FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ROSWITHA MARIA MAROLD
AND FREDERICK WILLIAM MAROLD

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Upon the Petition of	)	
ROSWITHA MARIA MAROLD,	)	
Petitioner-Appellant,	)	*Filed October 28, 1987*
And Concerning	)	
FREDERICK WILLIAM MAROLD,	)	7-110 86-435
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Black Hawk County (No. 32368), Roger F. Peterson, Judge.

Petitioner wife appeals and respondent husband cross-appeals from the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

George Lindeman of Lindeman & Yagla, Waterloo, for appellant/cross-appellee.

Frederick G. White, Waterloo, for appellee/cross-appellant.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ. Snell, J., takes no part.

DONIELSON, J.

Petitioner wife appeals and respondent husband cross-appeals from the decree dissolving the parties' marriage. On appeal, petitioner wife asserts that her alimony, child support awards, and the property division, taken together, are inequitable. Petitioner wife also requests attorney fees on appeal. On cross-appeal, respondent husband asserts that the trial court should have awarded him, not petitioner wife, physical care of the parties' children in the joint custody arrangement. We affirm as modified.

Petitioner Roswitha Marie Marold and respondent Frederick William Marold were married in 1968. They separated in 1983; the dissolution decree was entered in 1986. Roswitha is approximately 46 years old; Fred is approximately 68 years old. The parties have two children: Kathryn, born in 1969, and Robert, born in 1971. Roswitha has raynaud's disease (a circulatory ailment of the extremities) and kidney problems; Fred has high blood pressure.

Roswitha has a Bachelor's Degree from the University of Northern Iowa. She did not work outside the home until 1984, at which time she started a women's retail clothing business named Roswitha's Inc. She continued to work there as of the time of trial. Her income averages approximately $12,000.00 per year. Fred is a retired certified public accountant. He testified he receives income from his investments in an approximate amount of $36,000.00 per year. He receives approximately $16,000.00 a year in social security benefits.

Roswitha did not bring significant property into the marriage. The trial court stated that Fred "contends that at the time of the marriage he had assets with a value of approximately $290,946.00," consisting of the following:

Cash and Accounts Receivable	$ 10,278.00
Cash Value of Life Insurance	9,203.00
Investment in Accounting Partnership	144,600.00
Investment in Proof Sets	403.00
Automobiles	3,000.00

Residence at 252 Derbyshire (mortgage-free)	18,000.00
Furniture and Personal Items	6,000.00
Securities	157,000.00

We note that this list of assets totals $348,484.00, not $290,946.00. Fred contends on appeal that the assets' value at the time of marriage was $348,000.00, with deferred tax liabilities of $57,538.00, for a net worth of approximately $300,000.00. Fred valued the securities at market value for an amount of $157,000.00; the cost of the securities was $57,756.25.

At the time of trial, the trial court found the parties had the following assets:

Cash on Hand	$ 265.00
Proof Sets	2,000.00
1977 Buick Automobile	4,000.00
1956 Packard Automobile	1,000.00
1978 Monte Carlo Automobile	2,000.00
602 Prospect Blvd.	120,000.00
Furniture and Fixtures in the Home	20,000.00
Jewelry	10,000.00
Roswitha's Inc.	44,000.00
Securities	962,092.00
Petitioner's Checking Account	10,000.00
Petitioner's IRA	2,000.00
Respondent's IRA at National Bank of Waterloo	34,849.00
Dearborn Credit Union	47.00
Balance Due from the Accounting Partnership (10/1/86)	38,012.00
Cash Value of Life Insurance	22,205.00
	$1,272,470.00

The valuation attached to the securities is the market value as of December 31, 1985. The trial court found the cost of those securities to be $357,297.14.

The trial court awarded Roswitha the following property:

Stock in Roswitha's Inc.	$ 44,000.00
Automobile	2,000.00
Checking Account	10,000.00
IRA Account	2,000.00
Household Furnishings and Goods	20,000.00
Jewelry	10,000.00
One-Half Equity in House	60,000.00
	$148,000.00
$10,000 a Year for 10 Years (present value not computed)	100,000.00
	$248,000.00

The trial court awarded Fred the following property:

Proof Sets	$ 2,000.00
Two Automobiles	5,000.00
One-Half Equity in House	60,000.00
Securities	962,092.00
IRA	34,849.00
Credit Union	47.00
Accounting Partnership Balance Due	38,012.00
Life Insurance	22,205.00
	$1,124,205.00

Fred was directed to pay $1,000.00 per month alimony until Roswitha remarries, dies, or commences cohabitation with a male. The district court set up a joint custody arrangement with Roswitha having physical care of the children. Fred was directed to pay $1,200.00 a month child support. The home was awarded to the parties as tenants in common to be sold when the youngest child graduates from high school, at which time the proceeds are to be divided equally between the parties. Fred was ordered to assume the liabilities, which included a bank overdraft in the amount of $1,220.00, an amount due Merrill Lynch in the amount of $12,166.00, income taxes in an approximate amount of $4,000.00, and real estate taxes in an approximate amount of $900.00. Fred had also alleged he had deferred income taxes on capital gains on stocks and on the income portion of his IRA for a total approximate amount of $172,000.00.

Roswitha has appealed, and Fred has cross-appealed from the decree.

Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I. Roswitha contends that the trial court erred in its decision with respect to the award of property, alimony, and child support. Roswitha desires that alimony or child support be increased in the event that she is not awarded more property. Because we now hold that Roswitha is entitled to a larger propor-

tion of the property, we will not address in detail the issues of alimony and child support. However, we observe in Fred's settlement proposal that he was agreeable to $1,000.00 a month alimony and to $600.00 a month child support if the parties had joint physical custody.

In reviewing a district court's division of marital property, we are guided by the criteria set out in Iowa Code section 598.21(1) (1985). We reaffirm our rejection of any rule based upon a percentage division of the assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). We are not bound to achieve a precisely equal division in awards of marital property. In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). In general, the division of property is based upon each marital partner's right to a just and equitable share of the property accumulated as a result of the efforts of both parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1976). The controlling mandate is that courts achieve an equitable and just award under the circumstances. In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981).

Over a million dollars' worth of property is involved in the present case. It is our duty to determine what an equitable division of this property should be. The total amount of property the trial court found to be divided was $1,272,470.00. We find the total amount of property to be divided totals $1,311,946.00, based on a new valuation of securities, $1,001,568.00, which we discuss later in this opinion. Roswitha received, including the $100,000.00 to be paid over ten years (without present value computations), $248,000.00. Fred received property valued at $1,124,205.00; using our new valuation of securities, Fred received $1,163,681.00.

The record is replete with various accounting records and testimony from Fred, a certified public accountant, of the many accounting techniques used to arrive at the valuations of the property, specifically, the securities, both

at the inception of the marriage and at the time of trial. Fred values the securities at market value ($157,000.00) at the time he was married. Of course, this would appear that he brought a greater valuation of property into the marriage (a factor of Iowa Code section 598.21 in dividing property) than if the cost value ($57,756.25) of the securities was used. Fred bases the market valuation at $157,000.00 by assuming the securities increased in value at the same rate in the previous fifteen years as they did in the subsequent fifteen years. We can find no facts in the record to support Fred's market rate valuation, which is about $100,000.00 more than the cost basis. Fred also submits that estimated brokerage expenses should be taken into account, along with estimated deferred tax liabilities based on then existing capital gain rates. We reject these contentions: *these are only potential liabilities; there are no facts to* support such premises, nor factual amounts to attach to these liabilities assuming Fred is correct. The record discloses Fred bought and sold stocks frequently; some of those in his portfolio may even have been purchased just before his marriage. Fred concedes that those stocks purchased the year before the marriage would be valued at their cost basis. We are also cognizant of the fact the securities' value could have been less than their cost basis.

Fred further tries to equate the value of the assets in 1967 with the assets at this time in terms of a 31.7% rate from the Labor Department statistics. This would give an equivalent value of the assets brought into the marriage for which Fred contends he should be given credit in an amount of approximately $980,000.00. We do not find this argument persuasive.

With respect to the valuation of the securities as of trial date, Fred contends and the trial court agreed, that they were valued at $962,092.00, the market value as of December 31, 1985. The cost of these securities was $357,297.14.

Section 598.21 recognizes that consideration should be given to the property that was brought into the marriage in deciding what an equitable division would be. Fred and the trial court both rely on In re Marriage of Lattig, 318 N.W.2d 811 (Iowa App. 1982), to support the argument that where the accumulated property is not the product of the joint efforts of both parties or where one party brings property into the marriage there need not be a division. However, a review of that case discloses this principle is more inclined to be followed when the marriage is of short duration. The Lattig case cited with approval Mol v. Mol, 147 N.J. Super. 5, 9, 370 A.2d 509, 510 (Super Ct. App. Div. 1977), which held that a party is not entitled to a portion of enhancement in value of an asset that was due solely to inflation or economic factors to which the party did not contribute in any way. The trial court found and Fred agrees that the enhancement of the securities' value was not due to inflation or other economic factors. Rather, Fred's argument is that the enhancement of the securities' valuation was due solely to his careful efforts, wise management, and his expertise. We find Lattig does not support Fred's position. The court in that case recognized that the contribution of the wife as housemaker and mother, even though the husband contributed more financially, would allow the wife an equitable share in the property. Lattig, 318 N.W.2d at 815. Furthermore, the marriage in Lattig lasted only seven years, as compared to eighteen years in the case at hand.

Fred also wants us to take into account potential tax liabilities of $375,000.00 (his estimate) and 10% brokerage expenses in valuing the securities. We decline to do so because such expenses are purely speculative. If Fred did not sell any stocks and bonds before he died, there would be no taxes or broker's fees.

The trial transcript discloses that Fred testified that the value of the securities as of the time of trial was $1,001,568.00 (not taking into account his allegations of potential tax liabilities). We adopt this amount as the securities' value as of the time of trial, rather than $962,092.00 which the trial court found.

Fred stresses in his brief that the assets accumulated were solely the result of his earnings and investments which were looked after by him. Fred contends that the issue involved requires analysis and comparison of both parties to determine who is experienced in preserving the capital; he maintains because Roswitha is unversed in the handling of the assets, she should not be awarded the percentage of securities she deserves and submits "it would have been foolhardy" to place the assets under Roswitha's dominion. Fred contends that were it not for his efforts, Roswitha would not have enjoyed a comfortable life-style. We find these arguments to be condescending and unsupported by evidence; and, as such, we give no weight to them.

Roswitha alleges the court failed to consider the fact she gave eighteen years of her life to this marriage by being a mother and homemaker. We agree with Roswitha's premise that eighteen years of marriage should be an important factor to consider. In addition, we find support in an increased property award to her based on her health problems and her decreased earning ability.

The property distribution discloses Fred received approximately 80% of the assets, which included all the securities, with Roswitha receiving approximately 20% of the property. Roswitha receives $1,200.00 child support a month; this sum will end soon since the children are now approximately 18 and 16. Even with Roswitha receiving alimony, she still received considerably less than that to which we feel she is entitled.

Roswitha contends that it would not be unfair to grant her one-half the difference between Fred's assets when they married and the assets at the present.

We find that Roswitha is entitled to a portion of the securities in accord with the factors set forth in Iowa Code section 598.21 and in line with our law in Hitchcock, 309 N.W.2d at 437, that the parties are entitled to an equitable distribution of the property. It would be patently unfair for Fred to obtain all benefit and advantage of the enhanced valuation of the securities throughout the course of the marriage when Roswitha contributed to the marriage, albeit as a mother and homemaker rather than an investor and bookkeeper, for eighteen years.

The securities at the time of the marriage were valued between $157,000.00 (estimated market value) and $57,756.25 (cost basis). An average valuation is $107,378.12. This substituted value, added with the list of other assets at the time of marriage, totals $298,862.12. Roswitha was awarded property, which includes $100,000.00 distributed over ten years, valued at approximately $248,000.00, which is approximately 18% of the total $1,311.946.00 to be divided at the time of dissolution. (This figure includes securities valued at $1,001,568.00 as referred to earlier in this opinion.) We therefore find in order to effectuate a more equitable distribution of the property, Roswitha should be awarded a proportion of the securities, the parties' largest asset, which was exclusively awarded to Fred. Roswitha submits it would be equitable for her to retain one-third the value of the assets. We agree. One-third of $1,311,946.00 is $437,315.00. We therefore award Roswitha $189,315.00 worth of securities ($437,315.00 (one-third of total assets) less $248,000.00 (already awarded)).

II. Roswitha also requests this court to provide assurance that the monthly alimony payments shall continue after Fred's death. The trial court determined that the alimony is to continue until Roswitha remarries, dies, or cohabits with a male. We decline to decide the issue of assuring payment beyond Fred's death as this was not an issue at trial. Nor does counsel cite any authority

in support of such contention. Failure in a brief to state authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 14(a)(3).

III. Roswitha requests attorney fees on appeal. Under Iowa law attorney fees are not recoverable in a dissolution as a matter of right, but rest within the sound discretion of the court. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). An award depends upon the relative needs and abilities of the parties. In re Marriage of Fish, 350 N.W.2d 226, 231 (Iowa App. 1984).

We order Fred to pay $500.00 toward Roswitha's attorney fees on appeal, based on his superior ability to pay.

IV. Fred contends that the trial court erred in placing the physical care and custody of the minor children of the parties with Roswitha. Roswitha replies that Fred cannot raise this issue for the first time at the appellate level; that Fred at no time asked the trial court for sole physical care and custody of the minor children and hence error was not preserved.

The supreme court will not consider a theory of relief not asserted in the district court. Kartridg Pak Co. v. Department of Revenue, 362 N.W.2d 557, 561 (Iowa 1985).

We are not in agreement with Roswitha's position that Fred did not desire the physical care and custody of the children until this appeal. Fred in trial testified he desired two households be set up and that each parent receive physical placement of the children every six months. It is apparent he felt this would be a preferable alternative to one parent having sole physical custody; he felt neither parent should be denied the opportunity to have the children live with each of them. The transcript does not disclose that Fred desired, in the alternative, to be awarded the sole physical care in the event joint physical care was not awarded. However, he did infer that he did not desire Roswitha to have sole physical care of the children. His trial brief also referred to the physical

care of the children belonging to Fred. Because we are in equity and our review is de novo, we find the record is sufficient to consider the issue which Fred now asserts. We next address the merits of his contention.

Fred was made a joint custodian in the dissolution decree. He is therefore benefited in seeking physical care by the inference be met the joint custody tests set forth in In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979). We are satisfied with the trial court's determination that joint custody of the children should be awarded to both parties based upon the court's rationale that the parties can communicate with each other, each party has equal parenting abilities, each parent supports the other, and both parents are in the same geographic location. Fred argues that the care of the children should be with him because of his constant day-to-day attention and because he has provided structure and discipline to the children's environment. He feels he would be able to be with the children more than Roswitha because she works at her dress shop and travels out of state.

There are no hard and fast rules governing the issue of custody. In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984). Precedent is of little value and our decision must ultimately depend on the particular facts relevant to each issue. Id. The basic tenet which overrides all else in determining which parent is entitled to custody is the best interest of the child. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). The general principles applicable to the issue of custody are set forth at length in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974) and Iowa Code section 598.41(3) (1985) and need not be repeated here. Among the most important factors to be considered in making a child custody determination are the capacity and interest of each parent to provide for the needs of the child and the stability and wholesomeness of each proposed environment. In re Marriage of Grandinetti, 342 N.W.2d 876,

879 (Iowa App. 1983). The ultimate question is therefore which parent could minister more effectively to the long-range best interests of the child. In re Marriage of Sparks, 323 N.W.2d 264, 266 (Iowa App. 1982).

The trial court found that both parties would be suitable custodians for the children; both parents have equal ability to meet the children's psychological and emotional needs; and both parents have actively cared for the children. A review of the children's testimony at trial reveals that they desire to live in the home with their mother and they want continued visitation with their father.

Iowa Code section 598.41(3)(f) provides that the court may consider the children's wishes in deciding a custody arrangement, taking into consideration their age and maturity. Because the children were of sufficient age at the time of trial to voice their concerns as to the custody arrangement, we give weight to their decisions. We also give consideration to the fact that both parties are capable parents. The trial court had the opportunity to view the parties and felt that "the scale tips in favor of placing the children with the petitioner." We decline to disturb the trial court's ruling in this regard and find that the children's best interests will continue to best be served by keeping their sole physical care with Roswitha. They have lived in the family home for years; to move out of their accustomed environment would disrupt their teenage years.

In summary, we modify the property division, decline to address the alimony issue, allow Roswitha attorney fees on appeal, and affirm the custody arrangement.

AFFIRMED AS MODIFIED.