



IN THE COURT OF APPEALS OF IOWA

PAMELA E. MARTIN,	)	
Appellee,	)	Filed November 10, 1977
vs.	)	
RICHARD L. MARTIN,	)	<u>284</u>
Appellant.	)	2-59614

Appeal from Polk District Court - Dale S. Missildine, Judge.

Husband appeals child support provisions in dissolution decree claiming it constitutes alimony. - Modified and affirmed.

Ned P. Miller and Michael L. Huston, of Erickson, Seckington, Laughlin & Huston, of Des Moines for Appellee.

David C. Craig and Robert A. Hutchison, of Swift, Brown and Winick. of Des Moines for Appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

SNELL, J.

Respondent Richard L. Martin appeals the child support provisions of the dissolution decree. Richard and Petitioner, Pamela E. Martin, have two children, a son Scott, born July 6, 1966, and a daughter Wendi, born July 5, 1974. Custody of the two children was placed in Pamela. The trial court ordered Richard to pay \$35 per week per child as child support until the children reached the age of eighteen, married or became self supporting. The trial court also ordered Richard to pay, as additional child support, all principal and interest on the first mortgage of the parties' residence, all taxes assessed against the property as well as all the utility bills for the residence, excluding long-distance telephone calls. This latter provision was to continue until Pamela moved from the home, remarried or until both children were eighteen, married or otherwise self-supporting.

On appeal, Richard argues that the amount of child support awarded was excessive and that requiring him to make the mortgage, tax and utility payments in effect constitutes alimony. Our review is de novo, rule 4, Rules of Appellate Procedure. In matters of child support, we are guided by the factors set forth in *In re Marriage of Zoellner*, 219 N.W.2d 517, 525 (Iowa 1974). Each case is peculiarly dependent upon its own facts and therefore precedents are of little value. *Zoellner*, supra. While we give weight to the trial court's findings of fact, we are not bound by them. Rule 14(f)(7), R. App. P.

At the time of trial, Richard was employed as a fire fighter at a gross salary for 1976 of \$10,600. He also has part-time employment in which he earns approximately \$3,800 a year. His net monthly income is \$924. Richard submitted a financial statement listing monthly expenses and installment payments of \$847. This did not include any proposed child support. Pamela, on the other hand, was unemployed. It had been three years since she worked part-time in a law office answering phones and doing overflow typing. Currently she was attending adult education classes in an attempt to improve her typing skills. Pamela testified she hoped to secure employment as a typist and expected to earn between \$3.00 and \$3.50 per hour. Her financial statement listed monthly expenditures of \$804 for herself and the two children. This figure also included a \$79 monthly payment on a car she did not receive under the decree.

The decree permitted Pamela and the two children to live in the parties' house until Pamela moved, married or the children became self-supporting. At that time, the house would be sold and the net proceeds divided equally between Pamela and Richard. C.f. *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977). Up to that time, Richard was to be responsible for payment of the monthly mortgage of \$141 which included principal, interest, taxes and insurance as well as the basic utility bills which were estimated at \$75 per month. Richard was also ordered to pay all of the family debts, which exceeded \$1,600, and to hold Pamela harmless thereon.

Both Richard and Pamela are legally obligated for the support of their children, not necessarily equally but proportionately according to their ability and circumstances. In *re Marriage of Carney*, 206 N.W.2d 107, 112 (Iowa 1973); *Dworak v. Dworak*, 195 N.W.2d 740, 743 (Iowa 1972). After a review of the factors set forth in *Zoellner*, we find the trial court was justified in its child support award of \$35 per child per week.

The trial court contemplated that Pamela would shortly begin working and to encourage her to do so, granted no alimony. Richard contends that the requirement for him to pay the mortgage, tax and utility payments, though called child support, is really alimony.

We are satisfied with the trial court's denomination since the obvious purpose in mind was to provide a home for the children. We find, however, the provisions exceed Richard's ability to pay. The decree is therefore modified to the extent that Richard shall pay only the principal and interest payments on the first mortgage and all taxes against the property. At such time as the house is sold pursuant to the trial court decree, Richard shall be paid from the net proceeds an amount equal to his principal payments made under the decree after which any remaining proceeds shall be equally divided between Pamela and Richard.

Pamela also asks for attorney fees on this appeal. Attorney fees are not a matter of right but are granted to enable a party to prosecute or defend. Section 598.11, The Code. The trial court awarded attorney fees in the amount of \$750. While we do not fix the amount of fees for Pamela's attorney we hold that Richard shall pay \$100 of Pamela's attorney fees incurred on this appeal/

Modified and affirmed.

All judges concur, except Oxberger, J., who dissents.