FILED
MAY 0 1993

IN THE COURT OF APPEALS OF IOWA

No. 2-503 / 91-1937

000605

IN RE THE MARRIAGE OF MARY MICHELLE THOMPSON AND RANDY LYNN THOMPSON

Upon the Petition of
MARY MICHELLE THOMPSON,

Appellee,

And Concerning
RANDY LYNN THOMPSON,

Appellant.

Appeal from the Iowa District Court for Tama County, Thomas L. Koehler, Judge.

The husband appeals the economic provisions of a decree of dissolution. **AFFIRMED AS MODIFIED IN PART, AFFIRMED BY OPERATION OF LAW IN PART, AND REMANDED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan, Condon & Klaessy, Marshalltown, for appellant.

Michael J. Moon of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Considered en banc.

Randy and Mary Thompson were married on June 27, 1975. The parties have five minor children.

Mary was thirty-five years old at the time of the dissolution hearing. She is a high school graduate with less than twenty hours advanced education at Marshalltown Community College. Mary worked as a grocery store cashier after high school and as a dental assistant. Mary stopped working as a dental assistant eight months after her marriage at Randy's request. In May of 1989, Mary began working as a veterinary assistant. Mary currently works approximately thirty hours per week and has an average gross weekly income of $130.32.

Randy was thirty-eight years old at the time of the dissolution hearing. He is a high school graduate. He works as a sales-delivery person. Randy is also employed as a school bus driver for the South Tama Community School District. Randy's net monthly income is approximately $1801.90. This includes dividend income and income from crop and pasture land rent.

In 1980, Randy inherited the parties' home from his mother. The value of the home was approximately $29,500. The property was placed in the names of both parties subsequent to the estate proceedings in order to accommodate a loan in the amount of $40,000 which was used to remodel and rebuild the home.

On March 6, 1991, Mary filed the petition for dissolution.

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On November 22, 1991, the district court entered a decree dissolving the parties' marriage. The district court concluded the homestead Randy inherited from his mother became marital property when it was placed in joint ownership. The district court concluded, based upon the length of the parties' marriage, the number of children, and Mary's willingness to forego any claim to the property, Mary and the children should have the use of the home until Randy is no longer obligated to pay child support to Mary. The district court ordered Randy to pay the monthly mortgage payment, the parties' joint debts, and child support. The district court excluded the amount of mortgage payments Randy made from his income to determine his child support obligation. The court also awarded tax exemptions to Mary.

Randy filed a motion for new trial and a rule 179(b) motion. Subsequently, Randy filed two amendments to his 179(b) motion. The first amendment asked the court to amend its findings and award Randy the tax exemptions for the five children. The second amendment requested the court limit Mary's right to reside in the home. Specifically, Randy asked that Mary's stay be terminated if she remarries or cohabits with another adult male. The district court overruled his motion to amend and enlarge. Randy has filed this appeal.

On May 21, 1992, the Iowa Supreme Court granted Randy's application for limited remand for the purpose of

permitting Randy to file an application for modification. The parties agreed Randy should have physical care of their eldest child. On July 16, 1992, the district court entered an order approving the parties' stipulation for modification of the dissolution decree. The order modifying the decree also reduced Randy's child support obligation by $25.89 per week. Mary was not required to pay child support for this child.

Our scope of review is de novo. Iowa R. App. P. 4.

I. Tax exemptions.

On appeal both parties agree the tax exemptions should be awarded to Randy. The trial court provided in its decree:

> [t]he Petitioner may include the children as exemptions on his individual federal and state tax returns as long as the mandates of any appropriate tax regulation do not reflect otherwise and he is current in his child support payments for the calendar year for which he intends to declare the children as exemptions.

The problem with the trial court's award is Mary is the petitioner. Randy filed a motion to amend and enlarge the tax exemption provision; however, the court overruled his motion. We now correct the error made in the trial court decree. We hold Randy Lynn Thompson may include the tax exemptions for his five children on his individual federal and state tax returns as long as he is current in his child support payments at the end of the taxable year.

II. Economic provisions. 000609

The trial court provided Mary and the parties' children were entitled to remain in the home until Randy was no longer obligated to pay child support to her. The youngest of the Thompson children was born October 5, 1986. Pursuant to the dissolution decree, Randy is responsible for the mortgage payment and retains full equity in the home. Randy contends the property division is inequitable. On appeal, Randy requests Mary and the children be allowed to remain in the home for twelve to eighteen months. He argues thirteen years is not a "reasonable period of time" under Iowa Code section 598.21(1)(g).

We determine some aspects of the property division must be modified. The property disposition is inequitable under the circumstances. Pursuant to the dissolution decree, Randy must pay the mortgage, large joint debts of the parties, child support, and living expenses for himself and the parties' eldest child. Randy contends he can manage the debts and financial obligations by refinancing. His statement, however, is merely conjecture. In the absence of any proof that Randy can refinance, we do not decide the issues before us based on conjecture.

A. Real estate.

First we address the disposition of the home. In making a property disposition, a court is to consider the desirability of awarding the right to live in a family home

to the party having physical care of the children. Iowa Code § 598.21(1)(g) (1991). We also consider the facts that Mary foregoes any claim to the property in exchange for its use while the parties' children grow up, the parties did extensive remodeling after obtaining a $40,000 loan, and the parties have five children for whom they must provide. Under all the circumstances, we find the trial court's decision to award full equity of the home to Randy and its use to Mary and the children was fair and equitable.

The trial court provided Mary and the children could reside in the home until Randy no longer had a child support obligation. We modify this provision. Mary and the parties' children shall be entitled to reside in the home until the youngest surviving child attains his or her majority, becomes self-supporting, or marries, but in any event, until every child completes his or her high school education.

Randy requested the trial court to terminate Mary's and the children's rights to reside in the home upon Mary's remarriage or cohabitation with another. The trial court failed to address this issue. Randy makes the same request on appeal. This court is divided on the issue. Three judges, Judges Donielson, Hayden, and Habhab, granted Randy's request to so restrict Mary's occupancy in the house. Three other judges, Chief Judge Oxberger and Judges Schlegel and Sackett, refused to restrict Mary's occupancy

to remarriage or cohabitation. As a result of the trial court's failure to address this issue and the division of this court, this issue is affirmed by operation of law and Randy's request to restrict Mary's occupancy is denied. Iowa Code § 602.5106(1) (1991).

The trial court stated Randy was responsible for the mortgage and "all obligations required by the mortgage." We conclude taxes and insurance on the home are required by the mortgage and Randy shall be solely responsible for them.

We modify the trial court decree with respect to which party will be responsible for repairs. Mary shall be responsible for maintaining the home in good condition and for all repair costs. Mary is also solely responsible for utility bills. Utility usage and costs will be better controlled if the consumer pays the bills. In re Marriage of Florke, 270 N.W.2d 643, 645 (Iowa 1978).

B. Child support.

Next, we address the child support provisions of the trial court decree. In its original decree, the trial court based Randy's child support obligation on gross income figures of $130 per week for Mary and $1801.90 per month for Randy. The court deducted the requisite tax and other deductions allowed by the guidelines from Randy's gross monthly income figure. In addition, the court also lowered Randy's income figure by subtracting his monthly obligation for the mortgage. The trial court used the

resulting monthly net income and applied the five or more children chart to set Randy's support obligation at $129.45 per week. Later, the district court modified the original custody and child support provisions, pursuant to a stipulation of the parties, to award custody of the parties' eldest child, Dirk, to Randy. The trial court also reduced Randy's child support obligation by one-fifth.

First, we address the method by which the trial court calculated Randy's child support obligation. The court reduced Randy's net income by the amount of his mortgage payment and used the resulting income to determine his support obligation. This court is divided on the issue. Three judges, Judges Donielson, Hayden, and Habhab, affirmed this method of calculating child support. Three other judges, Chief Judge Oxberger and Judges Schlegel and Sackett, determined Randy's support obligation based on his net monthly income and then gave him a credit against his support obligation for mortgage, taxes, and insurance associated with the house. Because this court is divided on this issue, the trial court's calculation of child support is affirmed by operation of law. Iowa Code § 602.5106(1) (1991).

However, we modify Randy's child support obligation on a different basis. Following the method of calculation used by the trial court, we conclude Randy's net income must be further reduced by the amount of insurance and

taxes he pays on the house and then the resulting income must be used to determine his support obligation. The record does not indicate the amount of house insurance and taxes. Therefore, we remand to the trial court to determine the amounts of insurance and taxes and adjust Randy's child support obligation accordingly.

The second issue we address is whether Mary should be required to pay child support to Randy for the one child in his custody. The child's name is Dirk and he is the parties' eldest child. Dirk was born November 14, 1977. The trial court did not impose a support obligation on Mary with regard to Dirk. This court determined child support should be assessed against Mary for Dirk, the child in Randy's physical custody. Upon remand the trial court shall decide the amount of child support for Mary to pay Randy for their son Dirk. We remand to the trial court for this purpose also.

We affirm the trial court decision on all other issues whether or not specifically addressed in this opinion.

III. **Attorney fees.**

Mary requests attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to

defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Randy is ordered to pay $500 to be applied toward Mary's appellate attorney fees. The costs of appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED IN PART, AFFIRMED BY OPERATION OF LAW IN PART, AND REMANDED.