FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

00112

IN RE THE MARRIAGE OF VERNON W. NERAD AND BETTY LEA NERAD

UPON THE PETITION OF VERNON W. NERAD,	)	Filed January 26, 1983
Petitioner/Cross-Appellant,	)	
AND CONCERNING BETTY LEA NERAD,	)	2-337 2-67463
Respondent-Appellant.	)	

Appeal from Johnson District Court, Harold J. Swailes, Judge.

Respondent-wife appeals and petitioner-husband cross-appeals from economic provisions of the parties' dissolution decree. AFFIRMED AS MODIFIED.

Bruce L. Walker of Phelan, Tucker, Boyle & Mullen, Iowa City, for respondent-appellant.

Stephen C. Gerard II of the Bartley Law Offices, Iowa City, for petitioner/cross-appellant.

Considered en banc.

PER CURIAM

Respondent-wife appeals and petitioner-husband cross-appeals from economic provisions of the parties' dissolution decree. We affirm as modified.

The parties, Vernon and Betty Nerad, had been married for over twenty-three years when their marriage was dissolved in 1981. Vernon was born in 1930 and Betty was born in 1937. Four children were born of their marriage, to wit: two sons who are now emancipated; a daughter who is now aged twenty and a full-time student; and a son who is now aged seventeen.

At the time of their marriage, both Vernon and Betty were employed. Vernon presently works at Iowa-Illinois Gas and Electric Company, where he has worked since shortly after the parties' marriage and currently earns an annual gross salary of approximately $24,228. In addition to his retirement pension through this employment, which is fully vested, he is entitled to receive retirement benefits from the army when he reaches age sixty. Betty has a high school education and was employed outside the home for periods throughout the marriage. She presently runs a child-care service in her home and earns an annual gross income of approximately $9,000 to $10,000.

Upon granting Vernon's petition for dissolution, the trial court awarded custody of the two unemancipated children to Betty. The court did not designate an amount to be awarded as child support but did award Betty alimony in the amount of $400 per month, subject to certain contingencies.

In addition to various household goods and other personal property, Betty was awarded possession and occupancy of the parties' home until 1988, at which time the house was to be sold and the net proceeds were to be equally divided between Vernon and Betty. Betty was also granted a first option to purchase the house at that time. In the meantime Betty was ordered to pay mortgage payments and other incidental expenses on the house.

Vernon was awarded a car and various items of personal property, as well as his interest in a stock fund, a company savings fund, a company pension fund, and a retirement fund and benefits resulting from participation in the Army Reserve. The court ordered Vernon to pay all remaining debts and obligations of the marriage with the exception of the real estate mortgage, and to continue certain insurance coverage.

Respondent Betty Nerad now appeals from the dissolution decree, asserting: (1) that the property division was inequitable; (2) that the amount of support awarded was inadequate and that a portion of the alimony award should have been characterized as child support; and (3) that attorney fees should have been awarded both for the trial and this appeal. Vernon cross-appeals, contending that the support award should not have been made subject to a cost-of-living adjustment.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law and determine anew those rights properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). We give weight to the findings of the trial court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

I. Property Division. Betty contends that the trial court's division of the parties' property was inequitable because out of the significant marital assets to be considered for division—the family home; Vernon's army retirement benefits, and Vernon's Iowa-Illinois savings and retirement plans—all the savings and retirement plans and one-half of the proceeds from the sale of the family home were awarded to Vernon, whereas Betty was left with only the remaining one-half of the house proceeds. In addition, Betty was ordered to make the mortgage payments on the house, which had an encumbrance of $16,313, and Vernon was ordered to pay all remaining debts and obligations of the marriage, totaling $8,648.

After considering the factors listed in Iowa Code § 598.21(1)(property distribution) in light of the facts of this case, we agree that Betty is entitled to a larger share of the value of the marital assets. While rejecting a mechanical rule that each spouse must receive one-half of the marital property, the Iowa courts have recognized that an equal division of the property is often equitable. See, e.g., In re Marriage of Schissel, 292 N.W.2d 421, 423 (Iowa 1980); In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). We think that a more equal division is appropriate in this case. Neither party brought much property to the marriage, or inherited property during the marriage. See Iowa Code § 598.21(1)(b)(1981). Considering Betty's efforts in homemaking and caring for the children as well as her outside employment, it appears that the parties have contributed approximately equally to the marriage. § 598.21(1)(c). The parties have been married for twenty-three years, § 598.21(1)(a), and at this point it seems unlikely that the earning capacity of either Vernon or Betty will change drastically in the future. § 598.21(1)(f). However, Vernon currently earns substantially more than Betty and probably will continue to do so until his retirement, at which point he will be entitled to various retirement benefits. Because of the nature of her past employment, Betty is not eligible for any such retirement pay.

The total value of Vernon's various savings and retirement plans, which may be taken into consideration in achieving an equitable property division, see § 598.21(1)(i); In re Marriage of Jones, 309 N.W.2d 457, 460 (Iowa 1981), is approximately $35,030. The value of the parties' home was listed as $60,000 on Betty's financial affidavit and as $70,000 on Vernon's, with an agreed encumbrance of $16,313. The trial court's disposition of these major items of property would have resulted in awarding approximately $67,500 of the total value of these assets to Vernon as opposed to $32,500 to Betty. We agree that this division is particularly inequitable when coupled with the fact that Betty's obligation to

make mortgage payments exceeds Vernon's obligation to pay the remaining debts of the marriage by several thousand dollars. Although Vernon argues that his alimony payments to Betty will contribute toward her household expenses and mortgage payments, we conclude that a portion of this award should have been characterized as child support (Part II). We therefore deem it appropriate to modify the trial court's property division by providing that, at the time of sale or whenever Betty decides to purchase the house, she shall be entitled to two-thirds of the equity in the house, and Vernon to one-third.

II. Support Awards. On appeal Betty also contends that the trial court's award of $400 per month to be payable to Betty as alimony was inadequate in amount and inequitably characterized. The trial court ordered Vernon to pay Betty $400 per month as alimony, to be reduced by $50 per month when Lynette "ceases to attend regularly an approved school in pursuance of a course of study designed to qualify her as a computer programmer or when she dies, marries, or reaches age twenty-two," and to be further reduced by $250 when Brian ceases to attend school or vocational training, dies, marries, or reaches age twenty-two. An additional $100 reduction in the amount of alimony was to occur upon Betty's death or remarriage.

We think that the total amount of the support award was adequate, particularly in light of our modified property distribution. See Iowa Code § 598.21(3)(c)(listing distribution of property as one of the factors in determining amount of support payments). However, we agree that a portion of this award should have been characterized as child support for a combination of several reasons. First, a child support order is warranted in this case. See In re Marriage of Carney, 206 N.W.2d 107, 112 (Iowa 1973)(noting legal and moral duty of support between parent and child); In re Marriage of Vrban, 293 N.W.2d 198, 202 (Iowa 1980)(duty extends to child between ages of eighteen and twenty-two who is still in school). Second, the obvious intent of the trial court was to provide for the

support of the two children until they became emancipated; the court chose to label the entire amount "alimony" because this arrangement would provide a "substantial tax saving for the parties." Finally, the effect of the court's provision would be consistent with this intent. Where the intent and effect of support award is to create a fund from which contributions to the support of the children are to be made, we think that that portion of the award should be properly characterized, as child support rather than alimony. See In re Marriage of Woodward, 229 N.W.2d 274, 278 (Iowa 1975)(trial court's use of term "alimony" found not conclusive; substance of the arrangement, not the form, is conclusive); In re Marriage of Williams, 199 N.W.2d 339, 348 (Iowa 1972)(court recharacterized $200 per month alimony award as $100 alimony and $100 child support). To hold otherwise in order to minimize the adverse consequences to the parties would be tantamount to encouraging fraudulent misrepresentation of taxes due.

We therefore modify the trial court's provision regarding support payments by providing that the initial $50 and $250 reductions shall be characterized as child support for Lynette and Brian, respectively. The $100 support payments remaining subsequent to the occurrence of these reductions shall be paid to Betty as alimony until termination occurs in accordance with the contingencies set forth in the trial court's decree.

We further modify the decree by substituting the following cost-of-living adjustment, which we hold applicable to both the alimony and child support awards, for the one provided in the original decree:

> The support payments shall be automatically adjusted each year on the anniversary date of the trial court's decree to reflect any increase or decrease in the National Consumer Price Index, as published by the United States Department of Labor for the most recent twelve-month period for which data is available, provided that Vernon's actual gross salary for that period has increased by at least the same percentage. If Vernon's gross salary increases by a lesser

> percentage, then the payments to Betty shall increase by this lesser percentage. However, this cost-of-living adjustment shall not be used to reduce Vernon's support obligation below the amount established in the trial court's decree.

We find this provision to be consistent with the Iowa Supreme Court decision of In re Marriage of Stamp, 300 N.W.2d 275, 276-80 (Iowa 1980)(COLA provision appropriate where husband's gross salary was readily obtainable without resort to tax returns,employment history of both husband and wife was stable, and record did not reflect substantial prospective changes in other factors that would require modification).

III. Attorneys Fees. Betty alleges that she is entitled to a reasonable contribution from Vernon towards her attorney's fees at trial and on appeal. She has failed, however, to supply this court with an itemization of her attorney's fees, which it is her duty to provide. In keeping with our policy of not awarding attorney's fees based merely upon conjecture, we deny her request for attorney's fees on appeal. Previously stated policy reasons also lead us to the conclusion that Betty's request for contribution towards the attorney's fees she incurred at trial should be denied; we decline to interfere with the trial court's discretion in the allocation of attorney's fees when it is apparent that the court considering the entire economic situation of the parties in arriving at its order. In re Marriage of McFarland, 239 N.W.2d 175, 180 (Iowa 1976).

The decision of the trial court is hereby modified in accordance with the provisions set forth herein.

AFFIRMED AS MODIFIED.