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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-265 / 88-597

IN RE THE MARRIAGE OF PENNY L. McLAUGHLIN AND CASEY L. McLAUGHLIN

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Upon the Petition of
PENNY L. McLAUGHLIN,

Appellee,

And Concerning
CASEY L. McLAUGHLIN,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, James L. Beeghly, Judge.

The husband appeals from a dissolution decree, challenging his child support obligation. **AFFIRMED.**

Gene Yagla of Lindeman & Yagla, Waterloo, for respondent-appellant.

Terry Diane Parsons of Olsen, Parsons & Ament, Cedar Falls, for petitioner-appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

Casey McLaughlin appeals various provisions of the district court's decree dissolving his marriage to Penny. He asserts: (1) the amount of child support he was ordered to pay is excessive; (2) the child support obligation should be reduced or eliminated during the six weeks in the summer when he has extended visitation with the child; and (3) the trial court should have directed Penny not to move the child's residence out of Black Hawk County without prior court approval. We affirm.

The parties, Penny and Casey McLaughlin, were married in 1981. They have one child, a daughter named Erin, born in December 1982. Erin has a congenital urinary tract problem which threatens her kidney functioning, which requires constant monitoring, and which may require surgery in the future. She is otherwise healthy.

Casey is employed as a stockbroker. His income is based largely on commissions and is quite variable. In 1986 his gross income peaked at about $74,000; however, due to the October 1987 stock market crash and because of a job change, he does not expect to reach that level again in the near future. Casey's gross income in 1987 was approximately $58,000.

Penny is employed as a paralegal, earning about $16,000 per year.

In spite of Casey's high income, the parties had accumulated little property. Prior to the dissolution financial pressures had forced them to let their house revert to the seller; they assert they lost their $15,000 down payment in this transaction. Both of the parties' cars are encumbered beyond their value. The division of the meager remaining assets is not controverted in this appeal.

The dissolution decree placed Erin in joint legal custody and in Penny's physical care. The decree directed Casey to pay child support in a base amount of $450 per month. If his gross income exceeds $40,000 per year but is less than $80,000 per year, he must also pay 15% of the excess over $40,000. In addition, if his gross income exceeds $80,000 per year, he must pay an additional 10% of the excess over $80,000.

Neither party was awarded alimony. Casey was directed to contribute $2000 toward Penny's trial attorney's fees.

I.

Our review of these matters is de novo. Iowa R. App. P. 4. We give weight to the district court's findings of fact, but are not bound by them. Iowa R. App. P. 14(f)(7).

Casey initially argues that the child support award is excessive. We disagree. 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 consider 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). Upon consideration of the aforementioned factors, we deem the child support award to be quite equitable. The trial court's graduated payment structure fairly takes into account the fact that Casey's salary is subject to upturns and declines in the market. In addition, such an approach enables the trial court to award an appropriate level of support while avoiding speculation as to the amount of commissions that will be earned by Casey in the future. Cf. In re Marriage of Heineman, 309 N.W.2d 151, 152 (Iowa App. 1981).

In a similar vein, Casey contends that his child support obligations should be reduced or eliminated during his six-week summer visitation with the child. As the Iowa Supreme Court has noted, such a waiver fails to take into consideration the continuing nature of most of the custodial parent's expenses even while the child is absent. In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa

1973); see In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976); cf. In re Marriage of Carlson, 338 N.W.2d 136, 142 (Iowa 1983). But see In re Marriage of Schlenker, 338 N.W.2d 136, 142 (Iowa 1983). We do not believe the circumstances here warrant a reduction in child support during Casey's summer visitation with his daughter.

II.

Casey also asserts that Penny should have been directed not to move the child's residence out of Black Hawk County without prior court approval. We decline to impose such a restriction on Penny. "[T]he parent having physical care of the children must, as between the parties, have the final say concerning where their home will be." In re Marriage of Stickle, 408 N.W.2d 778, 780 (Iowa App. 1987) (quoting In re Marriage of Frederici, 338 N.W.2d 156, 159 (Iowa 1983). Courts in other jurisdictions have similarly refused to place restraints on the custodial parent's ability to move. See Kline v. Kline, 686 S.W.2d 13, 17 (Mo. Ct. App. 1984); In re Marriage of Baird, 603 S.W.2d 108, 109 (Mo. Ct. App. 1980); Helentjaris v. Sudano, 194 N.J. Super. 220, 476 A.2d 828, 832 (1984). We do not believe such a restriction is called for under the facts of this case.

III.

Penny requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within

the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We award Penny appellate attorney fees in the amount of $750. Costs on appeal are assessed to the appellant.

AFFIRMED.