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IN THE COURT OF APPEALS OF IOWA

No. 7-533 / 96-1209

IN RE THE MARRIAGE OF RANDAL ALLEN REDMAN AND TERRI LYNN REDMAN

FILED
APR 24 1998
CLERK SUPREME COURT

Upon the Petition of
RANDAL ALLEN REDMAN,

Appellant,

And Concerning
TERRI LYNN REDMAN,

Appellee.

Appeal from the Iowa District Court for Story County, Timothy J. Finn, Judge.

Randal Redman appeals a modification of the parties' dissolution decree.

AFFIRMED AND REMANDED.

Eric Borseth of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Larry J. Handley of Handley & Block, Ankeny, for appellee.

Considered by Huitink, P.J., Mahan, J. and McCartney, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

McCARTNEY, S.J.

The appellant, Randal Allen Redman (Randal), appeals from an order of the district court modifying a decree of dissolution with respect to child support. We affirm and remand for further limited proceedings as herein set forth.

The marriage between Randal and his wife, Terri Lynn Redman (Terri), was terminated by decree of dissolution in May 1991.

The parties have two children, Jamie, a daughter, who will be twenty-two years of age on January 10, 1999, and a young son, Justin, a minor. The decree of dissolution provided that there be joint custody, but that the physical placement of the two children would be with their mother, Terri. Randal was directed to pay $425 per month for child support, which was to be reduced to $300 per month when Jamie was no longer considered a dependent. The trial court, in this decree of dissolution, however, retained jurisdiction to determine support for these children if they "pursue education beyond high school."

Jamie graduated from high school in May of 1995 and that fall entered Iowa State University, continuing to live with her mother, Terri. When Jamie graduated from high school, Randal immediately reduced his child support payment to $300 per month. Thereafter and within a few months, he increased his child support voluntarily to $390 per month for Justin, which he believed was the appropriate calculation under the Child Support Guidelines and based upon the respective incomes of the parties.

This termination of support for Jamie caused Terri to file in August of 1995 her request for a modification of the decree to provide child support for their children while they are in college. This would, at that time, apply only to Jamie. She further, in her petition for modification, asked that child support to be increased for both children to a level consistent with the guidelines and that a wage assignment be granted for the support.

The trial court, after a hearing on the petition for modification, found that Randal should pay $390 per month support for Justin, that Randal should pay $186 per month support for Jamie while she was in college and until she attained the age of twenty-two years, provided for a wage assignment, and provided that he pay $750 to apply toward the attorney fees incurred by Terri as consequence of the modification proceedings.

Randal filed a motion to amend these findings of fact and decree pursuant to Iowa Rule of Civil Procedure 179(b).

The court modified its modification decree by reducing the monthly support for Jamie from $186 a month to $144 per month, but in all other respects denied the motion to amend filed by Randal.

Randal appealed this modification as amended asserting that the trial court was in error in calculating this monthly stipend for the support of Jamie and in requiring him to make those payments to Terri. He further asserted the trial court was in error in failing to order that he be provided with copies of Jamie's grades and in awarding

Terri the dependent exemption for 1995 and every other year thereafter. He further asserts the award of attorney fees to Terri was in error.

Our review is de novo. Iowa R. App. P. 4. We give weight to the trial court findings but are not bound by them.

In arriving at the support Randal was to pay for Jamie's college expenses, the court granted Terri the difference between guideline support for two children and one child. The trial court initially considered this to be $186 per month, but in ruling on the motion to amend filed by Randal, determined the accurate difference was $144 per month.

In 1997, the Iowa General Assembly enacted Chapter 175 of the laws of the 77th General Assembly. It was then signed into law and became effective July 1, 1997.

In pertinent part, Chapter 175 created a new subsection to section 598.21 of the 1997 Iowa Code. This new subsection, (5A), speaks to the obligation of parents to provide post-secondary education for their children and with some specificity.

Consequently, it is appropriate to separate the question of Jamie's college support for the period prior to July 1, 1997, and for the subsequent time period.

In re Marriage of Lieberman, 426 N.W.2d 683, 685 (Iowa App. 1988), held that divorced parents were obligated to contribute to the college education of their children but according to their financial means. The amount of support is obviously dependent upon the circumstances of the case. *In re Marriage of Richards*, 439

N.W.2d 876, 879-880 (Iowa App. 1989). These contributions may be apportioned according to the relative amounts of income of the parents. *Id.*

Jamie's tuition for the fall semester of 1995 and including various fees was $1315. In addition to that, she had book costs of approximately $250-300 per semester. In addition to that would be her cost of living. By residing with her mother, she did not pay any board and room costs to the university. Terri testified that her cost of living was approximately $1700 per month. Of that, however, approximately $550 was for her own transportation and miscellaneous expenses not itemized. This would leave her with approximately $1155 per month in expense that would include Jamie's share of board and room. Randal asserts that the only cost Terri would have would be the additional cost of food for their daughter. This, however, would have Terri providing housing without any contribution from Randal, and this asks Terri to assume more of a burden than is appropriate. Assuming that a semester is four and one-half months long and calculating Jamie's proportionate share of her room and board with her mother at $250 per month, in four and one-half months she would incur $1125 for these expenses. We think this is an appropriate amount for Jamie's living expenses and would be comparable to the costs incurred had she lived in a university dormitory. Consequently, her four and one-half month expense totals approximately $2700 for a semester. For her first semester, Jamie received various grants of approximately $2000, leaving her with a shortfall of $700 for that period of time, or approximately $175 per month. Under these circumstances, we do not think

the grant of $144 per month by the trial court is unwarranted. This does allow Jamie some extra funds for incidental school and personal expenses not otherwise attended to and including the repayment of certain loans she incurred during this period of time prior to July 1, 1997. Terri made a substantial contribution to Jamie's living expenses including not only food and lodging but the extra labor required and incurred in her care of Jamie. The net monthly income that Randal receives is about $1663 while Terri's net monthly income is about $764. After adjusting both parties net income by the support paid by Randal and received by Terri, their incomes become fairly equal. This does not take into account the benefit Randal receives from his present wife's income. We may consider this in determining his financial condition although we do not use it in calculating his support obligation. *In re Marriage of Linberg,* 462 N.W.2d 698, 701 (Iowa App. 1990). We find, as did the trial court, that these monthly payments be made twelve months a year.

The provisions of section 598.21, new subsection (5A), Code of 1997 comes into play for the period of time beginning July 1, 1997. The contribution of a parent shall not exceed one-third of a child's post secondary education costs after taking into account the grants, loans and earnings a child may receive. Iowa Code §598.21(5A). The contribution is to be paid to the child or the institution and not to the other parent. *Id.*

As a consequence we find that this matter should be remanded to the district court for the limited purpose of determining these expenses and the contributions made by Jamie as defined in the new subsection and with the calculation of one-third

of the net costs to Jamie which will then be the contribution to be made by Randal directly to his daughter or to the institution. This sum shall be determined commencing July 1, 1997 and shall be made retroactively to that date.

Granting of attorney fees to Terri in the trial court rests in the sound discretion of that court, and we see nothing in this record to indicate that such discretion was abused in any way. That amount is approved.

In view of the substantial contribution Terri makes toward Jamie's college costs we find the decision of the trial court in granting Randal and Terri alternating dependent exemptions for Jamie for annual income tax purposes is appropriate.

The trial court directed that Randal be provided with proof that Jamie was enrolled in an ongoing post-secondary education program, and we think that is sufficient. Randal asks that Jamie be required to provide him with her grades. Pursuant to Iowa Code section 598.22(3)(d), Jamie's grades should be provided to Randal in accordance with that statute.

Terri asks for attorney fees for her appeal. Randal asserts her request is not timely but provides no authority for this assertion. We believe the holding in *Franzen v. Deere & Co.*, 409 N.W.2d 672, 676 (Iowa 1987) sheds some light on this problem. The Supreme Court there quotes from *Overnight Transportation Co. v. Chicago Industrial Tire Co.*, 697 F.2d 789, 793 (7th Cir. 1983), holding that motions "inexorably bound to the underlying merits of the case" should be filed "during the pendency of the appeal on the merits." The request here for fees was made in writing and during the pendency of this appeal on the merits.

Fees are allowed in the sound discretion of the court. Given the relative earnings and financial conditions of the parties we allow Terri the sum of $600 from Randal to apply on those costs.

Based upon the foregoing we therefore affirm the holding of the trial court and remand this cause for the limited purposes set forth in this opinion. We do not retain jurisdiction. Costs of this appeal are assessed to Randal.

AFFIRMED AND REMANDED.