IN THE COURT OF APPEALS OF IOWA

No. 0-700 / 99-1352
Filed January 10, 2001

CHRISTINE R. LAMBERT,
Petitioner-Appellee,

vs.

MONTE JAMES,
Respondent-Appellant.

FILED
JAN 10 2001
CLERK SUPREME COURT

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

Appellant appeals the district court's ruling setting aside temporary restraining and custody orders. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Marla Suddreth of Borseth, Genest & Suddreth Law Office, Altoona, for appellant.

Carmen Janssen, West Des Moines, and LeAnne K. Krell, Clive, for appellee.

Considered by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

Monte James appeals from a trial court's decision to set aside temporary restraining and custody orders issued in a proceeding he initiated to modify a paternity decree. He also contends the district court erred in ordering him to pay temporary attorney's fees of $2,000 to Christine Lambert. Upon review, we dismiss the appeal from the district court's order setting aside the temporary orders, reverse the attorney fee award, and remand.

I. Background Facts and Proceedings. Christine Lambert and Monte James are the parents of Parker James, born in April 1998. Christine and Monte were never married. As a result of Christine's petition, a decree was entered in January 1999 establishing paternity, custody, visitation, and support. In the terms of the parties' stipulated decree, Christine was granted primary physical care of Parker and Monte received weekend, holiday, and summer visitation. The decree required Christine to give Monte sixty days written notice if she ever decided to move out of the state ". . . so as to allow [Monte] to seek court intervention in order to modify the provisions regarding *visitation* in the event the parties cannot agree upon a modification of those provisions." (emphasis added).

In a letter dated April 6, 1999, Christine informed Monte of her intent to move to Florida. On June 15, 1999, Monte filed an application to modify custody and requested that he be granted Parker's primary physical care. Alternatively, he sought modification of the visitation provisions of the decree. In response to Monte's allegations that Christine intended to flee the state or country and deny him visitation, the district court entered a series of three ex-parte orders. In the

first, a temporary restraining order filed June 15, 1999, Judge Leo Oxberger enjoined Christine from removing Parker from the state of Iowa. The order scheduled hearing on whether a permanent restraining order should issue for July 1, 1999, and authorized Monte to remove Parker from the State of Iowa to exercise his visitation.[1] Upon further application by Monte, Judge George Bergeson entered an emergency temporary order on June 22, 1999, granting Monte sole custody and physical care of Parker. The emergency order scheduled a hearing on temporary matters for July 12, 1999. Judge Bergeson entered a separate ruling on June 22, ordering law enforcement personnel to assist Monte in obtaining custody of Parker.

On June 29, 1999, Christine filed a motion to set aside all three orders. The district court heard Christine's motion and other temporary issues on July 1, 1999. Christine, Monte, and their counsel were present. Following hearing, all three temporary orders were set aside, and Christine was restored to her position as Parker's primary physical caretaker as provided in the original paternity decree. Monte was ordered to pay $2,000 in temporary attorney fees to Christine. This appeal followed.

On appeal, Monte contends the district court erred in setting aside the temporary restraining order entered June 15, 1999, and the order for temporary custody entered June 22, 1999. He also contends the court erred in ordering him to pay $2,000 in temporary attorney fees to Christine.

Christine has not cross-appealed. She has, however, moved to dismiss, claiming Monte's appeal is interlocutory in nature. Both Monte and Christine

[1] The record reveals Monte was a resident of South Dakota at the time his application for temporary orders was filed.

have requested an award of appellate attorney fees. At the time briefing was concluded in this matter, Monte's application to modify was still pending before the district court and had been scheduled for trial. The record reveals Christine filed her own application to modify in July 1999 seeking an increase in the level of Monte's current and delinquent child support obligation.

II. Christine's Motion to Dismiss Monte's Appeal. Following Monte's appeal, Christine filed a motion to dismiss, claiming the appeal was actually an impermissible interlocutory appeal of the district court's dismissal of temporary orders, rather than an appeal based on a final order of the district court. Upon review of the record, we agree. The Iowa Supreme Court has held temporary custody orders are not final judgments appealable as a matter of right, but rather interlocutory orders from which permission to appeal must be obtained. *In re Marriage of Denly,* 590 N.W.2d 48, 51 (Iowa 1999). Temporary restraining orders also are not appealable as a matter of right. Under Iowa Rule of Appellate Procedure 1(d), an appeal improperly presented as arising from a final judgment is regarded as an application for interlocutory appeal. Rule 2(a) provides the standard to be utilized in deciding whether to grant or deny an application for interlocutory appeal.

Pursuant to these rules and the supreme court's direction in *Denly,* we are required to consider Monte's appeal from the dismissal of ex-parte temporary orders as an application for interlocutory appeal. In order to grant the application we must find: 1) the court's order involves substantial rights; 2) the order will materially affect the final decision; and 3) a determination of the order's correctness before trial on the merits will better serve the interests of justice.

See Iowa R. App. P. 2(a); *Banko Mortgage Co. v. Steil,* 351 N.W.2d 784, 787 (Iowa 1984). We are not permitted to grant permission to appeal under rule 1(d) merely because a child's placement is implicated. *See In re Marriage of Graziano,* 573 N.W.2d 598, 600 (Iowa 1998).

We find Monte fails to satisfy the necessary requirements for granting interlocutory appeal. Christine was granted primary physical care of Parker in a paternity decree entered in January 1999. No appeal was taken. The trial court's decision to vacate the temporary orders was simply a restoration of the status quo pending a final decision in the modification proceeding. The trial court's dismissal order has no more effect on the final decision than if the temporary orders had not been issued. The custody of children should be quickly fixed and seldom disturbed. *Denly,* 590 N.W.2d at 51. Causing children to re-locate and change primary caregivers creates unnecessary instability and uncertainty, especially in a child of tender years. We grant Christine's motion to dismiss Monte's appeal of the dismissal of the temporary restraining and custody orders. Pursuant to Iowa Rules of Appellate Procedure 1(d) and 2(a), we deny him permission for interlocutory appeal of the district court's order.

Even if we were to address the trial court's decision to set aside its temporary orders on the merits, we would deny Monte relief. Assuming, without deciding, that temporary custody orders are authorized in a proceeding to modify a paternity decree, we conclude the trial court did not err in vacating its orders. Our review of the record convinces us that the court acted properly in returning Parker's care to Christine.

III. The Attorney Fee Award. Monte also challenges the trial court's decision to award $2,000 in temporary attorney fees to Christine. Christine's argument regarding the interlocutory nature of Monte's appeal applied only to the first part of his appeal, not the attorney fee issue. Iowa Code section 598.36 permits the trial court discretion to compensate the prevailing party in modification proceedings for this expense. *In re Marriage of Bolick,* 539 N.W.2d 357, 361 (Iowa 1995). The award of attorney fees is reviewed for an abuse of trial court discretion. *In re Marriage of Geil,* 509 N.W.2d 738, 743 (Iowa 1993). The award depends upon the party's ability to pay, whether the party resisting the modification petition was successful, and whether the party has been obliged to defend the trial court's decision on appeal. *Bolick,* 539 N.W.2d at 361.

The trial judge who granted Monte's request for temporary sole custody and primary physical care also conducted the hearing on Christine's motion to set aside temporary orders. It is apparent from the transcript of the hearing that the trial judge felt the court had been misdirected by Monte and his trial counsel in connection with the issuance of temporary restraining and temporary custody orders. Immediately after hearing the arguments of counsel, the trial court announced its intention to dissolve all prior temporary orders. The court immediately restored physical care of Parker to Christine and advised that she would not be prevented from moving to Florida. In responding to the request of Christine's trial counsel for attorney fees, the court remarked: "And this court is going to allow temporary attorney fees in this matter because I think some of your rights may have been violated in this matter. And I am going to order $2,000 be paid to your attorneys."

We conclude the trial court's decision to award temporary attorney fees was premature and contrary to the controlling statute. At the time the fee award was made, Monte's application to modify custody had not been tried. Christine filed her own application to modify shortly after the fee award was made. No final determination had been made regarding which party prevailed in this action. In addition, it does not appear the district court applied the factors established by our supreme court in *Bolick* for making an attorney fee award in a modification proceeding. Instead, it appears the court based the award on Christine's contention at the hearing that her civil rights had been violated in several respects. We conclude this was an abuse of discretion. Therefore, we reverse the trial court on this issue.

IV. Disposition. In summary, we grant Christine's motion to dismiss and deny permission for interlocutory appeal on the issue of the trial court's dismissal of the temporary restraining and custody issues entered on June 15 and June 22, 1999. We reverse the trial court's award of temporary attorney fees to Christine. We remand this case for further proceedings not inconsistent with this opinion. This ruling does not pre-empt Christine from seeking an attorney award in this proceeding pursuant to section 598.36 in the event she is the prevailing party in this proceeding. We do not retain jurisdiction.

We award no appellate attorney fees. Court costs are assessed one-half to each party.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.