FILED
FEB 26 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF LARRY LEE MITCHELL AND LADELL ANN MITCHELL

149

Upon the Petition of	)	
LARRY LEE MITCHELL,	)	Filed February 26, 1986
Petitioner-Appellant,	)	
And Concerning	)	5-718 85-744
LADELL ANN MITCHELL,	)	
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Polk County (47-28044) - A. M. Critelli, Judge.

Petitioner husband appeals from the decree dissolving the parties' marriage.

AFFIRMED AS MODIFIED.

Jerry R. Foxhoven, Des Moines, Iowa, for petitioner-appellant.

Ray Sullins, Des Moines, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., Hayden, and Sackett, JJ.

Petitioner husband appeals from the decree dissolving the parties' marriage. He asserts that: (1) the trial court should have awarded him custody of the parties' child; (2) his child support obligation is excessive; and (3) the trial court should not have awarded respondent wife attorney fees. We affirm as modified.

Petitioner Larry Lee Mitchell and respondent Ladell Ann Mitchell were married in 1978. They have one child, Cory, born in 1979. Ladell has two children from a previous marriage, one of whom, Melanie, is still a minor. Melanie, now age 16, has some emotional problems. She lived with Ladell and Cory in the marital residence until two months before trial, when Ladell caused her to move in with her paternal grandparents because she had been violent toward Ladell and, apparently, to Cory. Ladell is a nurse; she earns $2,062 gross per month. Larry works for the post office; he earns $518 gross per week. At the time of trial, Larry was living with his grandmother; he apparently did not have plans regarding providing for Cory's physical needs if he were awarded custody.

The trial court awarded Ladell sole custody of Cory. It directed Larry to pay $325 per month child support and $500 toward Ladell's attorney fees. The trial court awarded each party the personal property in his or her possession; his or her bank, credit union, and IRA accounts; and half of the parties' current income tax refunds. Larry received judgment for $1,500 to equalize the values of the personal property each party was awarded. Ladell received the parties' marital residence, which she had brought to the marriage, subject to a $3,500 lien in Larry's favor. Larry has appealed from the dissolution decree.

Our review is de novo. Iowa R. App. P. 4. When considering the credibility of witnesses, we give weight to the trial court's findings but are not bound by them. Iowa R. App. P. 14(f)(7).

Larry argues that he should have been awarded sole custody of Cory. He claims that Melanie, Ladell's daughter by a previous marriage, poses such a threat to his son that placement with Ladell is improper.

In child custody cases, the best interests of the child is the first and governing consideration. Iowa R. App. P. 14(f)(15); Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975). The factors considered in awarding custody are enumerated in sections 598.41(3) of the Iowa Code and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), and need not be repeated here. 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 Bowen, 219 N.W.2d 683, 689 (Iowa 1974).

In reviewing these principles, we conclude that the trial court's custody determination was appropriate. It is apparent from the record that Melanie has some emotional and psychological problems. As the trial court indicated, Larry's concerns about his son's safety if left alone with Melanie were not contrived or unwarranted. For this very reason, the court specifically required Ladell to ensure that Cory is not left alone with Melanie. We find this provision limiting Melanie's access to Cory adequately safeguards Cory's interests. The trial court obviously took Larry's concerns into consideration in drafting the custody provision.

We caution the parties that strict adherence to the "nonaccess provision" is imperative. Ladell should make every effort to avoid leaving her son in the unattended company of Melanie. We find, as the trial court did, that Cory's best interests and safety require limited contact with his half-sister. If the arrangement proves to be unworkable or infeasible, certainly future action

would be warranted. At this point in time, however, Cory's interests appear adequate protected and we see no reason to disturb the custody provision of the decree.

II.

Larry also claims that the child support award of $325 per month should be decreased.

In considering this claim, we examine the facts of this case in light of the factors listed in Iowa Code section 598.21(4). We further recognize that both parties to a marriage 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 Heinemann, 309 N.W.2d 151, 153 (Iowa Ct. App. 1981).

Our examination of the record convinces us that the child support obligation is excessive. As Larry points out, the parties to this action have virtually identical incomes. Thus, there is no reason to require Larry to contribute more towards the support of his child. On a temporary basis, the trial court ordered Larry to pay $275 per month in child support. Ladell testified that this amount was sufficient to cover child care costs. Accordingly, we reduce the child support from $325 per month to $275 per month.

III.

The final issue before this court concerns attorney fees. Larry argues that the trial court erred in awarding Ladell $500 in trial attorney fees.

The trial court is vested with considerable discretion in allowing attorney fees to be awarded in dissolution cases. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa 1983). The allowance here appears fair and reasonable and should not be disturbed.

AFFIRMED AS MODIFIED.