

FILED

MAR 31 1980

CLERK SUPREME COURT

380

IN THE COURT OF APPEALS OF IOWA

**IN RE THE MARRIAGE OF CONNIE DIANE NICHOLSON
AND RICHARD CLYDE NICHOLSON**

Upon the Petition of	)	
CONNIE DIANE NICHOLSON,	)	Filed March 31, 1980
Petitioner-Appellant,	)	
And Concerning	)	
RICHARD CLYDE NICHOLSON,	)	0-59
	)	2-63524
Respondent-Appellee.	)	

Appeal from Polk District Court - Harry Perkins, Judge.

Petitioner appeals economic provisions of parties' dissolution decree. Affirmed as modified.

Robert Koop Johnson of Whitfield, Musgrave, Selvy, Kelly & Eddy, Des Moines, for petitioner-appellant.

Michael J. Galligan of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, for respondent-appellee.

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

DONIELSON, J.

Petitioner, Connie Diane Nicholson, appeals economic provisions of parties' dissolution decree, asserting circumstances justify an award of alimony, a larger child support award, and a provision in the event their son, Brian, attends college. We modify the trial court's decree and affirm it as modified.

I.

Our review is de novo. Iowa R. App. P. 4. We review the facts and law, determining anew from credible evidence all properly presented contentions of the parties. While we give weight to the trial court's fact findings, especially when the credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7).

II.

The parties were married in 1964. Connie filed for dissolution of marriage on November 3, 1978. After trial, the trial court entered a decree on April 4, 1979. The parties' assets were divided pursuant to their stipulation. Connie was awarded custody of their ten-year old son and child support from Richard of \$60 per week, but no alimony. Child support is to be paid until the child reaches age eighteen, marries, or becomes self-supporting. Connie filed notice of appeal on April 23, 1979. Upon parties' joint application to the trial court, a document was filed on October 30, 1979, captioned as an amended decree of dissolution of marriage. This filing does not affect any provision of the decree relevant to this appeal. Connie's application for attorney's fees for this appeal was ordered submitted with the appeal.

Robert is a sheet metal worker, with a 1978 gross income of \$22,116.36. During the marriage, Connie held various jobs, the last of which paid \$3.00 per hour. At the time of trial, Connie had been offered a job as a teller at a financial institution at a salary of \$580 per month. In her financial statement, she estimates monthly expenses of \$1,085.09 for herself and the child.

III.

Our analysis of this appeal begins with section 598.21, The Code 1979, which provides that "when a dissolution of a marriage is decreed, the court may make such

order in relation to the children, property, parties, and the maintenance of the parties as shall be justified." Id. Factors to be considered in achieving a fair and equitable determination of the financial obligations are set forth in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968) (modified to exclude fault, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972)).

The purpose of section 598.21, The Code 1979, in providing for the awarding of child support is to enforce the "legal as well as moral duty of support between parent and child." In re Marriage of Zoellner, 219 N.W.2d 517, 524 (Iowa 1974). Precedents are of little value in determining extent of that duty as each case is peculiarly dependent on its facts. Id. at 525. Both parents are under the same legal duty to support their children. In re Marriage of Wahl, 246 N.W.2d 268, 272 (Iowa 1976). This obligation, however, is not necessarily to be borne equally, but should be apportioned according to the reasonable ability of each to contribute. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976); Wahl, 246 N.W.2d at 272.

In evaluating the correctness of a particular support award, it has been stated:

Factors to be considered are parties' age, health, present earning capacity, future prospects, amount of resources owned by each or both parties, contributions of each to the joint accumulations, the children involved, duration of the marriage, indebtedness of each or both, and any other relevant factors which might assist the trial court in reaching a just and equitable decision.

See In re Marriage of Zoellner, 219 N.W.2d 515, 525 (Iowa 1974). After consideration of the relevant factors, the one party's need must be balanced against the other party's ability to pay. In re Marriage of Murray, 213 N.W.2d 657, 660 (Iowa 1973). This determination is essentially a question of what is equitable. In re Marriage of Moorehead, 224 N.W.2d 242, 245 (Iowa 1974).

Here, both parties are approximately the same age; Richard is forty-two and Connie is thirty-four, and both enjoy good health. They brought equal assets to the marriage and contributed to the accumulation of assets according to their respective abilities. Currently, Richard's earning capacity exceeds Connie's by about \$16,000. Connie was awarded possession of their house, provided: She pays the mortgage; their son is less than eighteen years old or attending an accredited institution of learning;

Connie remains unmarried; and she does not reside with an adult member of the opposite sex in the manner of husband and wife. If any one of these events occurs, the house is to be sold and the net proceeds divided equally.

Connie's basic contention is that her and Brian's needs exceed her ability to provide and Richard has the ability to make up the difference. In her financial statements, she estimates their monthly living expenses to be \$1,085.09. Richard estimates their monthly expenses to be \$800.67. Using Richard's lower figure, Connie's annual living expenses would be about \$9,600. The job she was offered would have provided her with an annual net income of \$5,580. Adding Richard's annual support obligation of \$3,120, Connie would have total resources of \$8,700 per year, or a shortfall of approximately \$900. Although Richard's estimate of Connie's expenses was similar to hers, it failed to include sitter expenses for their son, which Connie estimates to be about \$70 per month. All together, Connie and Brian's expenses exceed her net income by about \$1,740.

Under these circumstances, we find the trial court's award was not equitable. Until Connie becomes more established in the work world and commands a greater income, she and Brian will experience difficulties in meeting their expenses. Richard possesses the earning capacity to alleviate this problem. We, therefore, modify this award by ordering Richard to pay to Connie \$150 per month for a period of five years, commencing from the date of issuance of procedendo of this decision. See In re Fenchel, 268 N.W.2d 207, 209 (Iowa 1978); In re Marriage of Murray, 213 N.W.2d 657, 661 (Iowa 1973). This award of alimony grants Connie the opportunity to acquire further job training and experience, which will increase her earning capacity.

We also modify the support award to provide, in addition to its current provisions, that the trial court will retain jurisdiction of this matter so that in the event Brian attends college, the matter of Richard's obligation to assist in the expenses of his education is not precluded by res judicata. See Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974). Section 598.1(2), The Code 1979, defines "support" and does not provide for modification once a decree is handed down. Since this decree provides that Connie may occupy the house even after Brian reaches age eighteen if he attends a post-secondary

educational institution, it is possible in a modification action this would indicate contemplation and rejection of just such a provision. This could preclude modification. See Page, 219 N.W.2d at 557.

IV.

Connie seeks attorney fees for this appeal. Attorney fees are not recoverable as a matter of right. In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). Such an allowance depends on one party's financial needs and the other's ability to pay. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978). Without determining the amount her attorney may charge, we hold Richard shall pay all costs of this appeal and \$500 toward her attorney fees. See Peterson, 227 N.W.2d at 143.

AFFIRMED AS MODIFIED.

Oxberger, C.J. dissents.

OXBERGER, C.J. (dissenting)

I agree the trial court award is inequitable. Unfortunately, the majority's modification does not remedy the inequity.

Alimony is based on relative needs and resources of the parties. In re Marriage of Beeh, 214 N.W.2d 170, 175 (Iowa 1974). During fourteen years of marriage, Connie devoted her efforts to her family rather than her employment career. Now she finds herself with annual expenses exceeding annual income by \$1740. Her earnings are \$16,000 per year less than Richard's and Richard has substantially fewer expenses than she. This case is one where the relative needs and resources of the parties justifies an alimony award. Thus, I concur with the majority's imposition of an alimony provision.

However, I cannot agree with its limitation of the alimony award to a five-year period. The majority arbitrarily imposed that limitation without explanation. The effect of the limitation will be to place Connie in the same harsh financial status five years from now as now condemned by the majority as inequitable. The facts of this case square with developing lines of case law where permanent alimony is awarded.

The following language in In re Marriage of Sanders, 255 N.W.2d 109, 111 (Iowa 1977), is appropriate here:

Over the years she sacrificed her own earning ability in order to make a home for him and their child. Partially because of her efforts his earnings are substantial. Hers are not. We hold the award as made was justified under this record both as to amount and duration.

I believe permanent alimony is appropriate in this case.