FILED
JAN 29 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ALLEN D. VOLDEN AND CYNTHIA A. VOLDEN

Upon the Petition of)

ALLEN D. VOLDEN,)

Petitioner-Appellee/ Cross-Appellant,)

And Concerning)

CYNTHIA A. VOLDEN,)

Respondent-Appellant/ Cross-Appellee.)

397

Filed January 29, 1986

5-553
85-376

Appeal from the Iowa District Court for Polk County - Harry Perkins, Judge.

Respondent wife appeals and petitioner husband cross-appeals from the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Kenneth L. Butters, Des Moines, for respondent-appellant/cross-appellee.

Roger J. Hudson and Steven H. Shindler of Wimer, Hudson, Flynn & Neugent, Des Moines, for petitioner-appellee/cross-appellant.

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

Respondent wife appeals and petitioner husband cross-appeals from the decree dissolving the parties' marriage. On appeal, respondent wife asserts (1) the alimony, child support, and attorney fee awards are inadequate, and (2) that the trial court should have given her the income tax dependency exemptions for the parties' two children. Respondent wife also requests attorney fees for the trial and appeal. On cross-appeal, petitioner husband asserts that the trial court should not have awarded respondent wife any alimony.

Petitioner Allen D. Volden and respondent Cynthia A. Volden were married in 1970. They have two children, Lisa, born in 1971, and Melanie, born in 1974. Allen is an assistant manager for AT&T; his gross income for 1984 was $34,200. Cynthia did not work outside the parties' home until 1977, when she took a part-time job at Hy-Vee; she earned $5.80 per hour at this job.

The trial court gave the parties joint custody of their two children, with Cynthia having physical care. The trial court directed Allen to pay Cynthia child support of $200 per child per month, alimony of $200 per month for two years, and attorney fees of $1,000. The trial court stated that Allen would have the income tax dependency exemptions for the children so long as his child support and alimony payments were current.

The trial court awarded Allen two cars, two insurance policies, his AT&T savings and retirement plans, and certain items of personal property. The trial court awarded Cynthia a car, an insurance policy, a bank account, some savings bonds, some shares of AT&T stock, and the personal property not awarded to Allen. The trial court also awarded Cynthia the parties' house, subject to a lien in Allen for his half of the equity, payable essentially when the parties' youngest child was grown. The trial court ordered Allen to pay $1,000 of the wife's $2,488.09 trial attorney fees. Cynthia has appealed and Allen has cross-

appealed from the dissolution decree. Neither party contests the property division.

After the case was heard, but before the decree was entered, Cynthia began full-time employment with the Banker's Life Company in Des Moines. The parties stipulated in an amendment to the appendix that her gross monthly income is $850 and her net monthly income is $664 based on 4.3 weeks per month.

Our review is de novo. Iowa R. App. P. 4. The fact findings of the trial court are given weight, but are not binding. Iowa R. App. P. 14(f)(7).

I. Financial Situation. Initially, the parties differ on their respective income and expenses. Allen claims his net monthly income is $1,546. The trial court found that Allen's net income figure was arrived at by taking deductions from his gross income for expenses not allowable for child support purposes. These expenses involved deductions for a credit union loan, bonds, AT&T savings, and group life insurance totalling $447. After reviewing the record, we concur with the trial court's findings of this matter. Thus, for alimony purposes, Allen's net monthly income is $1,993 which is arrived at by adding $447 of claimed expenses to the $1,546 net income figure. Allen also claimed monthly personal expenses of $1,236.50. The trial court found that certain expenses totaling $244 were not substantiated. Allen's monthly personal expenses were considered to be $992.50. Allen has nearly $1,000 each month after his expenses are deducted ($1,993 net monthly income - $993 monthly personal expenses).

The parties also dispute Cynthia's expenses. Allen claims her monthly expenses are $1,063, while she contends her monthly expenses total $1,321. The $1,063 expense figure Allen uses is a misstatement of the record. Cynthia claimed monthly expenses of $1,321 and if she had a net monthly income of $258 from Hy-Vee, she would have a shortfall of $1,063. This is not to say her expenses would only be $1,063. We conclude that Cynthia's expenses are $1,321.

It is not disputed that Cynthia receives $1,269 in net monthly income from her job, alimony, and child support. Thus, Cynthia presently has a $57 monthly shortfall ($1,264 income - $1,321 expenses).

II. Alimony. Cynthia seeks an increase in the amount of and/or duration of alimony. Allen cross-appeals and claims no alimony is justified.

Iowa law provides that alimony is awarded according to each party's earning capacity, the present standard of living, and the relative needs of each party. See Iowa Code § 598.21(3); In re Marriage of Hitchcock, 309 N.W.2d 432, 436-37 (Iowa 1981).

Considering Cynthia's salary from her new job, alimony as awarded, and child support, she receives $1,264 monthly. Even though Cynthia's earning capacity is enhanced by her new job, it is clear that Allen has and will continue to have a superior earning capacity. At the present time, Allen's net income from his job is three times greater than Cynthia's net income from her job.

In addition, Cynthia premised her alimony on the need to pay for health insurance, job retraining, and expenses until a full-time job is found. The remaining unresolved factor is her expense for health insurance. Even though Cynthia has obtained full-time employment at Banker's Life, the record is void of her health insurance costs. Even though precedent is of little value because the determination of what award is necessary is made on a case by case basis, see In re Marriage of Cook, 205 N.W.2d 682, 684-85 (Iowa 1973), this court has increased alimony on several occasions. See, e.g., In re Marriage of Giles, 338 N.W.2d 544 (Iowa Ct. App. 1983), one instance where an increase was justified we stated:

> Clearly, petitioner's needs cannot be met on $100 per week. Equally important is that respondent has the wherewithal to provide more. While we agree that petitioner cannot expect to be maintained at the same standard of living she enjoyed while she was married, we point

> out that alimony payments should not be calculated to maintain respondent's standard of living at petitioner's expense.

Id. at 545-46. An increase in alimony in this case would work substantial justice between the parties because Cynthia needs additional money to meet her expenses while Allen can afford to pay an increased amount.

Given Cynthia's $57 monthly shortfall, considered in relation to her standard of living and her needs, we modify the alimony award from $200 per month for two years to $300 per month for five years. This modification is retroactive to payments which commenced on April 1, 1985. The other portions of the alimony award are left intact. Obviously, we find no merit in Allen's cross-appeal to reverse Cynthia's alimony award.

III. Child Support. Cynthia maintains the child support of $200 per month for each child is inadequate. We disagree.

While both parents have an obligation to support their children, this obligation shall be apportioned according to the reasonable ability of each parent to contribute. In re Marriage of Heineman, 309 N.W.2d 151, 153 (Iowa Ct. App. 1981). In light of Cynthia's present financial situation and the financial demands placed on Allen, we find that the child support as awarded by the trial court is adequate.

IV. Tax Dependency Exemption. The trial court entitled Allen to claim his two children as dependents for income tax purposes provided he made timely child support and alimony payments. The trial court directed Cynthia to execute any documents necessary to have Allen claim such tax status.

The Internal Revenue Code, section 152(e) (1985), as amended in Internal Revenue Amendments, Pub. L. No. 98-369, § 423, 98 Stat. 799[1], allows

---

[1]Former I.R.C. § 152(e)(2) provided:

> **(2) Special rule.**—The child of parents described in paragraph (1) shall be treated as having received over half of his support during the calendar year from the parent not having custody if
>
> > (A)(i) the decree of divorce or of separate maintenance, or a written agreement between the parents applicable to the taxable year beginning in such calendar year, provides that the parent not having custody shall be entitled to any deduction allowable under section 151 for such child, and
> >
> > **(ii)** such parent not having custody provides at least $600 for the support of such child during the calendar year, or
> >
> > (B)(i) the parent not having custody provides $1,200 or more for the support of such child (or if there is more than one such child, $1,200 or more for each of such children) for the calendar year, and
> >
> > **(ii)** the parent having custody of such child does not clearly establish that he provided more for the support of such child during the calendar year than the parent not having custody.
>
> For the purposes of this paragraph, amounts expended for the support of a child or children shall be treated as received from the parent not having custody to the extent that such parent provided amounts for such support.

I.R.C. § 152(e)(2), as amended, for taxable years beginning after December 31, 1984, provides:

> **(2) Exception where custodial parent releases claim to exemption for the year.**—A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if
>
> **(A)** the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

the noncustodial parent to have such tax status if under I.R.C. § 152(e)(2)(A) the custodial parent signs a written declaration that the custodial parent will not claim such children as dependents. Subparagraph (B) of this same section also requires that the written declaration be attached to the noncustodial parent's tax return. Cynthia claims a trial court cannot order her to sign such a declaration because Congress intended that the declaration provided in I.R.C. § 152(e)(2) (1985) be signed voluntarily by the custodial parent. We are not persuaded that I.R.C. § 152(e), as amended, should be interpreted as having a voluntariness component read into the custodial parent's written declaration.

The legislative history regarding this change indicates that "The custodial parent can release his or her claim to the exemption for the year to the noncustodial parent." Joint Comm. on Int. Rev. Tax., 98 Cong., 2d Sess., Legislative History of the Internal Revenue Code of 1954, at 718 (1984); see also H. Rep. No. 98-432, Pt. 2 (March 5, 1984), pp. 1498-1500; H. Rep. No. 98-861 (June 23, 1984), pp. 1118-1119 (Conference Report).

I.R.C. § 152(e) (1985) also provides that the manner and form of the written declaration may be regulated by the Secretary. The Secretary has enacted Income Tax Regulation § 1.152-4T, T.D. 7973 (August 31, 1984), which provides that the noncustodial parent can claim the dependency deduction provided "the custodial parent has agreed to release his or her claim . . . ."

Neither the Treasury regulations nor the legislative history conclusively indicate that the issue presented was contemplated. We acknowledge that an argument can be made the Treasury regulations and legislative history are

---

> **(B)** the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.
>
> For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.

couched in voluntary-type terms. Nevertheless, because the former practice under I.R.C. § 152 allowed trial courts to order the custodial parent to provide the noncustodial parent with the dependency deduction and the new law does not indicate that any change in this practice was intended, we conclude that the trial court acted within its authority by ordering Cynthia to sign the written declaration.

V. Attorney Fees. Cynthia finally seeks attorney fees for the trial court and appellate proceedings. The primary consideration in awarding attorney fees in dissolution proceedings is the resources of the parties. In re Marriage of Lattig, 318 N.W.2d 811 (Iowa Ct. App. 1982). The court also considers the ability of the non-requesting party to pay and whether the requesting party was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981).

Cynthia seeks $1,488.09 for trial attorney fees, in addition to $1,000 already awarded. She also seeks $1,811.90 for appellate attorney fees. After evaluating the above-mentioned factors, we affirm the trial court's award of attorney fees and hold that the parties shall pay their own appellate attorney fees and brief costs. Given the results on appeal, the parties shall each pay an equal portion of the remaining appellate costs.

AFFIRMED AS MODIFIED.