IN THE COURT OF APPEALS OF IOWA

No. 9-040 / 98-992

IN RE THE MARRIAGE OF CARL OPPERMAN AND SUSAN OPPERMAN

Upon the Petition of
CARL OPPERMAN,

Appellant,

And Concerning
SUSAN OPPERMAN,

Appellee.

FILED
MAR 31 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Winneshiek County, Jon C. Fister, Judge.

Carl Opperman appeals from a tempoary order granting him joint custody of children but granting Susan Opperman temporary primary physical care. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Craig Ament of the Ament Law Firm, Waterloo, for appellant.

David L. Strand of Larson, Nichols & Strand, Decorah, for appellee.

Heard by Huitink, P.J., and Vogel, and Zimmer, JJ.

ZIMMER, J.

The petitioner-appellant Carl Opperman appeals custodial and support provisions of a temporary order entered in a dissolution action. He also appeals from the district court's dismissal of his petition for relief from domestic abuse. Upon review of the record, we dismiss the appeal from the district court's temporary custody order and reverse its dismissal of the petition for relief from domestic abuse. We affirm the district court's award of temporary child support.

I. Factual and Procedural History

Carl executed a verified petition for dissolution and an application for writ of temporary injunction on April 8, 1998. In his petition, he requested the parties be awarded joint care and custody of their minor children, with temporary and permanent physical placement with him. He requested the matters of custody and support not be set for hearing as the parties were continuing to reside together at the same address.

On April 10, 1998, a judge issued an order for temporary writ of injunction, based on Carl's application, enjoining the respondent, Susan Opperman, from moving the parties' children, Whitney and Wyatt, from the family residence or removing them from the state of Iowa.

On April 21, 1998, Susan filed an answer requesting temporary custody, temporary child support, and a hearing to quash the temporary injunction. She obtained an order scheduling a one-hour hearing on these issues for May 5, 1998. On May 5, Carl filed a petition for relief from domestic abuse.

Following the submission of affidavits and testimony on May 5, the court entered an order on May 6 awarding temporary custody of the minor children to Susan, with visitation granted to Carl. The court also ordered Carl to pay temporary support in the amount of $605 per month. As part of its order, the court also dissolved the temporary injunction entered April 10, and dismissed Carl's petition for relief from domestic abuse.

Carl filed a notice of appeal on June 1, 1998. On June 24, 1998, a senior judge of the Iowa Supreme Court entered an order staying the support, temporary custody, and temporary injunction provisions of the district court's order. The stay order also indicated the temporary orders entered were final judgments and therefore appealable as a matter of right.

II. Whether a Temporary Custody Order is Final or Interlocutory in Nature

The Iowa Supreme Court recently held temporary custody orders are not final judgments appealable as a matter of right, but rather are interlocutory orders from which permission to appeal must be obtained. *See In re Marriage of Denly,* 1999 WL 80779, at *4, ___ N.W.2d ___ (Iowa 1999). Under Iowa Rule of Appellate Procedure 1(d), an appeal improperly presented as arising from a final judgment is regarded as an application for interlocutory appeal. Rule 2(a) provides the standard to be utilized in deciding whether to grant or deny an application for interlocutory appeal.

Pursuant to these rules and the Supreme Court's direction in *Denly,* we are required to consider Carl's appeal from the district court's temporary custody order

as an application for interlocutory appeal. In order to grant the application we must find: (1) the court's order involves substantial rights; (2) the order will materially affect the final decision; and (3) a determination of the order's correctness before trial on the merits will better serve the interests of justice. *See* Iowa R. App. P. 2(a); *Banco Mortgage Co. v. Steil,* 351 N.W.2d 784, 787 (Iowa 1984). We are not permitted to grant permission to appeal under Rule 1(d) merely because a child's placement is implicated. *See In re Marriage of Graziano,* 573 N.W.2d 598, 600 (Iowa 1998).

We find Carl's appeal fails to satisfy one of the necessary requirements for granting interlocutory appeal. The district court's resolution of the temporary custody issue does not "materially effect the final decision." Which party is awarded custody of the parties' children on a temporary basis is not a factor that the district court is to consider in determining the final custody arrangement. *See* Iowa Code § 598.41 (1997); *In re Marriage of Denly*, 1999 WL 80779, at *5. We are confident the district court's award of temporary custody to Susan will not unduly influence the final custody determination. We also note the district court granted Carl the opportunity for significant visitation in its temporary order and the parties live near one another, which will foster further visitation opportunities. In addition, Carl has had a period of temporary physical care by virtue of the stay order previously entered in this case.

We deny permission for interlocutory appeal of the district court's custody order pursuant to Iowa Rules of Appellate Procedure 1(d) and 2(a).

III. Dismissal of The Domestic Abuse Petition

Carl has appealed from the district court's dismissal of his petition for relief from domestic abuse brought under Iowa Code chapter 236. Our review of the district court's ruling is for legal error. *See* Iowa R. App. P. 4; *Harden v. State*, 434 N.W.2d 881, 883 (Iowa 1989).

Carl filed a petition for relief from domestic abuse on May 5, 1998, alleging Susan assaulted him on April 30. His petition requested the court issue a temporary protective order and set hearing on his petition. The petition was presented to the court immediately prior to commencement of the May 5 hearing on Susan's requests for temporary custody, temporary child support, and to quash the temporary injunction. At the commencement of the hearing, the district court noted a domestic abuse complaint against Susan had been filed by Carl. The district court entered a ruling on May 6, 1998, regarding the issues of temporary custody, temporary support, and injunctive relief. The ruling also dismissed Carl's petition for relief from domestic abuse.

On appeal, both petitioner and respondent acknowledge neither party was aware the district court intended to decide Carl's petition for relief from domestic abuse as part of its ruling on the issues heard May 5. The record does not disclose a request by either party to have the court address the petition as part of the hearing which had been previously scheduled. Evidence presented at the hearing included testimony regarding allegations of domestic abuse; however, neither party contends

they agreed or consented to have the court rule on the petition for relief from domestic abuse on the basis of the evidence presented May 5. Susan did not move to dismiss Carl's petition under Iowa Rule of Civil Procedure 104(b) and she does not contend Carl's petition fails on its face to sufficiently state a claim for domestic abuse.

Although we share the district court's frustration in dealing with contentious litigants who appear to have placed their children squarely in the middle of their dissolution proceedings, we conclude it was error for the court to dismiss Carl's petition for relief from domestic abuse as part of its ruling filed May 6. Absent agreement by both parties, the district court was required to follow the procedures set forth in Iowa Code section 236.4 regarding notice and hearing before adjudication of Carl's petition. We therefore reverse the dismissal of the petition for relief from domestic abuse and remand for further proceedings. Obviously we would reach a different result if the record showed the parties waived the time and notice requirements of chapter 236 and proceeded to immediate hearing with the consent of the court.

IV. Temporary Child Support

Carl contends he should not have been ordered to pay temporary child support of $605 a month. He believes the level of child support is in excess of the child support guidelines. Carl has worked as a seasonal construction worker for many years. Generally, he has earned substantial pay during the construction season and then drawn unemployment benefits and worked part-time during his lay-off period.

Carl is presently doing cement work for a business in Festina, Iowa. The district court fixed child support based on Carl's last full calendar year of employment and his employment history. Upon our review, we agree with the district court's determination of child support. We affirm on this issue.

In summary, we deny permission for interlocutory appeal on the issue of temporary custody. We reverse the district court's dismissal of Carl's petition for relief from domestic abuse. We affirm the award of temporary support made by the district court. We remand this case for further proceedings. We do not retain jurisdiction.

We award no appellate attorney fees. Court costs are assessed one-half to each party.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.