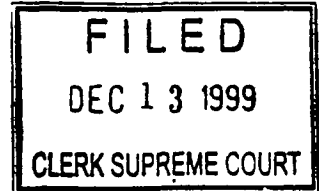


IN THE COURT OF APPEALS OF IOWA

No. 1999-287 (9-517) / 98-2231
Filed December 13, 1999



**IN RE THE MARRIAGE OF CRAIG D. BURBANK
and CYNTHIA JOY BURBANK**

Upon the Petition of
CRAIG D. BURBANK,
Petitioner-Appellant,

And Concerning
CYNTHIA JOY BURBANK,
Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Allan L. Goode,
Judge.

Craig Burbank appeals various economic provisions of the parties' dissolution
decree. **AFFIRMED.**

Kevin A. Fors, Harcourt, for appellant.

Blake Parker of Blake Parker Law Office, Fort Dodge, for appellee.

Considered by Streit, P.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Craig Burbank appeals various economic provisions of the parties' dissolution decree. We affirm.

Background facts. Craig and Cynthia Burbank were married in 1994. One child, Caelen, was born to the marriage in 1995. Craig filed a petition for dissolution of marriage and trial was held in October of 1998. The parties agreed that Cynthia should have primary physical care of Caelen. The court's decree distributed the parties' debts and assets, set Craig's child support obligation, and denied Cynthia spousal support. Craig now appeals.

Scope of review. Our review of this equitable proceeding 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 Barry*, 588 N.W.2d 711, 712 (Iowa App. 1998). We give weight to the fact findings of the district court, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Setting child support on imputed income. Craig first contends the district court ~~erred in~~ attributing a \$35,000 income to him for purposes of child support. Since ~~he lost his employment~~ prior to the dissolution, Craig asserts that the record does not support a finding that he intended to deprive Caelen of support.

Iowa case law supports the proposition that in the determination of child support, a party may not claim inability to pay child support when that inability is self-

inflicted or voluntary. See *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993) (citations omitted). The self-infliction rule prevents parents from gaining an advantage by voluntarily or recklessly reducing their earning capacity with the intent to deprive their children of support. See generally *In re Marriage of Walters*, 575 N.W.2d 739, 743 (Iowa 1998) (father's reduction in earning capacity and income was result of voluntary criminal activity, but not done with improper intent); *In re Marriage of Swan*, 526 N.W.2d 320, 324 (Iowa 1995) (father's decision to return to school after involuntary termination was not made with improper intent); *Foley*, 501 N.W.2d at 500 (although father was responsible for loss of job, there was no intent to deprive children of support or evidence of reckless disregard for welfare of children).

Craig began working as a trackman for Chicago & Northwestern Railroad in 1977 and was later promoted to engineer. His gross income for the years 1991 through 1995 was \$38,278.04, \$53,002.16, \$78,947.33, \$53,122.21, and \$54,127.84. In November of 1996, Craig was fired for misconduct. Craig's employment following his termination was sporadic and short-term. He was employed in the trucking industry for approximately two months in 1996 and worked for three months at an asphalt company in 1997.¹ He was not employed in 1998. At trial Cynthia pointed out that although Craig has his commercial driver's license, he has not applied for advertised trucking openings at a local company which pay between \$29,000 and

¹ We note Craig also worked in construction for two months in 1996 prior to his termination from the railroad.

\$38,000 annually. The district court concluded that Craig had an earning capacity of \$35,000 and used that figure in calculating his child support obligation.

In its decree, the district court explained why it chose to impute income to Craig:

Simply stated, the Petitioner's [Craig's] testimony that he can't find employment is not credible. It's not that he can't find a job. He just doesn't want to and hasn't really tried. Petitioner's choice is an obvious hardship on the child he professes to love, and the court cannot condone the irresponsible abnegation of parental responsibility.

We give significant weight to a trial court's clear credibility findings. *See Iowa R. App. P. 14(f)(7)*. These findings, along with Craig's failure to obtain a job since 1997, support a conclusion that Craig acted with an improper intent to deprive his child of support. Although Craig claims the court's imputation of \$35,000 is too high, it was based both on Craig's past earnings history and his good health. Furthermore, the imputed income is less than half of what Craig earned in 1993. We find \$35,000 to be a reasonable amount and do not believe this figure amounts to an insurmountable burden. *Cf. Walters*, 575 N.W.2d at 743 (court reduced child support obligation as it was unrealistic to impute previous earning capacity to incarcerated father). We therefore affirm the child support provisions in the decree.

II. Property division. Craig next asserts that the court erred in subordinating a debt to his father to Cynthia's property award.

Partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Hass*, 538 N.W.2d 889,

892 (Iowa App. 1995). Assets and debts should be equitably, but not necessarily equally, divided under the circumstances after considering the criteria delineated in Iowa Code section 598.21(1). See *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa App. 1997).

Cynthia and Craig's largest asset was the marital home and acreage which, at the time of trial, had an outstanding mortgage of approximately \$40,000 and a disputed value.² Craig purchased the home prior to the marriage, but Cynthia made several mortgage payments and contributed to maintenance costs. In March of 1996, Craig's father paid the delinquent taxes on the property and began to make the mortgage payments. Craig later executed a promissory note to his father in the amount of \$21,000 plus interest at 10% per annum to repay him for his contributions. Craig's father also began receiving the cash rent produced from the acreage.

In making an equitable division of the parties' property, the court determined that the house should be sold and Cynthia awarded the first \$12,500 from the net proceeds after deducting sale expenses and the mortgage. The court ordered that Craig's father would receive the next \$23,210.55, representing the contribution he made less the rent money he had received. Craig now asserts that his father's debt should supersede Cynthia's payment since the house would have been foreclosed upon but for his intervention. However, we find the court's method of distribution

² The property consists of the home and thirty-nine acres, some of which are tillable and have been rented out for cash. The tax assessed value of the property at the time of trial was \$58,530. Craig valued the property at \$70,000, and Cynthia claimed it is has a value of \$130,000. Craig's father estimated the value between \$65,000-\$70,000.

to be equitable under the circumstances. Cynthia brought considerable assets into the marriage and made significant financial contributions. Furthermore, Craig's father held no mortgage against the real estate and Craig cites no relevant authority to support that the debt to his father should be paid ahead of Cynthia's equitable interest. See Iowa R. App. P. 14(a)(3) (failure in the brief to state, argue or cite authority in support of an issue may be deemed waiver of that issue). For these reasons, we affirm the district court's distribution of the parties' property.

III. Appellate attorney fees. Finally, Cynthia requests an award of appellate attorney fees. An award of attorney fees on appeal 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). 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 district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa App. 1997). After considering these factors, we award Cynthia \$1000 for attorney fees. Costs of this appeal are assessed to Craig.

Having considered all issues properly before us on appeal, we hereby affirm the district court's decree.

AFFIRMED.