

FILED

JAN 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF FRANK MILO NIENKERK AND ANN MARIE NIENKERK

**UPON THE PETITION OF
ANN MARIE NIENKERK,**

)

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Petitioner-Appellant,

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Filed January 26, 1982

)

**AND CONCERNING
FRANK MILO NIENKERK,**

)

1-419
2-66425

Respondent-Appellee.

)

Appeal from Mahaska District Court, James D. Jenkins, Judge.

The petitioner-wife appeals from the economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED WITH INSTRUCTIONS.**

Rosemary Sackett of Sackett, Sackett, Hemphill & Howe, Spencer, for petitioner-appellant.

Garold F. Heslinga of Heslinga & Heslinga, Oskaloosa, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

The petitioner-wife appeals from the economic provisions of the parties' dissolution decree. We affirm as modified and remand with instructions.

The parties began living together in October 1973. In February 1975 they purchased a home in both their names as Frank and Ann Nienkerk. On February 14, 1977, they were married.

The parties have one daughter, Michelle, born May 14, 1978. Both parties have children from prior marriages. During the marriage, the husband was employed as an agricultural salesman for Frake and Strothman. The wife attended school, receiving a Bachelor of Business Administration in accounting. She worked outside the home some of the time during the marriage. At times, although not working for pay, she worked very closely with her husband, assisting him with his job. After Michelle was born, Ann began working for the same company as her husband. In April 1979 Ann moved out, taking her two children and Michelle with her. On June 21 she filed her petition for dissolution. The trial judge awarded custody of Michelle to the wife and ordered the husband to pay \$30 per week child support until the child reaches age 5, \$50 per week from age 5 to age 10, and \$75 per week from age 10 to age 18 or upon graduation from high school. No alimony nor attorney fees were awarded. He awarded the parties' home to the husband. The wife was awarded the furniture and automobile in her possession, and her \$2500 commission due from Frake & Strothman. The rest of the parties' property was awarded to the husband.

The wife appeals, asserting that: (1) the property division was unfair; (2) the amount of child support was inadequate, and; (3) the trial court erred in reserving to the husband the right to bring an alienation of affections suit against the wife's parents.

The third issue is now moot since the Iowa Supreme Court has recently abolished the right to recover for alienation of affection. Fundermann v.

In arguing that the property division was inequitable, the wife alleges that during the separation the husband took nearly \$100,000 of the parties' assets and concealed it in order to avoid its division by the court. The trial judge found this allegation to be without support in the evidence. The financial record in this case is unclear. Part of the reason for this is that during their marriage the parties had a practice of borrowing money to pay bills and then repaying the bank by withdrawing commissions earned from Frake & Strothman. There is disputed testimony as to what the parties owned at the time of the trial in this matter. The amounts of the bills owed by the parties are also disputed. Since the parties disagreed as to what was owed and owned, a determination of the truth depends largely on the credibility of each witness. Although we are not bound by them, we give weight to the findings of the trial court, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974). The trial court apparently believed the respondent when he said the money he withdrew during the separation was used to pay bills. We accept this belief and therefore affirm the property division.

The wife also asserts that the child support award of \$30 per week to age 5, \$50 per week to age 10, and \$75 per week thereafter is inequitable. We agree. The wife is currently earning \$6 per hour (\$12,000 per year gross salary) and will be able to take the CPA examination in the near future. The husband's commissions have varied, and he has earned the following in fiscal years 1975 through 1979: \$26,192; \$26,743; \$21,804; \$87,588; and \$16,823. According to the wife's financial statement, her expenses for herself and the parties' child are about \$900 per month. Therefore, we modify the child support provision as

follows: the husband will pay \$50 per week child support with an automatic cost of living adjustment as provided in In re Marriage of Stamp, 300 N.W.2d 275 (Iowa 1980). The amount of the adjustment will be the lesser of: (1) the percentage change in the National Consumer Price Index, or (2) the husband's salary increase as evidenced by his gross income on his federal tax returns. See Stamp, id. at 276-77. On remand, the trial court will include a COLA provision in its decree which is substantially similar to the one in Stamp.

All other provisions of the trial court's decree are affirmed.

AFFIRMED AS MODIFIED; REMANDED WITH INSTRUCTIONS.

Donielson, Snell, and Carter, JJ., concur; Oxberger, C.J., and Johnson, J., dissent.

OXBERGER, C.J., dissenting.

I dissent. Inflation is a problem. The trial court solution is one way of approaching inflation. However, the supreme court in In re Marriage of Stamp, 300 N.W.2d 275 (Iowa 1980), established the method to deal with inflation. We should accept the Stamp procedure.

Johnson, J., joins in this dissent.