IN THE COURT OF APPEALS OF IOWA

No. 7-738 / 96-1962

IN RE THE MARRIAGE OF BONNIE LOU JENDRO AND DENNIS ARTHUR JENDRO

Upon the Petition of
BONNIE LOU JENDRO ,

Petitioner-Appellee,

And Concerning
DENNIS ARTHUR JENDRO,

Respondent-Appellant.

FILED
JUL 31

Appeal from the Iowa District Court for Floyd County, John S. Mackey, Judge.

Dennis Jendro appeals from a post-dissolution decree district court ruling affecting division of the parties' marital debt. **AFFIRMED AS MODIFIED.**

Kevin J. Visser of Moyer & Bergman, P.L.C., Cedar Rapids, for appellant.

Russell Schroeder, Jr., Charles City of appellee.

Considered by Cady, C.J., Huitink, J., and Hayden, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HAYDEN, S.J.

The respondent appeals from a post-dissolution decree district court ruling affecting division of the parties' marital debt. He contends the court erred in ordering him to pay the entire cost of defending and settling a lawsuit filed against the parties' business, the value of which was ordered equally divided between the parties. We affirm as modified.

Dennis and Bonnie Jendro's thirty-two-year marriage was dissolved in January 1996. The decree incorporated the parties' stipulation that proceeds from the sale of their business, Jendro Sanitation Services, Inc., would be divided equally between the parties. The sale will yield gross payments in excess of $1,600,000 prior to April 1, 2005. At the time the decree was entered, a wrongful termination suit was pending against the parties' business and the respondent individually. They agreed to reserve the cost assessment concerning the lawsuit for the court following disposition of the case.

The lawsuit settled for $10,004.84. Attorney fees were $14,690.40. The petitioner filed an application with the court, requesting the respondent be responsible for these costs. At the hearing on the petitioner's application, the court received testimony concerning "bad acts" of the respondent in violation of a court order prohibiting use of corporate funds except in the normal course of business. The testimony related to issues which had been adjudicated in the dissolution and which were unrelated to the lawsuit. The district court ordered the respondent to pay the

entire cost of the lawsuit, finding the petitioner was aware of the lawsuit, but no one consulted with her concerning the settlement. The court stated the respondent disposed of the petitioner's assets, that is, part of her one-half interest in the business without her knowledge or consent and thus should bear the entire cost.

We review de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but do give them deference because the district court had the opportunity to view the demeanor of the witnesses when testifying. *Marriage of Griffin*, 570 N.W.2d 258, 259 (Iowa App. 1997).

The respondent contends the parties' stipulation did not require consultation with the petitioner before settling the lawsuit. He also claims there was no evidence that, had the petitioner been consulted, the result would have been different because she does not complain the settlement was unreasonable.

The stipulation provided "major decisions concerning the conduct of the business" would be made by action of the board of directors. It contained a non-exclusive list of examples of major decisions, which did not include settlement of lawsuits. We determine settlement of a lawsuit of this magnitude is a major decision. We conclude the provisions of the stipulation required the respondent not to settle the lawsuit without board action to approve the settlement. Because his settlement of the lawsuit did not comply with the terms of the stipulation, it is appropriate for the respondent to bear the entire cost of the settlement in the amount of $10,004.84. Although the board could have approved the settlement at the same amount, the issue

is not whether a better settlement could have been made. The issue is respondent failed to comply with the stipulation in taking it upon himself to settle the case without corporate board approval.

The respondent further argues the court erred in considering "fault" as a basis for assigning the lawsuit cost to him as a non-marital debt. *See In re Marriage of Zoellner*, 219 N.W.2d 517, 523 (Iowa 1974) (reasoning evidence of the parties' conduct should not be included in determining property division). As noted above, much testimony was received at the hearing concerning the respondents prior "bad acts" relating to the use of corporate assets and violation of a court order. Assuming, without deciding, that the evidence should have been excluded, the respondent has not demonstrated any prejudice.[1] Nothing in the order assessing the cost of the lawsuit to the respondent gives any indication the court based its decision on the respondent's prior actions or even considered them. Consequently, we find no merit in the respondent's claims concerning fault.

Finally, the respondent argues the corporation should bear the cost of attorney fees for defending the lawsuit. The petitioner and the respondent both were on the board of directors. The petitioner testified she approved the use of legal counsel to defend the suit. We conclude the corporation should be responsible for the attorney

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[1] We note the trial court took the evidence subject to the respondent's objections. This procedure is normal for equitable proceedings. Such procedure, however, does not imply the court gave the evidence improper weight or even considered it at all.

fees in the sum of $14,690.40 arising from the lawsuit. We modify the trial court's decision and hereby direct each party to pay one-half of the legal fees.

Both parties request appellate attorney fees. 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 Hansen*, 514 N.W.2d 109, 112 (Iowa App.1994). We 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 Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). Under the circumstances in the record before us, we determine the parties should pay their own appellate attorney fees. Costs of this action are taxed equally between the parties.

AFFIRMED AS MODIFIED.