

IN THE COURT OF APPEALS OF IOWA

No. 9-294 / 88-1645

FILED

AUG 23 1989

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF MARY BETH LONGMAN
AND LANCE L. LONGMAN**

Upon the Petition of

MARY BETH LONGMAN,

Appellee,

And Concerning

LANCE L. LONGMAN,

Appellant.

390

Appeal from the Iowa District Court for Poweshiek County, James D. Jenkins, Judge.

Respondent appeals certain provisions of a dissolution decree. He claims the district court erred in: (1) granting petitioner primary physical care of the children; (2) limiting his visitation rights; (3) requiring him to pay \$250 per month per child in child support; (4) awarding petitioner \$700 per month in rehabilitative alimony; and (5) ordering him to pay petitioner's attorney fees and court costs. **AFFIRMED AS MODIFIED.**

Tim Pearson of Hyland, Laden & Pearson, Des Moines, for appellant.

Lee M. Walker and Eugene Knopf of Walker, Knopf & Billingsley, Newton, for appellee.

Considered by Donielson, P.J., and Schlegel and Sackett, JJ.

DONIELSON, P.J.

Petitioner Mary Beth Longman and respondent Lance L. Longman were married on February 17, 1973. They have four minor children: Timothy L. Longman, born June 10, 1976; Lucas M. Longman, born July 16, 1978; Jeffrey J. Longman, born February 17, 1981; and Douglas W. Longman, born July 23, 1985.

Mary Beth was born February 7, 1952. She is certified as an LPN. Mary Beth worked sporadically during the marriage. At the time of trial she was attending the Des Moines Area Community College in Ankeny. She is seeking a liberal arts degree and wants to enter personnel management. Lance was born on September 14, 1949. He is a sales representative for Pfizer, Inc. Lance is on the road at least one night, and sometimes several nights, per week. He has a gross salary of \$3700 per month or \$44,400 per year.

Following the parties' separation in November of 1987, Mary Beth filed a petition for dissolution of the marriage on December 17, 1987. She resided with the four children in the family home until June 1988. At that time she and the children moved to Ames so that she would be closer to the college she was attending.

Trial on this dissolution matter was held on October 4, 1988. The district court granted the parties joint legal custody of the children. The court found that Mary Beth

had always been the primary caretaker of the children and physical care of the children was placed with Mary Beth. Lance was given visitation on every other weekend, alternating major holidays, and three weeks during the summer. Lance was ordered to pay \$250 per month per child in child support. Mary Beth was awarded rehabilitative alimony of \$700 per month as long as she remained a full-time student. The alimony would be discontinued when she obtained her degree and in no event was it to continue beyond September 1, 1992. The court ordered that the marital home be sold and the proceeds divided equally. Lance was ordered to pay \$2500 for Mary Beth's attorney fees and to pay the court costs.

Lance appeals from five aspects of the trial court's decision. He claims that he should have been granted primary physical care of the children. If this court affirms the trial court's decision to grant Mary Beth primary physical care of the children, then Lance asks that he be given increased visitation rights. He specifically wants more time with the children during the summer. Lance also feels that both parties should be responsible for the costs of visitation.

Lance contends that his child support obligation should be decreased. He must pay \$1000 per month in child support. Lance contends that this amount is punitive. He asserts that Mary Beth should be required to contribute to the support of the children.

Lance also appeals from the district court's award of alimony. He states that he should not have to pay alimony of \$700 per month. His net income is \$2,869 per month. He is now paying \$1700 per month in support. Lance claims that Mary Beth does not need rehabilitative alimony because she already has a marketable job skill as an LPN. He suggests that Mary Beth go to school part-time and contribute to her own support.

Finally, Lance contends that the district court abused its discretion in ordering him to pay \$2500 of Mary Beth's attorney fees and the court costs.

Physical Care of the Children. Our review in custody determinations is de novo. In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974); Iowa R. App. P. 14(f)(15). In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Lance contends that he is in a superior position to care for the everyday needs of the children. He argues that Mary Beth's attendance at college will deprive her of the time necessary to care for the children. Mary Beth will be attending school full time, but three of the children are also attending school and she will be home with her family each evening and weekend. Depending on her class schedule, Mary Beth may have days in which she has few classes and thus she will be able to be at home during much of those days as well. Mary Beth also does much of her studying while at home with her children. As the primary caretaker for the children, Mary Beth has demonstrated her ability to care for the children and to provide them with a nurturing environment. They have prospered under her care.

While the record reveals that Lance has a strong interest in, and a close relationship with, his children, he has an occupation that will keep him away from home at least one evening a week. Lance is still residing in the community where the children grew up. The transitional difficulties caused by the children's move to Ames are not such that would necessitate an award of custody to Lance based on this factor alone.

This court finds that the trial court did not err in awarding primary physical care of the children to Mary Beth.

Visitation. Where possible a court is to award liberal visitation rights to ensure the maximum continuing physical and emotional contact with both parents. Iowa Code § 598.41(1). The trial court in this matter awarded Lance visitation on alternating major holidays, alternating weekends from 9:00 a.m. Saturday until 6:00 p.m. on Sunday, and for three weeks during the summer months. This court finds this visitation arrangement to be too limited in light of the close relationship between the boys and their father. Lance's summer visitation is expanded to include six weeks. The summer weeks need not be consecutive, and the timing of this summer visitation is left to the parties. If they are unable to agree to a summer visitation plan, then the six-week period will commence one week after the boys' spring semester of school has ended. Lance's weekend visitation is modified and is to begin at 6:00 p.m. on Friday of each alternate weekend. This modification is done to accommodate the travel time that exists between the boys' home in Ames and the father's home in Grinnell. These weekend visits will continue to conclude at 6:00 p.m. on Sunday. Lance's holiday visitation is to continue as set forth in the original decree.

This court cautions the parties, as did the trial court, to put aside their animosity and genuinely attempt to work out visitation plans that will ensure the children

maximum contact with their noncustodial parent. As the children grow older and become involved with extracurricular activities, a rigidly-applied visitation schedule may become disruptive. Parental expectations and the visitation schedule will have to be adjusted to accommodate those changes. Efforts now by the parents to encourage visitation will make facilitation of those future changes much easier.

Lance's request to modify the trial court's order that he be solely responsible for the costs and responsibility of obtaining the children and returning them to their mother, is denied in light of this court's modification of the alimony provisions of the divorce decree.

Child Support Lance appeals from the trial court's order that he pay child support in the amount of \$250 per child per month. It is well established that parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). The factors to be considered are: the financial resources of the child; the financial resources of both parents; the standard of living the child would have enjoyed had there not been a dissolution; the cost of day care; the physical and emotional health needs of the child; and the child's educational needs. Iowa Code § 598.21(4).

Lance has a secure income in which he nets approximately \$2,869 a month. His main objection to the trial court's order of child support seems to be that he believes the trial court erred in not apportioning this burden more equitably between him and Mary Beth. Because Mary Beth is a licensed LPN, he feels she should be required to provide for the support of the children. This court agrees with the trial court's assessment of Lance's ability to pay child support in this case. Even if Mary Beth were working as an LPN rather than going to school full time, it is unlikely that this support obligation could be characterized as excessive. The size of the Longman family and the needs of four young sons renders the trial court's decision appropriate in this matter.

The trial court did err in ordering that Mary Beth was entitled to claim the dependents for income tax purposes. This provision of the trial court's decision is reversed.

Alimony. Lance appeals from the trial court's award of rehabilitative alimony in the amount of \$700 per month. These payments are to continue as long as Mary Beth is a full-time student. The alimony payments are to end when she obtains her degree and in no event do they continue later than September 1, 1992.

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. Fleener, 247 N.W.2d at 220. The discretionary award of alimony is made

after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983).

Rehabilitative alimony is intended to provide a displaced spouse who has been out of the workplace for an extended period because of marriage, with the education necessary to develop adequate skills to ensure his or her entry into the job market. While Mary Beth is an LPN and worked occasionally throughout her marriage, the trial court did not err in recognizing that her job skills were minimal and that she needed more education to attain more than minimum-wage jobs. While rehabilitative alimony is warranted in this case, this court finds that the award of \$700 a month was excessive and that it should be reduced to \$450 a month. Mary Beth testified that her payments for tuition are derived from grants and student loans. This factor, along with this court's review of the entire record, reveals that rehabilitative alimony in the amount of \$450 per month is appropriate in this case. All of the rest of the terms of the dissolution decree dealing with payments of the rehabilitative alimony continue to apply; only the amount of the alimony is modified.

Attorney Fees and Court Costs. Lance challenges the trial court's decision ordering him to pay \$2,500 of Mary Beth's legal fees and the court costs. Iowa trial courts have considerable discretion in awarding attorney fees. In

re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and be based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa 1982). A review of the record and the economic circumstances of the parties convinces this court that the trial court did not abuse its discretion with regard to this matter.

In summary, the decision of the trial court awarding physical care of the children to Mary Beth is affirmed. Lance's visitation with the children is expanded to include six weeks each summer and to begin on Fridays at 6:00 p.m. during alternate-weekend visitation. The decision of the trial court with regard to child support is affirmed, but the trial court's allocation of the right to claim the children as dependents for tax purposes is reversed and is awarded to the father, Lance Longman. The trial court's award of rehabilitative alimony is reduced to \$450 a month. The trial court's decision with regard to attorney fees and costs is affirmed.

AFFIRMED AS MODIFIED.