IN THE COURT OF APPEALS OF IOWA

No. 6-318 / 95-1143

IN RE THE MARRIAGE OF JAMES ALLEN FOX AND BARBARA ANN FOX

Upon the Petition of JAMES ALLEN FOX,

Petitioner-Appellant,

And Concerning BARBARA ANN FOX,

Respondent-Appellee.

FILED
AUG 30 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, George E. Bergeson, Judge.

James challenges the order modifying the child support provisions of the parties' dissolution decree. **AFFIRMED IN PART AND MODIFIED IN PART.**

Robert H. Laden of Hyland, Laden & Pearson, P.C., Des Moines, for appellant.

Steven H. Lytle of Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Habhab and Huitink, JJ.

SACKETT, C.J.

Petitioner-appellant James Fox challenges the order modifying the child support provisions of the decree dissolving his marriage to respondent-appellee Barbara Ann Fox. James claims the trial court erred in: (1) modifying the child custody provisions of the decree to find that he owed additional child support on the premise the parties did not have a true joint physical custody arrangement; (2) not ordering a set-off of the child support each party owed the other because there was a joint physical custody arrangement; and (3) awarding Barbara attorney fees and not awarding him attorney fees. Additionally, he claims he should receive appellate level attorney fees. Barbara also requests appellate level attorney fees. We modify in part and reverse in part.

The parties' marriage was dissolved in August 1992. The parties have one minor child, Elizabeth, born September 13; 1987. In the dissolution decree, it was ordered Barbara and James have a "joint physical custody" arrangement. The decree specifically provided James have physical custody of Elizabeth on every third week of each month from Monday evening until Friday evening. James worked twenty-four hour shifts as a Des Moines fireman on Wednesdays; consequently, Barbara would take Elizabeth on Wednesday night. James was granted physical custody every other weekend. Elizabeth's physical care during holidays and school vacations were split between James and Barbara. The agreement was approved only after a guardian ad litem appointed to represent Elizabeth recommended a joint physical custody

arrangement for Elizabeth.

The dissolution decree further ordered James and Barbara to meet with a mediator after May 1, 1992, in order to determine child support. It was assumed Barbara, who at the time the decree was entered was only employed part-time, would find full-time employment. James's child support obligation, termed "temporary," was set at $225 per month. Additionally, James was ordered to pay for Elizabeth's medical insurance and pay one-half of uncovered medical expenses. In setting the child support, consideration was given to the parties' current income and the shared joint physical care arrangement.

The parties met with a mediator in June 1992. There were no further meetings. James claims Barbara refused to mediate when it became clear his child support obligation would be reduced. Barbara then filed an application for modification of the dissolution decree asking the court to establish permanent child support. There was considerable evidence by both parties as to the times they had Elizabeth in their care and the expenses they paid for her. Both are loving and concerned parents and have been generous in meeting Elizabeth's needs.

The district court determined although the custody arrangement was labeled "joint physical custody" Barbara had primary physical care and James had liberal visitation. The trial court determined the parties' net monthly incomes as defined by the child support guidelines. The trial court applied the child support guidelines and ordered James to pay $375 per month to Barbara as child support. Barbara was

awarded attorney fees of $3000. James appeals.

The first question we need address is whether the trial court was correct in considering Barbara to have primary physical care. James contends this finding modified custody from joint physical care to primary physical care with Barbara. He contends Barbara failed in her burden to show a modification of the custody provisions of the dissolution decree was in order.

Barbara contends there was no modification. She advances she believed the custodial arrangement was working well and did not ask that it be changed. She said all the court did in this action was determine that the custodial arrangement labeled "shared physical custody" in the original decree was not a correct label.

We agree there is no evidence to support a finding there was a change of circumstances. The custodial provisions of the decree should not be modified. However, we do not interpret the trial court's decree as modifying the custodial arrangement. The trial court found, based on the history between the time of the decree and the hearing on this application, that James did not have Elizabeth one-half the time and the child support guidelines were applicable and should be applied as though Barbara were the parent having primary physical care. The result is that the trial court order gives Barbara more child support as a full-time employed parent than she received under the decree when she was only employed part-time.

We agree with the trial court that taking James's and Barbara's obligations and in essence offsetting them equally does not give Barbara proper credit for having

Elizabeth a greater share of the time. However, James is a parent sharing physical custody and has the child a substantial portion of the time and pays a greater portion of her expenses than a parent having only visitation. This fact needs to be considered. *See In re Marriage of Gilliam*, 525 N.W.2d 436, 438 (Iowa App. 1994).

Furthermore, in the original decree, it was anticipated the child support guidelines would be applied to the shared custody arrangement. Barbara agreed to this when the original decree was entered. There is no showing the agreement made was not in the child's best interest. The decree contemplated mediation to set child support when Barbara was employed on a full-time basis. She is now so employed.

The child support guidelines should be applied. Both parties have net monthly income as defined for child support purposes in excess of $1000; consequently, under the guidelines each should pay 22.5 percent of his or her net monthly income in child support. For James, whose defined income is $1695, his support would be $381. For Barbara, whose defined income is $1050, her support would be $236.

James suggests, as did the court in *Gilliam*,[1] that we subtract the two figures and divide the difference in half. Because our de novo review of the evidence

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[1] In *In re Marriage of Gilliam*, 525 N.W.2d 436 (Iowa App. 1994), we said:

> The district court was correct in attempting to use a set-off method to determine Jeffrey's monthly payments. *In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992). The district court, however, missed a step in the analysis. The district court subtracted the amount Mary should pay from the amount Jeffrey should pay for a payment equaling $1220 a month. The district court should have further divided this amount in half to reflect the split physical care arrangement.

Gilliam, 525 N.W.2d at 438-39.

convinces us that James has physical care about one-third of the time, we determine the equitable computation is to order him to pay two-thirds of the difference or $96.67 per month. We modify the decree accordingly.

James further contends he should not have been ordered to pay Barbara's trial attorney fees. He points out the parties had agreed to resolve the child support issue through mediation but Barbara called the mediation off and went into district court. He said there is no showing that he did not cooperate and was ready to proceed with the mediation which would have been less costly. The trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Bonnette*, 492 N.W.2d 717, 723 (Iowa App. 1992). The trial court did not abuse its discretion in awarding Barbara attorney fees. We deny James's request for trial attorney fees.

We find it unnecessary to address James's challenge to the trial judge in essence adopting all the proposed findings submitted by Barbara.

We find the trial court incorrectly set the child support amount. We award no attorney fees on appeal. Costs on appeal are taxed one-half to James and one-half to Barbara.

AFFIRMED IN PART AND MODIFIED IN PART.