FILED
DEC 17 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF
MERILDA ANN HEINDRICKS AND DANNIE FRANKLIN HEINDRICKS

Upon the Petition of	)	119
MERILDA ANN HEINDRICKS,	)	Filed December 17, 1987
Appellant,	)	
And Concerning	)	7-243 86-1511
DANNIE FRANKLIN HEINDRICKS,	)	
Appellee.	)	

Appeal from the Iowa District Court for Story County (4068), Russell J. Hill, Judge.

Petitioner wife appeals the district court order dissolving her marriage to respondent husband and denying her Iowa Rule of Civil Procedure 179(b) motion. **AFFIRMED AS MODIFIED.**

B. Joan White of Tysseling & White, Ames, for petitioner-appellant.

Dannie Frankling Heindricks, Fort Douglas, Utah, pro se.

Considered by Oxberger, C.J., and Donielson, Schlegel, Hayden, and Sackett, JJ.

SCHLEGEL, J. 120

Petitioner wife appeals the district court order dissolving her marriage to respondent husband and denying her Iowa Rule of Civil Procedure 179(b) motion. She argues that the trial court erred in: (1) failing to award her a portion of the husband's military retirement benefits; (2) failing to award her partial reimbursement for a child's orthodontic work, failing to specify orthodontia and dental surgery as medical costs, and in failing to require the husband to pay an additional monthly amount for orthodontics and dental surgery; and (3) requiring a joint stipulation for annual cost of living adjustments. Our scope of review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's findings of fact, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We affirm as modified.

I. **Background.** Petitioner Merilda Ann Heindricks (Ann) and respondent Dannie Franklin Heindricks were married in 1969. They have two minor children, Angela and Elisa. The parties separated in 1979. At the time the trial court entered the decree dissolving the parties' marriage, they had been married seventeen years. They stipulated to an amount of child support. Dannie is in the military service and receives about $25,000 per year. Ann is enrolled in a one-year accounting program and expects to gross about $10,400 per year when she finishes the program. Both of the children need orthodontic work and Angela needs dental surgery which will cost about $2,700.

II. **Military Retirement Benefits.** Ann contends that the trial court erred in failing to award her a portion of Dannie's military retirement benefits. She claims that an equitable division would entitle her to fifty percent of Dannie's military retirement benefits. We agree that Ann was entitled to part of Dannie's benefits. The United States Supreme Court held, in McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), that federal law precludes

a state court from dividing military retired pay in a marriage dissolution. Congress responded by passing the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 718, 730-38 (1982), which served to allow the division of military pensions in dissolution proceedings. The Act, in relevant part, provides as follows:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(c)(1) (1982). We therefore determine that Dannie's military retirement pay was the property of both Dannie and his spouse, Ann. Iowa follows a theory of equitable distribution of property in a dissolution. In re Marriage of Byall, 353 N.W.2d 103, 106 (Iowa App. 1984). We determine the following to be an equitable allocation of the military pension in this case. The proportion of each military pension payment received by Dannie that shall be payable to Ann is one-half of the ratio of the number of years Ann and Dannie were married to the number of years military benefits accrued to Dannie.

This opinion shall serve as a court order prescribed by 10 U.S.C. § 1408 (1982) for implementation of this property division. We direct that the United States Department of Defense shall, upon the commencement of Dannie Fanklin Heindricks drawing his military pension, pay to Merilda Ann Heindricks that portion of the military pension which has been allocated to her using the above formula. Pursuant to 10 U.S.C. § 1408, a certified copy of this opinion, together with the information required by section 1408(b), shall be served upon the Secretary of Defense or an appropriate agent of the Secretary designated for receipt of service, return receipt requested.

III. Dental Care Costs. Ann next contends that the trial court erred in failing to (a) award her partial reimbursement for orthodontics for the parties'

child, Angela, (b) specify orthodontia and dental surgery as medical costs, and (c) require Dannie to pay an additional monthly amount for the children's orthodontics and dental surgery. As noted by the Iowa Supreme Court in Brown v. Brown, 269 N.W.2d 819, 822 (Iowa 1978), parents have a mutual duty to support their children and a court of equity, as we are here, may properly order one parent to reimburse the other for any sum paid in excess of his or her proportionate share. We believe that equity dictates that Dannie partially reimburse Ann for the expenses incurred by her in providing orthodontia for Angela. Therefore, we order Dannie to pay Ann the sum of $1,000 for such reimbursement. Additionally, we believe that the dissolution decree, as written, is ambiguous regarding the coverage of orthodontic treatment and dental surgery for the children. The decree obligates the parties to share equally in medical costs not covered by Dannie's military health and dental insurance. This insurance does not cover the orthodontia or dental surgery. The language of the decree does not make it clear whether "medical costs" includes orthodontia and dental surgery. Thus, we order that the words "including orthodontia and dental surgery" be added to the medical costs to be shared by the parties. Such an amendment would serve to avoid any possible limitation on that provision. Finally, Ann requests us to order Dannie to pay an additional $80 per month child support until his share of the dental surgery and orthodontia is paid in full. We decline to order Dannie to pay this additional amount.

IV. Cost of Living Adjustment. Ann's final argument is that the trial court erred in requiring the parties to file a joint stipulation for annual cost of living adjustments to child support, given Dannie's prior history of failure to return legal documents sent to him for his signature. Ann proposes that she be allowed to file and serve Dannie with a cost-of-living stipulation based on the percentage change in the consumer price index. If Dannie objects, Ann

states, the court would then step in and determine the proper adjustment. However, if Dannie failed to object, Ann's submitted adjustment would take effect. We do not believe that the trial court's procedure for annual cost-of-living adjustments to child support was improper It allowed both parties to participate in the adjustment process from the outset Therefore, we see no need to modify the provision

AFFIRMED AS MODIFIED

Oxberger, C J , and Sackett, J , concur, Donielson, J , and Hayden, J., dissent

DONIELSON, J. (dissenting)

I respectfully dissent from that portion of the majority's opinion awarding Ann a proportion of Dannie's military pension payments.

I would initially state that I would affirm the trial court in all respects. The parties were separated the last seven years of their marriage. Ann has been self-supporting for the period of the parties' separation, demonstrating the fact she possesses marketable skills. She has been enrolled in a community college program. Her earning capacity will undoubtedly increase.

Dannie testified if he were to retire in May 1987, his retirement benefits would total approximately $850 per month, his benefits being calculated at 50 percent of his base pay. *He further testified that any dependents' support* comes out of his retirement pay since there are no extra allowances provided for support obligations. The children at trial were ages sixteen and ten; Dannie's support obligations, currently $375 per month, will continue until the children reach age twenty-two if they pursue additional education. Dannie is uncertain when he will retire or if he will pursue another career. To award Ann that sum of money to be calculated as set out by the majority would appear to leave Dannie little to live on.

The Uniformed Services Former Spouses' Protection Act does not mandate awarding military pensions to both spouses; rather, it is a permissible option which the court may consider. The trial court set forth a well-reasoned opinion stating its findings of fact and conclusions of law in consideration of those factors enumerated in Iowa Code section 598.21(1) and in following our case law that property division is to be equitable. The trial court further confirmed its decision with respect to the retirement benefits in its ruling on Ann's motion for enlargement to consider the military pension.

Alternatively, I find that even if Ann is entitled to a portion of Dannie's military pension, the majority incorrectly determined the award formula to be based on the number of years Ann and Dannie were married, i.e., seventeen years The parties were separated the last seven years of their marriage. Thus, *I would compute the* ratio of benefits to be awarded Ann based on ten years. In addition, I would alter the ratio of benefits payable to Ann so that Ann would receive one-third, rather than one-half, of the ratio of years Ann and Dannie were together (ten years) to the number of years of military benefits accrued to Dannie

HAYDEN, J (dissenting)

I respectfully dissent I would affirm the trial court