he did not intend to create a custodial account under section 565B.9(1), we hold the trial court had the authority to create such an account under section 598.21 of the Code to protect and promote the best interests of the children.

III. Tax Exemption. Michael also contends that the trial court erred in awarding only one child to him to be utilized as a tax exemption. The general rule is that the custodial parent is allowed to claim the exemption. (Internal Revenue Code §152(e)(1)). The custodial parent is treated as having furnished over half of the child's support. Id. There are three exceptions to the rule that a custodial parent is entitled to the dependency exception: (1) when there is a multiple support agreement that allows the child to be claimed as a dependent by a taxpayer other than the custodial parent; (2) when the custodial parent releases his or her right to the child's dependency exemption to the noncustodial parent by executing IRS Form 8332; and (3) when a pre-1985 divorce decree or separation agreement between the parents grants the exemption to the noncustodial parent and the noncustodial parent provides at least \$600 for the support

of the child for the year in question. I.R.C. § 152(e)(2), (3) and (4), citing, In re Marriage of Kerber, 433 N.W.2d 53, 55 (Iowa 1988). The second exception, a release of the exemption by IRS written form, is the exception which Michael contends the trial court in this case should have ordered. The trial court took into consideration the financial situation of both parties as well as the responsibility attributed to the custodial parent. We do not find error by the trial court and will not disturb the decision on appeal.

IV. Property Division. Michael also argues that the trial court erred in requiring him to pay a cash settlement to Linda. Property division is governed by section 598.21(1) of the Iowa Code. A percentage of the property is not statutorily sanctioned. The ultimate question is whether the distribution is equitable under the specified facts of a particular case. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa 1984). The property was divided equally.

Michael contends this is inequitable since this was a marriage of short term. However, there is nothing in the record to support Michael's contention that the distribution is inequitable. Both the parties worked during the marriage. While Michael did earn more money than Linda, Linda took care of the home and the children for the majority of time because Michael was on the road weekly.

As we previously stated, the length of the marriage is only one factor to be considered by a trial court. The court can also consider the contribution of each party to the marriage giving appropriate economic value to each party's contribution in homemaking and child care services. Iowa Code § 598.21(1)(c). We affirm the trial court's property distribution.

V. Income Tax Consequences. Finally, Michael contends the trial court did not consider tax consequences when it allocated the assets. He specifically contends the tax consequences with regard to his pension plan will be overly burdensome.

While the court is required to consider the income tax consequences when allocating property in a dissolution, Iowa Code § 598.21(1)(j), we do not find that the district court failed to consider possible consequences. The court did not require Michael to remove funds from his tax sheltered plan; rather the money could be paid to Linda by borrowing out of his current salary. We affirm the trial court with respect to this issue also.

Linda requests attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Upon consideration of these factors, we conclude that Linda should be awarded appellate attorney fees in the amount of \$750.

AFFIRMED.