FILED
MAY 31 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ESTHER EISENBACH AND HARRY EISENBACH

Upon the Petition of)

ESTHER EISENBACH,)

Petitioner-Appellee/ Cross-Appellant,)

And Concerning)

HARRY EISENBACH,)

Respondent-Appellant/ Cross-Appellee.)

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Filed May 31, 1988

8-142
87-828

Appeal from the Iowa District Court for Johnson County (No. 3585), Paul J. Kilburg, Judge.

Respondent former husband appeals and petitioner former wife cross-appeals from the trial court's ruling on both parties' applications for modification of a dissolution decree. **AFFIRMED.**

David S. Good of Nazette, Hendrickson, Marner & Good, Cedar Rapids, for appellant.

Edward W. Dailey of Edward W. Dailey Law Offices, Burlington, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

Respondent appeals and petitioner cross-appeals from the trial court's ruling on both parties' applications for modification of a dissolution decree. We affirm.

The marriage of petitioner, Esther Eisenbach, and respondent, Harry Eisenbach, was dissolved in 1979. The dissolution decree awarded Esther sole custody of the parties' child, Benjamin, born in 1975, and directed Harry to pay child support of $350 per month.

In 1986 Harry applied for a modification of the dissolution decree; he asked that the custody arrangement be changed from sole custody in Esther to joint custody with Esther having physical care. Esther answered Harry's application and also filed her own application for modification; she asked that the amount of her child support award be increased and that the award be continued while the child was between ages eighteen and twenty-two and attending college.

Trial was held. Afterward, the trial court entered an order which (1) refused to set up a joint custody arrangement, and (2) increased Esther's child support award to $550 per month until Benjamin reached age eighteen or, if Benjamin was then attending college, until he reached age twenty-two. Harry has appealed and Esther has cross-appealed from the trial court's order.

On appeal respondent asserts that the trial court should have changed the custody arrangement from sole custody in petitioner to joint custody with petitioner having physical care.

Custody questions are decided on the best interests of the child. Iowa R. App. P. 14(f)(15). When we weigh the factors set forth in Iowa Code section 598.41(3), we agree with the trial court's assessment that joint custody is not in the best interests of Benjamin as shown by clear and convincing evidence.

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Petitioner resides in Burlington, Iowa; respondent resides in Los Angeles, California. Respondent desires joint custody; petitioner possesses a good faith belief that joint custody is unworkable. The parties are unable to communicate with each other regarding Benjamin's needs. The parties' views with regard to Benjamin's religious upbringing greatly differ. There is doubt as to the respondent's ability to support petitioner's relationship with the child. In reading the record in this case, we cannot overlook the conduct of the respondent who has obeyed in the spirit and letter of the law only those orders he desired to obey. Respondent's failure to comply with prior orders of this court, as well as respondent's incomplete, late, and nonforthright responses to discovery, is demonstrative of his recalcitrant attitude. We find respondent's prior record for noncompliance is indicative of his being unable to follow any future directives if joint custody were awarded. For all of the foregoing reasons, we affirm the trial court's denial of a joint custody arrangement.

Respondent also asserts on appeal that the trial court should have provided for his payments of college education expense support for the parties' child to be made directly to the child or to the college rather than to petitioner. Respondent cites to no authority in support of his proposition. As such, we consider it waived. Iowa R. App. P. 14(a)(3).

On cross-appeal, petitioner asserts that the trial court should have increased her child support award more than it did. She does not specify the amount of increase she desires. We have reviewed the evidence and agree with the trial court's decision that child support shall be increased to $550 per month.

AFFIRMED.

Schlegel, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. The reasons cited by the majority for denying joint custody do not in my judgment meet the test proscribed by the legislature in section 598.41(2):

> . . . that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed.

I do not find that the admitted offensive conduct of the father would justify severing the legal custodial relationship. Nor does his conduct impact on his relationship with the child. I would grant joint custody.