



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF LINDA L. JOTZKE AND NORBERT T. JOTZKE

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Upon the Petition of)

LINDA L. JOTZKE,)

Petitioner-Appellant,)

Filed March 31, 1987

And Concerning)

NORBERT T. JOTZKE,)

Respondent-Appellee.)

6-516
86-868

Appeal from the Iowa District Court for Polk County (CD 49-28934)

- Theodore H. Miller, Judge.

Petitioner wife appeals the decree dissolving the parties' marriage.

AFFIRMED AS MODIFIED.

Hugh J. Cain of Duncan, Jones, Riley & Finley, Des Moines, Iowa, for
petitioner-appellant.

Donald G. Beattie of Skinner, Beattie & Wilson, Altoona, Iowa, for
respondent-appellee.

Considered by Schlegel, P.J., Hayden, and Sackett, JJ.

SCHLEGEL, P.J.**201**

Petitioner wife appeals the decree dissolving the parties' marriage. We affirm as modified.

Petitioner Linda L. Jotzke and respondent Norbert T. Jotzke were married in 1973. They have three children, a daughter born in 1977 and twin sons born in 1980. Linda is a legal secretary. She is thirty-four years old. Norbert manages a convenience store. He is thirty-nine years old.

In its dissolution decree, the trial court set up a joint custody arrangement with Linda having physical care of the children and Norbert having visitation of one night every other week, alternate weekends, alternate holidays, and from August 1 until three days before school starts every year. Norbert was directed to pay \$75 per week child support. He was allowed to claim two children as exemptions for income tax purposes and Linda was allowed to claim one. Linda was awarded the parties' house, subject to (1) a mortgage, (2) a home improvement loan, and (3) a lien of \$6,714.47 at 8% interest in Norbert's favor. Each party was awarded a car and the personal property in his or her possession.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Castle, 312 N.W.2d 147, 148 (Iowa Ct. App. 1981). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. Id.; Iowa R. App. P. 14(f)(7).

I.

Linda first asserts that the child support is inadequate. The trial court determined that Linda had \$1,040 per month net income and monthly expenses totalling \$1,684. The trial court determined that Norbert's net income was

\$201 per week. This amount yields a net of \$871 per month. The court did not determine if Norbert's claimed expenses were indicative of his present living costs. Norbert's own assessment of his expenses included child care expenses of \$300 per month and payments on a home improvement loan of \$200 per month. The trial court ordered Norbert pay \$75 per week child support. This amount requires Norbert to pay \$3,900 per year or \$325 per month over the course of a year in child support. Linda was ordered to pay the home improvement loan. The result of Linda being ordered to pay the home improvement loan is that she has approximately \$510 per month in house payments; her total monthly expenses then become \$1,884. Subtracting the court-ordered support payment due from Norbert, Linda's total monthly expenses are \$1,559. This leaves her approximately \$519 short each month. After paying \$325 per month child support Norbert would have \$546 left from his net monthly salary. Out of this \$546 he has revolving credit expenses of approximately \$125 per month. He does not have rental expenses as he lives with his mother; however, he does have food, transportation, and medical expenses. We find that to assist Linda in supporting the children, Norbert should increase his weekly support payment to \$40 per child per week. This requires Norbert to pay \$520 per month in child support over the course of a year. Although this still leaves Linda over \$300 short each month, we do not think that any larger grant of child support is possible given the financial circumstances of Norbert at this time.

II.

The trial court, presumably pursuant to Iowa Code section 598.21(4)(h), allowed Linda to claim one child as an exemption and Norbert two children as exemptions for income tax purposes. Linda contends that the court committed reversible error in awarding any child support deductions to Norbert. Linda contends the tax code mandates that Linda, as custodial parent, receive all

the deductions for the children. Without addressing the relationship between 26 U.S.C. § 152 and the awarding of deductions to parties in dissolution cases, we note that the allocation of the right to claim income tax exemptions has a direct effect on the financial resources available for the support of children and is often considered in connection with the award of support payments. In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977). We believe the equities of this case require that Linda be permitted to receive all the deductions for the children since at the moment she has no income which is not committed to maintaining the family. Linda is paying for the food, clothing, shelter, and day care of the three children in an amount far above the amount of support paid by Norbert. Linda, as noted above, still must face a disparity of over \$300 between the amount of money she has to expend each month and her income. Norbert has very little money left over after his expenses, but at least he does not face the serious monthly deficit that Linda faces. We believe Norbert is able to bear his burden of support without claiming any of the children as deductions; Linda, on the other hand, appears to need to claim all of the children as exemptions to keep the family's standard of living close to what it would have been had there not been a dissolution. See Iowa Code § 598.21(4)(c) (1985). Linda is presently working up to the limits of her available time and level of education. She works full time at a secretarial position and then returns home to a full time job of raising children and keeping the home. Norbert, at the moment, does not have two full time jobs. We believe equity requires that Norbert make his child support payments, but without claiming the children as his tax exemptions.

III.

Linda also contends that the trial court should not have awarded Norbert interest on his share of the parties' equity in their house. The district court

awarded the parties' homestead to Linda, subject to Norbert's equity of \$6,714.47, and decreed that the home be sold when the children become married, emancipated or 18 years of age and graduated from high school, normal progress anticipated. At the time of sale, Norbert's equity becomes due and payable. The district court stated that Norbert's equity should draw 8% interest until paid, noncompounded. The Supreme Court of Iowa has frequently concluded that when a change in status of a divorced couple's minor children triggers the sale of a house and an equitable division of the proceeds, interest on the equity will not be paid to the party not living in the family home. For example, in In re Marriage of Jordan, 203 N.W.2d 314, 316 (Iowa 1972), the court affirmed a property settlement providing that the family home should be sold when the wife no longer resided in the home, remarried, or no longer had custody of a minor child. No provision for interest was made when the court concluded that when one of the conditions accrued, the house should be sold and the net proceeds divided equally between the parties. Id. In In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), the court said that when a minor child reached the age of 18 the home should be sold and the net proceeds divided evenly between the parties. No interest was added to the husband's equity during the time of the child's minority. Id. In In re Marriage of Nessel, 345 N.W.2d 107, 112 (Iowa 1984), the court agreed that a decree was equitable which provided that the parties' house would be sold at the time the last child left home or upon the wife's remarriage. The husband would then be awarded the amount of equity he had in the home but without interest. Id. In In re Marriage of Pittman, 346 N.W.2d 33, 37 (Iowa 1984), the court found that where one party was awarded the family house and the other party was given a lien without interest and payable when the house was sold or the minor child reached 18 or graduated from high school, such property division was equitable. Id. See also Annot. 19 A.L.R.

4th 239, 278-81 (1983). In the instant case, the record shows that the real value of the house cannot presently be recouped given the current market situation for houses in that area. As the trial court found:

The parties paid about \$38,000 for their home in Greenfield in 1978 legally described as Lot 11 in Short's Addition to the town of Greenfield, Iowa. They added about \$25,000 in improvements during their use. It has been offered for sale at times since 1980, but the best offer was \$35,000, less than it was worth.

In these circumstances, we do not feel it is equitable to give Norbert a guaranteed 8% return on his equity in the house. Such a return would guarantee Norbert \$537 per year until the house was sold whereas Linda is in no way guaranteed such a healthy return on her equity in the home. In fact, given the current economic realities in rural Iowa, she runs the real risk of suffering an overall loss in her housing investment. We do not think, therefore, that it is appropriate to give interest to Norbert on his equity until that equity becomes due and payable. See Lemrick v. Grinnell Mutual Reinsurance Company, 263 N.W.2d 714, 720 (Iowa 1978); 47 C.J.S. Interest and Usury § 46 (1982). The trial court's judgment is therefore modified to eliminate any interest payment on Norbert's equity until that equity is due and payable and interest at that time will be assessed at the then prevailing statutory rate. See In re Marriage of Heinemann, 309 N.W.2d 151, 153 (Iowa Ct. App. 1981).

IV.

Linda next contends that the trial court should not have awarded Norbert so long a summer vacation period. The record reveals the trial court was concerned with the best interest of the children in awarding the summer visitation to Norbert. See Iowa R. App. P. 14(f)(15). We do not see any persuasive evidence in the record indicating that the children's best interest would not be served by such visitation and therefore we affirm the trial court's decision in this matter.

V.

We have already discussed Linda's final assertion, that the trial court erred in making her responsible for both the mortgage and home improvement loans. We have adjusted the amount of child support to be paid by Norbert as well as the allocation of the tax exemptions. Given these adjustments, the requirement that Linda pay the home improvement loan is equitable when viewed in light of the division of the entire division of the parties' property.

AFFIRMED AS MODIFIED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

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The majority's apparent basis for modifying the trial court order is Linda should have more money because of her projected costs are higher than her income and Norbert doesn't need much money because he lives with his mother. The majority's order would result in the children and Linda having \$13 per day each to live on. Norbert will have \$10 per day.

We cannot base child support awards on how people want to fix their standard of living. We must allocate the income fairly.

I realize the parties' income is limited and their expenses are high. I therefore agree with the majority's decision not to order interest on Norbert's lien on the house. However, the lien should be paid when the home is sold or the last child no longer qualifies for child support.