

IN THE COURT OF APPEALS OF IOWA

No. 9-598 / 89-251

FILED

JAN 25 1990

CLERK SUPREME COURT

IN RE THE MARRIAGE OF RANDY E. WEDO AND CINDY LOU WEDO

Upon the Petition of
RANDY E. WEDO,

Appellee,

And Concerning
CINDY LOU WEDO,

Appellant.

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Appeal from the Iowa District Court for Clayton County,
John Bauercamper, Judge.

The wife appeals from a district court decree of dissolution. She contends the district court erred in: (1) awarding inadequate child support; (2) failing to award nominal spousal support; (3) allowing the husband to claim the tax exemptions for the children; and (4) incorrectly reciting the parties' stipulation regarding visitation in its order. **AFFIRMED AS MODIFIED.**

Kevin C. Neylan of the Neylan Law Office, Elkader, for
the appellant.

Randy E. Wedo, Wilton, pro se.

Considered by Oxberger, C.J., and Donielson and
Sackett, JJ.

DONIELSON, J.

Randy Wedo and Cindy Wedo were married on October 24, 1981. Two children were born of this marriage; Crystal on April 25, 1983, and Shane on December 23, 1984. Cindy has another child from a previous relationship.

On April 19, 1988, Randy Wedo filed a petition for dissolution of marriage. On January 20, 1989, the case proceeded to trial. The parties made an oral stipulation concerning child custody, visitation, division of property, and allocation of debts.

On January 24, 1989, the district court entered its decree of dissolution of marriage. The court noted Randy, 32, was currently employed as an over-the-road truck driver earning a net income of \$1200 per month. Cindy disputes this figure on appeal. Cindy, 31, was employed as a factory worker earning a net income of \$770 per month. Pursuant to the stipulation, the court ordered the primary care of the children be placed with Cindy. Randy was granted visitation. However, instead of awarding Randy visitation with the children for two weeks in the summer as agreed to by the parties in the stipulation, the court awarded Randy two months of summer visitation. The court awarded child support of \$300 per month to Cindy and allowed Randy to claim the children as dependents for tax purposes. No award of spousal support was made.

I. Scope of Review. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's

determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II. Child Support. Cindy contends the district court erred in not awarding her more child support and in not including a cost-of-living provision in the decree. It is well established both parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). In establishing child support the courts are to consider the financial resources of the child; the financial resources of both parents; the standard of living the child would have enjoyed had there not been a dissolution; the cost of child care if it is needed; the physical and emotional health needs of the child; the child's educational needs; the tax consequences to each party; and such other factors as the court may determine to be relevant in an individual case. Iowa Code § 598.21(4) (1989).

Cindy argues the district court erred in calculating Randy's monthly net income. In his initial affidavit of financial status filed May 27, 1988, Randy listed his net income as \$953 per month. In his January 20, 1989, statement of affairs, he reported \$1,200 in net monthly income. At trial, Randy's W-2 for 1988 was submitted into evidence. It reflects the income he received for working ten months at Olson Explosives, Inc. (he began his employment on March 1, 1988). Cindy correctly notes this W-2 reveals Randy's net monthly income was approximately \$1,479 per month. Randy's testimony before the district court indicates his net income was actually somewhat lower because he had \$25 a week deducted to provide insurance coverage for his family. Randy's failure to file a brief in this action leaves this court to its own devices in ascertaining what his actual monthly income was. We assume Randy's net monthly income was approximately \$1,379 (\$1,479 less \$100 per month for insurance). Considering Cindy's low level of income and the needs of two small children, the child support obligation entered in this case is not adequate. Cindy's request, however, for \$175 per week in support would be inequitable and would not be consistent with the permanent support guidelines recently adopted by

our supreme court.¹ We find Randy's support obligation should be increased to \$400 per month.

Cindy claims the district court also erred in not incorporating a cost-of-living adjustment (COLA) provision into the decree. She specifically asked the court to include a provision for a 10% per year cost-of-living increase in Randy's child support obligation. Our supreme court has recognized the propriety of including COLA provisions in dissolution decrees when they are predicated upon changes in the consumer price index and are limited by the requirement of similar changes in the noncustodial parent's salary. In re Marriage of Nessel, 345 N.W.2d 107, 109-10 (Iowa 1984); In re Marriage of Stamp, 300 N.W.2d 275, 279-80 (Iowa 1980). This court has recognized a COLA provision may be tied to an individual's increase in salary. In re Marriage of Garvis, 411 N.W.2d 703, 708 (Iowa App. 1987).

Cindy did not offer the district court a COLA formula which was either tied to an objective measurement of the rate of inflation, Stamp, 300 N.W.2d at 280, nor upon actual increases in the noncustodial parent's level of income. Garvis, 411 N.W.2d at 708. Instead, she asked for an annual 10% increase in child support regardless of the actual rate of inflation or Randy's level of income. "A

1. See order entered by the Iowa Supreme Court on September 29, 1989.

court should not take judicial notice of future inflation." In re Marriage of Pfeffer, 443 N.W.2d 92, 95 (Iowa App. 1989). We have previously rejected provisions for automatic increases in child support which are not tied to actual inflation or wage level rates. Pfeffer, 443 N.W.2d at 95 (rejection of provision for annual eight percent increases in child support). The district court did not err in omitting Cindy's request for an annual 10% increase in child support from the dissolution decree.

III. Alimony. Alimony is an allowance to the ex-spouse in lieu of a legal obligation to support that person. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). Alimony is not an absolute right; its award depends upon the unique circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). In making an award of alimony the courts are to consider those factors now codified in Iowa Code section 598.21(3). In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983). From our review of the circumstances of this case, we find an award of alimony is not warranted.

IV. Right to Claim Children as Dependents. Cindy claims the district court erred in awarding Randy the right to claim both children as dependents for income tax purposes if he is current with his child support obligations. Cindy argues the district court had no authority to designate who shall receive dependency

exemptions, and it should not have attempted to govern matters governed by IRS regulations.

This court is cognizant of the pertinent federal law which governs a parent's right to claim dependency exemptions. See In re Marriage of Kerber, 433 N.W.2d 53, 55 (Iowa App. 1988). Three exceptions exist to the general rule that a custodial parent is allowed to claim an exemption. Id. The only exception applicable to this case is the situation in which a custodial parent releases his or her right to claim the exemption by executing IRS form 8332. 26 U.S.C. § 152(e)(2) (1988). This court has the power to order a party to execute whatever requisite IRS and Iowa Department of Revenue forms are necessary to ensure another party will be allowed to claim certain income tax exemptions. See In re Marriage of Brands, 392 N.W.2d 855, 857 (Iowa App. 1986); In re Marriage of Hickey, 386 N.W.2d 141, 144 (Iowa App. 1986).

Allocation of the tax exemptions available for dependents directly affects the amount of financial resources a noncustodial parent has available to support his or her children. In re Marriage of Lovetinsky, 418 N.W.2d 88, 90 (Iowa App. 1987). Our supreme court has previously approved a decree provision which allocated exemption rights to a noncustodial parent contingent on the parent staying current in his support obligations. In re Marriage of Wahlert, 400 N.W.2d 557, 561-62 (Iowa 1987).

In light of the increased support obligation our decision imposes upon Randy, we conclude it is equitable to allow him to claim the two children as tax exemptions provided he is current with his child support payments. Cindy shall execute whatever state or federal forms are necessary to effectuate this allocation of tax exemptions.

V. Visitation. Cindy's final claim concerns the visitation provision set forth in the decree. The district court stated it was granting visitation in accordance with the parties' stipulation; however, the decree states Randy is entitled to two months of summer visitation as opposed to two weeks as set forth in the stipulation. We find this to have been an inadvertent error on the district court's part, and we modify the decree to provide two weeks of summer visitation.

The decision of the district court is affirmed as modified by this opinion. Costs of this action are assessed to Randy Wedo.

AFFIRMED AS MODIFIED.

Oxberger, C.J., concurs; Sackett, J., concurs in part and dissents in part.

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

I respectfully dissent from that portion of the majority opinion fixing child support. I would remand to the trial court on this issue.

We are required to apply the Iowa Supreme Court child support guidelines. See Order of Sept. 29, 1989, In re Child Support Guidelines, N.W.2d Advance Sheet No. 46, at LXVIII (Oct. 31, 1989). The majority, while contending the guidelines have been followed, has not shown in their opinion how the necessary computations were made to arrive at what is termed in the guidelines as "net monthly income." I find the record here insufficient for me to make a calculation of "net monthly income." What is particularly troublesome is the majority is attempting to establish the father's income by working from a W2 form. A computation of tax liability can only be made from a completed tax return.

The father appears to have withholding in excess of his ultimate tax liability. Using the tax withheld figure from the W2 would result in his paying less child support than a noncustodial parent with the same income who figured tax paid from a return. This is inequitable.

The trial court did not have the permanent guidelines when this case was decided. I would remand to the trial court to apply the guidelines.