

IN THE COURT OF APPEALS OF IOWA

No. 3-564 / 93-607

FILED

DEC 29 1993

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JEFFREY L. MILLER AND ELIZABETH M.
MILLER

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Upon the Petition of

JEFFREY L. MILLER,

Appellant,

And Concerning

ELIZABETH M. MILLER,

Appellee.

Appeal from the Iowa District Court for Marion County,
J. W. Jordan, Judge.

Former husband appeals the child custody and property
distribution provisions of the parties' dissolution
decree. **AFFIRMED AS MODIFIED.**

Ronald R. Rieper of the Rieper Law Office, Des Moines,
for appellant.

Terry L. Wilson of Mick, Wilson & Mertz, Knoxville, for
appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

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HABHAB, J.

Former husband, Jeffrey L. Miller, appeals the child custody and property distribution provisions of the parties' dissolution decree. Jeffrey argues the district court erred in: 1) failing to award him physical custody of their two minor children; and 2) not equitably dividing the parties' debts and assets.

Jeffrey and Elizabeth Miller were married on August 1, 1987. They have two minor children, Zachary, born March 7, 1989, and Benjamin, born November 16, 1991. Jeffrey has a high school education and is employed at Plumb Supply Company in Des Moines. Elizabeth attended Grandview College full-time until graduation in 1991, at which time she became employed at the Veterans Hospital in Knoxville. During the marriage, the family lived in Pleasantville in a home they purchased with a \$2000 down payment provided by Jeffrey and \$28,000 borrowed from Jeffrey's grandfather. At the time of trial, there was \$13,700 remaining on the mortgage.

The parties separated in November 1992. Jeffrey remained in the family home and had custody of the children for the first ten days following the separation. Jeffrey and Elizabeth then agreed to split custody on an alternating weekly basis.

Jeffrey filed his petition on December 7, 1992. Following trial, the district court entered its decree on March 31, 1993. Pursuant to the decree, Elizabeth was

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granted physical care of the two children. Jeffrey was ordered to pay \$455.65 per month child support. Jeffrey was also ordered to pay Elizabeth \$11,771.41 by June 1, 1993, with interest at twelve percent. Jeffrey appeals. We affirm as modified.

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).

I. Custody of Children.

Jeffrey contends he should have been awarded physical custody of the children. Jeffrey maintains that he would provide a more stable and secure environment for the children. Jeffrey claims Elizabeth is unable to do so because her employment requires her to work various shifts.

In child custody cases, the best interests of the child is the first and governing consideration. The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a

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dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

The district court found both parties are dedicated to their children's welfare and appear to love their children very much. The parties have shared custody of the children since the separation. However, the court awarded primary physical custody to Elizabeth because the court believed Elizabeth was better able to care for the children.

From our de novo review of the record, we agree. Prior to the parties' separation, Elizabeth actively cared for the children. She dressed the children, fixed their meals, changed their diapers and bathed them. Elizabeth has demonstrated that she can provide a stable environment for the children despite her work schedule and that she is able to care for the children's physical and emotional needs.

We also agree with the district court's assessment that Jeffrey is not able to provide for the care of these children as well as Elizabeth. Elizabeth claims Jeffrey has not been sensitive to the medical needs of the children. Jeffrey denies this. The district court believed Elizabeth. We agree with the district court on this credibility issue. In addition, we are concerned about Jeffrey's refusal to give Elizabeth his telephone number until ordered by the court.

We affirm the district court's award of primary physical custody of the children to Elizabeth.

In the alternative to custody of the children, Jeffrey requests visitation for the entire summer. We agree with the trial court four weeks summer visitation is in the best interest of the children. It maximizes the opportunity for the children and Jeffrey to maintain a close relationship without being unduly disruptive to the children. We affirm the district court on this issue.

II. Distribution of Assets and Liabilities.

Jeffrey argues the district court erred in dividing the parties' assets and liabilities.

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 Russell, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each circumstance. Id. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

Jeffrey contends the district court erred in including as marital property three certificates of deposit valued at \$3,426.98, that were purchased by Jeffrey with his own funds prior to the marriage. We agree with Jeffrey all but \$500 of the CDs were premarital property and should have been set off to him. We modify the district court's

division of the parties' assets and liabilities to set off to Jeffrey three bank CDs valued at \$2,926.98. Accordingly, we decrease Elizabeth's lump sum payment by the same amount.

Jeffrey next claims the district court erred by ordering him to pay a Discover credit card bill for a trip Elizabeth took even though Elizabeth had already been reimbursed by the Veterans Hospital. We find the credit card bill is a marital debt and should be considered with the other assets and liabilities. We affirm the district court's assignment of the Discover card debt to Jeffrey.

Jeffrey also claims the district court erred in valuing the homestead at \$35,000, since they only paid \$30,000 for the home and no other evidence was presented at trial to indicate that the house had appreciated in value.

Elizabeth testified the parties had done extensive remodeling to the house since its purchase in 1988. She stated market values had gone up in the Pleasantville area in the past five years. She also testified without objection that she had talked with two realtors, one who valued the house at a minimum of \$34,000 and the other who valued the house between \$35,000 and \$40,000.

We find the value placed on the house by the trial court is well within the permissible range of evidence and we decline to disturb it on appeal. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

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Jeffrey's next argument is the twelve percent interest rate on any unpaid amounts to Elizabeth is excessive, and that the rate should be similar to that assessed under Iowa Code section 535.3 (1991). We agree. We modify the interest rate on any unpaid amounts to ten percent.

Finally, both parties request attorney fees for this 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). We conclude each party should pay his/her own attorney fees for this appeal.

Costs of this appeal are assessed one-half to Elizabeth and one-half to Jeffrey.

AFFIRMED AS MODIFIED.