FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF COLLEEN M. EVERS AND JAMES R. EVERS

Upon the Petition of)
COLLEEN M. EVERS,)
Petitioner-Appellee/)
Cross-Appellant,)
And Concerning)
JAMES R. EVERS,)
Respondent-Appellant/)
Cross-Appellee.)

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9-180
88-1341

Appeal from the Iowa District Court for Chickasaw County (DM 5A-27), Joseph C. Keefe, Judge.

Respondent husband appeals the dissolution decree and petitioner wife cross-appeals. **AFFIRMED AS MODIFIED.**

Roger L. Sutton, Charles City, for respondent-appellant/cross-appellee.

Christopher O'Donohoe of O'Donohoe, O'Connor & O'Donohoe, New Hampton, for petitioner-appellee/cross-appellant.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Respondent husband appeals the decree of dissolution entered for the parties in district court, and petitioner wife cross-appeals. Both parties challenge certain economic provisions of the decree. Upon our de novo review, Iowa R. App. P. 4, we affirm as modified.

The parties, Colleen and James Evers, were married in 1978. They have two children, both girls, born in 1978 and 1980. The dissolution decree placed the girls in Colleen's custody, and this custody provision is not challenged in the present appeal. In addition to these two children, Colleen has custody of two older children from a previous marriage.

James works in a machine shop and earns a net pay of approximately $535 per week, including overtime. Colleen is an LPN presently earning $5.20 per hour. She has plans to attend nursing school to become a registered nurse in order to improve her earning capacity. She testified that she would be able to finish her schooling by April of 1990.

The dissolution decree directed James to pay Colleen alimony of $200 per month until she finishes or discontinues her education to become a registered nurse. The court also ordered James to pay Colleen child support totaling $202 per week for both minor children. The decree further gave Colleen a judgment against James for $2,442.22, arrearage in temporary child support, and

temporary alimony payments, and ordered James to pay $400 of Colleen's attorney fees.

James has appealed from the dissolution decree, challenging the court's awards of alimony and child support. Colleen has cross-appealed and contends the district court erred in computing the amount of James' arrearage on temporary child support and alimony payments. She also requests attorney fees on appeal.

I. **Child Support.** James contends the child support award is excessive because it is based on an assumption that he will continue to work an average of 20 hours overtime per week. He also contends that the court erred by utilizing the Iowa Supreme Court's Temporary Child Support Guidelines as a basis for a permanent child support award. He also contends that the district court made a computational error in comparing his monthly earnings to the weekly child support award. Finally, he contends the child support award should be subject to a reduction when Colleen finishes her schooling.

It is well settled that although both parents are statutorily obligated to contribute to the support of their children, the amount of their respective contributions is apportioned according to their financial capabilities. See In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). In order to reach a just and equitable determination, we must consider the parties' financial

resources, the child's financial resources, the standard of living the child would have enjoyed had there been no dissolution, any costs of day care, the physical, emotional, and educational needs of the child, and any other factors that may be relevant in an individual case. Iowa Code § 598.21(4) (1987).

In the case at bar, the trial court computed James' child support obligation based on the Iowa Supreme Court's Temporary Child Support Guidelines, which apportions child support according to a set percentage of net income. The court also took into account respondent's weekly overtime wages. We agree with respondent that the trial court erred in both respects. In In re Marriage of Anderson, 400 N.W.2d 84, 85 (Iowa App. 1986), we held that child support should not be fixed at any set percentage of net income, but should be assessed in accordance with the factors set forth in Iowa Code section 598.21(4). Furthermore, as our court stated in In re Marriage of Heinemann, 309 N.W.2d 151, 152 (Iowa App. 1981):

> With regard to overtime wages, we believe that the amount of petitioner's child support obligation should be determined with reference to the amount of income he can actually expect to earn; it should not depend on the inclusion of income that is entirely speculative in nature and over which he has little if any control. Although overtime work has been available to the petitioner in the past, there is no guarantee that it will be available to him in the future and it should thus not be included in his income.

The court in Heinemann modified the court's decree concerning child support and required that the petitioner pay 25% of the net amount attributable to any overtime wages, and also required petitioner to submit, on an annual basis, a copy of his income tax returns to the trial court. Id.

According to respondent's weekly wage stub presented at trial, James' gross weekly earnings, based upon a 40-hour week, total $472. His deductions, which include both state and federal taxes, and social security, total approximately $166 per week, leaving him with a net weekly income of $306, and a net monthly income of approximately $1,224.[1] According to petitioner's affidavit of financial status, Colleen earns approximately $167.09 net pay per week, including deductions, and a net monthly income of approximately $668.36. Colleen also testified that she receives $120 per month from her 19-year-old son who lives at home, and $100 per month from the grandparents of her first two children. Colleen further estimated her monthly personal expenses to be $1,415. Based upon these figures, the relative debts of the parties, and the needs of the minor children, we modify the decree to provide as follows: respondent's child support obligation is reduced

1. According to respondent's weekly wage stub presented at trial, his standard deductions, based on a sixty-hour work week (including 20 hours of overtime), total $300.44. Our approximate figures are based on a forty-hour work week.

to $500 per month ($250 per child). In addition, we further adopt the award fashioned in Heinemann and order respondent to pay 25% of the net amount attributable to any overtime wages he may earn, and require him to submit a copy of his income tax returns to the trial court on an annual basis.

II. **Alimony.** James also contends that the trial court erred in awarding Colleen alimony of $200 per month until Colleen either finishes or discontinues her training to become a registered nurse. The factors governing an award of alimony are set forth in Iowa Code section 598.21(3) (1987). The payment of alimony is not an absolute right, but must be determined in light of all circumstances. In re Marriage of Bevers, 326 N.W.2d 896, 900 (Iowa 1982).

The record in this case indicates that Colleen was trained as an LPN immediately after high school and worked as an LPN during the parties' ten-year marriage for approximately three years. The record also indicates that she waitressed at a local restaurant and tap for approximately five years during the parties' marriage to nable her to spend more time with her children. In ovember 1987, Colleen enrolled in a nursing program full ime to become a registered nurse, but was forced to quit n January to go to work. She testified that she plans to eturn to school and that she could finish her schooling by

April of 1990. Given James' greater income, the length of the parties' marriage, Colleen's responsibilities for the children, and her desire and ability to seek new skills and secure better employment, we believe that the alimony award established by the trial court was reasonable under the circumstances and is therefore affirmed.

III. Attorney Fees. Colleen has requested attorney fees on appeal. An award of attorney fees is generally based on the parties' respective abilities to pay. In re Marriage of Williams, 303 N.W.2d 160, 167 (Iowa 1981). The trial court is vested with considerable discretion in allowing attorney fees to be awarded in dissolution cases. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). Colleen's appellate attorney fees are approximately $1,200. We order James to pay $500 toward Colleen's appellate attorney fees, with costs assessed equally between the parties.

IV. Colleen's Cross-Appeal. Colleen's cross-appeal also urges that the trial court erred in computing the amount of James' arrearage on temporary child support and alimony payments. We find no merit to this claim.

AFFIRMED AS MODIFIED.