FILED
JAN 26 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

00100

IN RE THE MARRIAGE OF HENRYKA LAMPERT MILLIKEN AND WILLIAM EDWARD MILLIKEN

Upon the Petition of	)	
HENRYKA LAMPERT MILLIKEN,	)	
Petitioner/Appellee/Cross-Appellant,	)	Filed January 26, 1983
And Concerning	)	
WILLIAM EDWARD MILLIKEN,	)	2-306 2-67644
Respondent/Appellant/Cross-Appellee.	)	

Appeal from Story District Court - James C. Smith, Judge.

Respondent father appeals the child visitation provisions of the parties' dissolution of marriage decree. AFFIRMED IN PART AND REMANDED IN PART.

Robert W. Goodwin of Goodwin Law Office, P.C., Ames, for respondent/appellant/cross-appellee.

Jane M. Mathison of Pasley, Singer, Pasley, Holm, Timmons & Mathison, Ames, for petitioner/appellee/cross-appellant.

Heard en banc.

DONIELSON, J.

Respondent father appeals the child visitation provisions of the parties' dissolution of marriage decree. On appeal respondent asserts that trial court's custody and visitation awards unconstitutionally excluded respondent as a "functioning parent" to the parties' minor child; therefore, allegedly pursuant to § 598.21(4) (1981), respondent requests an "order allowing him close contact with and joint responsibility of" the child, who is in petitioner mother's custody.

Petitioner mother cross-appeals the property division and attorney's fees provisions of the dissolution decree. We affirm.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. In re Marriage of Burham, 283 N.W.2d 269, 274 (1979). While we are not bound by the findings of the trial court, we do give them weight especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974).

I.

The parties, Henryka and William Milliken, were married in 1971. They have one child, David, born May 5, 1977. Their marriage was dissolved by decree filed on September 4, 1981. Henryka was awarded sole custody of David, subject to William's specified visitation rights of every other weekend, one evening per week, two two-week periods in the summer, and various holidays.

The trial court approved the parties' prior distribution of personal items, automobiles, and household goods, finding that distribution of these items was accomplished equitably. There was, however, dispute concerning the distribution of certain bank accounts and the proceeds from the sale of the inventory from the parties' defunct imported auto parts business.

Based on its conclusion that William's contribution to the business was

greater than Henryka's, the court awarded Henryka a lump sum of $5,000, to be paid in four yearly installments. There was no alimony award. William was ordered to pay $150 per month child support. Each party was ordered to pay his or her own attorney's fees.

William appeared pro se in the dissolution proceedings. After securing counsel, William timely filed a combined motion to amend and enlarge findings and conclusions and motion for new trial. As grounds for new trial, William asserted that there was insufficient evidence to support the custody award and the "restricted" visitation award, and that his pro se appearance was ineffective. As grounds to amend and enlarge, William asserted the expert testimony of a child psychologist showed that he should have been awarded liberal visitation in amounts equivalent to that exercised prior to the decree, rather than the allegedly "restricted" visitation awarded by trial court.

Henryka also timely filed a motion to amend and enlarge, asserting, inter alia, that trial court undervalued the value of the parties' disputed property by $10,000; that Henryka's property award was inequitable; and that William should be required to pay her trial attorney's fees.

On October 22, 1981, trial court denied all of both parties' post-trial motions. William then instituted this appeal and Henryka cross-appealed.

II.

William's first contentions concern the child custody and visitation arrangements. The legislature recently enacted new provisions specifically relating to child custody matters in dissolution decrees. 1982 Iowa Acts ch. 1250, §§ 1-2. We remand this case for a hearing under the new law of those issues relating to the custody of David.

III.

On cross-appeal, Henryka contends that the property division is inequitable.

She asserts that the parties' assets subject to division amount to $27,410, not $17,000 as found by the trial court. The trial court awarded her a lump sum settlement of $5,000 to be paid in installments.

Our analysis is governed by Iowa Code § 598.21 (1981), which codified many aspects of our prior case law. See Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) (modified to exclude fault, In re Marriage of Williams, 199 N.W.2d 339, 345(Iowa 1972)). Section 598.21 provides, in part, that, upon every dissolution of marriage:

> 1. . . . The court shall divide all property, except inherited property or gifts received by one party, equitably between the parties after considering the following:
>
> a. The length of the marriage.
>
> b. The property brought into the marriage by each party.
>
> c. The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
>
> d. The age and physical and emotional health of the parties.
>
> e. The contribution by one party to the education, training or increased earning power of the other.
>
> f. The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the . . .
>
> * * *

Thus, the ultimate question is, as it has always been, whether the distribution of property was equitable. We reject any rule based on a percentage division of the total assets and must determine what is equitable under the specific facts of this case. In re Marriage of Callenius, 309 N.W.2d 511, 514 (Iowa 1981). When asked to review an individual economic provision of a dissolution

decree, we consider all the provisions together as an integrated whole. In re Marriage of McFarland, 239 N.W.2d 175, 179 (Iowa 1976).

We believe the property division was equitable and justified. The trial court found, and we agree, that the value of various items which were in the parties' possession at the time of the dissolution were not disputed at trial and were divided equitably by the parties on their own initiation. The main asset, the value of which was disputed, was the defunct foreign auto parts business. The court found that the assets of the business consisted mainly of the inventory worth approximately $17,000. Henryka argues on appeal that there were business tools worth $5,000 and a business vehicle worth $3,000 which the court should have taken into account in making its division. She argues that, due to her contributions to the business, she should be awarded a greater amount of its value. We disagree. While we recognize that Henryka contributed to the business in the way of secretarial and bookkeeping services, the business was started by William with the assistance of his father before the parties' marriage. There are considerable debts associated with the business, all of which were assigned to William. He was also assigned to pay the majority of the marital debts, those incurred due to the separation of the parties, and the costs of the dissolution action. Henryka was assigned to pay her attorney's fees and approximately $1,800 in debts incurred by her. We find this property division to be equitable.

IV.

Henryka claims that the court erred in refusing to award her attorney's fees. She also requests attorney's fees on this appeal.

Attorney's fees are not recoverable as a matter of right, but depend upon one party's financial needs and the other party's ability to pay. In re Marriage of Burham, 283 N.W.2d 269, 278 (Iowa 1979). The trial court has considerable discretion in awarding such fees at trial. In re Marriage of Winegard, 257 N.W.2d

609, 618 (Iowa 1977). We believe the trial court considered the parties' financial needs and abilities in determining that each should pay his or her own attorney's fees. Likewise, on appeal our primary consideration in making an award of attorney's fees is the parties' resources.

We agree with the trial court's refusal to award Henryka her attorney's fees and find that she should pay her own attorney's fees in connection with this appeal. She is gainfully employed, while William's stipend appears somewhat uncertain. William is obligated under the decree to pay most of the marital and business debts in addition to child support. We believe the costs of this appeal should be divided equally.

AFFIRMED IN PART, REMANDED IN PART.