

IN THE COURT OF APPEALS OF IOWA

No. 2-081 / 91-769

FILED

APR 28 1992

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF WILLIAM L. VERTZ AND
KATHY JEAN VERTZ**

1006

Upon the Petition of
WILLIAM L. VERTZ,

Appellant/Cross-Appellee,

And Concerning
KATHY JEAN VERTZ,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County,
Arthur Gamble, Judge.

Parties appeal the economic and custody provisions of
their dissolution decree. **AFFIRMED AS MODIFIED.**

Marc S. Harding, Des Moines, for appellant.

Susan L. Ekstrom, Des Moines, for appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

William and Kathy Vertz were originally married in 1976 and divorced three years later. They later reconciled and were together for the past ten years by virtue of common-law marriage. The parties have three minor children, Holly Louise, born July 16, 1974; Heather Jo, born May 29, 1981; and William Earl, born May 2, 1982. The district court dissolved their marriage on May 3, 1991.

William has been employed in the construction business for the past fifteen years. He claimed his net income, including unemployment, was \$25,522 in 1986, \$21,284 in 1987, \$21,638 in 1988, \$4,251 in 1989, and \$40,000 in 1990. Approximately one and one-half years before trial William entered a business arrangement with a friend. William's friend owned the company, and William was an officer. Evidence suggests William was not a partner and owned no stock in the company. William provided the equipment, and his friend provided capital and the remaining equipment. William's compensation was dependent upon cash receipts, overhead, and availability of funds.

Kathy was a homemaker for most of the marriage. Currently, she works approximately twenty hours per week in a school cafeteria making \$5.97 per hour. In addition, she works approximately thirty to thirty-eight hours per week in the evenings at Mercury Tool & Engineering Company making \$4.50 per hour.

During the marriage the parties invested approximately \$9000 in a home which they purchased on a contract with a balloon payment. The parties were unable to make the balloon payment when it came due in June 1990. Rather than trying to sell the home and split the proceeds with Kathy, William allowed his parents to pay off the balloon payment of approximately \$21,000. In the fall of 1990 William's parents took full title to the property.

The dissolution decree awarded sole legal and physical custody of the parties' oldest child, Holly, to Kathy. The decree awarded the parties joint legal custody of the other two minor children, Heather and William, with Kathy having physical custody. In the decree the court found William's net monthly income for child support purposes was \$3000 per month and set child support at \$1101 per month for the three minor children. The court did not award alimony to either party. Finally, the court found William's parents had a net equity of \$19,000 in the parties' home and ordered William to pay Kathy a lump sum property settlement of \$10,000 representing William's equity in the home. William appeals the dissolution decree.

On appeal William contends the district court erred by finding his net income to be \$3000 per month and setting his support obligation at \$1101 per month. Specifically, he maintains his 1990 annual income of \$40,000 was artificially increased by income held over from the previous year, extraordinarily good weather, taking jobs

outside his normal scope of employment, and rental income which now belongs to his parents. He asks his child support obligation be based on the gross monthly income of \$1878 per month and a net monthly income of \$1222 per month.

William also appeals the district court's award of a \$10,000 lump property settlement to Kathy for the equity in the parties' home. He argues that \$10,000 is more than the parties invested in the home and that he should be required to pay a settlement of only \$4500, representing one-half of the approximately \$9000 that the parties originally invested in the home.

Finally, William contends the district court erred by granting sole legal and physical custody of the parties' teenage daughter, Holly, to Kathy. He argues the court based this custody decision on the strained relationship between Holly and himself and the fact that Holly lives with her maternal grandmother by choice. He further argues that as a practical matter the custody order grants Holly's maternal grandmother custody and interferes with his ability to maintain contact with Holly and improve his relationship with her.

On cross-appeal Kathy argues the district court erred by requiring payment of her attorney fees out of her lump sum property settlement. Kathy maintains she currently has no assets with which to pay attorney fees and asks for a separate award of the attorney fees that she has incurred at trial and on appeal.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

First, we address the child support issue. In 1989 William earned a gross income of \$354 per month; in 1990 he earned a gross income of \$3333 per month. For the first eight months of 1991, the record suggests William earned a gross income of approximately \$2989 per month. We find the trial court determination that William's net income is \$3000 per month is excessive. William must pay state, federal, and FICA taxes on his income, and the dissolution decree allows him to claim only two of his three children as dependents. In addition, William provides health insurance for the children.

We modify the trial court ruling to include a more equitable determination of William's income. To find William's proper net monthly income, we reduce the 1990 gross income of \$3333 by thirty-three percent to account for state, federal, and FICA taxes. We conclude his net monthly income is \$2222. Applying the guidelines to this amount, William is obligated to pay \$815 per month in child

support. When Holly turns eighteen or graduates from high school, whichever occurs later, William's obligation for the two other minor children will be \$698.

Second, we find the trial court properly distributed the parties' assets. Partners in a marriage are "entitled to a just and equitable share of the property accumulated through their joint efforts." In re Marriage of Havran, 406 N.W.2d 450, 452 (Iowa App. 1987). The distribution of the property of the parties should be that which is equitable under the circumstances after consideration of the criteria codified in Iowa Code section 598.21(1). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

The dissolution decree gave the bulk of the valuable and unencumbered assets to William. Testimony suggests the value of the parties' home at the time of dissolution was \$40,000. We find the distribution of the parties' assets as a whole justifies the \$10,000 lump sum award to Kathy.

Third, we find the trial court correctly placed Holly in Kathy's sole legal custody. For over a year William has not seen Holly, and Holly will not talk to him. The trial court decided Kathy should have sole custody of Holly "due to the break down [sic] of the relationship between Holly and William L. Vertz." William argues this breakdown occurred because of the influence of the maternal grandmother with whom Holly lives. After consideration of the factors set out in In re Marriage of Weidner, 338

N.W.2d 351, 355-56 (Iowa 1983), and because Holly will be eighteen years old in three months, we affirm the trial court award of custody.

Finally, Kathy requests trial and appellate attorney fees. 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 are to 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). We do not award attorney fees but note (as did the trial court) these fees can be paid out of the lump sum property settlement owing from William. The costs of this appeal are taxed to William.

In conclusion, we modify the trial court's determination of William's net monthly income thus reducing his child support obligation. We affirm the trial court on all other issues.

AFFIRMED AS MODIFIED.