FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-664 / 90-606

206

IN RE THE MARRIAGE OF JUDITH MAE GERMAN AND LEROY CLEO GERMAN

Upon the Petition of
JUDITH MAE GERMAN, n/k/a JUDITH MAE PICKEN,

Appellee,

And Concerning
LEROY CLEO GERMAN,

Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchinson, Judge.

The husband appeals a district court order modifying the parties' dissolution decree by requiring him to pay additional child support and one-half of the children's college education expenses. **AFFIRMED AS MODIFIED.**

Thomas P. Schlapkohl, Des Moines, for appellant.

Emil Trott, Jr., Des Moines, for appellee.

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

SCHLEGEL, J.

Judith and LeRoy German were married in November 1965. They had three children: Jane, born December 29, 1968; Gillian, born January 23, 1970; and Jason, born February 12, 1972. Their marriage was dissolved in December 1974. Under the terms of the decree Judith was awarded the custody of the children. LeRoy was ordered to pay $15 per week per child in child support. The question of the cost of the children's higher education was specifically deferred.

At the time of the dissolution decree Judith was an attorney right out of law school and working at the Iowa Court Administrator's office. Her gross income was $13,500 per year. LeRoy was employed as a systems analyst at Blue Cross/Blue Shield, and he earned $13,800 per year.

On March 1, 1989, Judith filed an application for modification seeking an increase in child support for Jason and one-half of the college expenses for Jane and Gillian.

Judith married Harold Dale in 1977 and moved to Chicago, Illinois. She is employed by the United States Treasury Department as a docket attorney. Her gross income was $60,756 in 1989. Harold earns about $35,000 per year and is able to help with household expenses. Jane entered the University of Wisconsin in 1987, and her expenses are $12,095 per year. Gillian entered the University of Illinois in 1988. Her expenses are $7,314 per year. Jason was expected to begin college in the fall of 1990.

LeRoy filed an answer on March 24, 1989, through his attorney, Leslie Babich. However, Babich had represented Judith at the time of the original decree, and he withdrew on November 13, 1989, due to this conflict. On December 4, 1989, the court set a hearing date of February 1, 1990, for the case.

At this time LeRoy was living in Gilbert, Arizona, with his present wife, Judy. It appears from the record that LeRoy had some problem engaging Iowa counsel from Arizona. Eventually, on January 10, 1990, he hired Allan Rauch. On January 18 Judy called Rauch to ask about the progress of the case because LeRoy was scheduled to take a business trip from January 21 to January 29. From talking to Rauch's secretary, Judy gained the impression a continuance had been granted.

Rauch filed a motion for continuance on January 30. The district court denied this motion. LeRoy did not find out about the denial until after 11:00 p.m. on January 31, when it was too late for him to travel to Iowa for the hearing.

Rauch appeared at the hearing and renewed his motion for a continuance. This motion was also denied. Rauch then left the courtroom. The trial proceeded without LeRoy or any counsel on his behalf being present.

On February 6, 1990, the district court entered an order modifying the dissolution decree. The court found there had been material changes in circumstances since the

original decree due to the parties' increased incomes and the increased expenses of the children. The court stated that LeRoy must earn at least as much as Judith. The court then ordered LeRoy to pay child support and one-half of the children's college expenses. The court also ordered LeRoy to pay $1,500 toward Judith's attorney fees.

LeRoy then hired his present attorney and filed a motion for new trial. He claimed he was entitled to a new trial under Iowa Rule of Civil Procedure 244(c), based on "accident or surprise," because he had been led to believe the hearing had been continued. In the alternative, LeRoy sought reconsideration of his increased child support obligation. The district court denied his motions. LeRoy appealed.

I. In this equity action our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. LeRoy first contends he should be granted a new trial due to his inability to be present at the modification hearing and due to the insufficiency of the evidence presented before the district court.

In ruling upon motions for a new trial, the district court has a broad, but not unlimited, discretion in determining whether the decision effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3).

The court is slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

We believe the district court acted within its discretion in denying LeRoy's motion for a new trial. There is sufficient evidence in the record to proceed with appellate review, and a second hearing would only cause additional delay.

III. LeRoy also contends the award of child support is excessive because it requires him to make regular child support payments in addition to making him responsible for one-half of the children's college expenses.

A court may order either of the parties to pay an amount in support of a child who is between the ages of eighteen and twenty-two years who is regularly attending an accredited school. In re Marriage of Richards, 439 N.W.2d 876, 879 (Iowa App. 1989). Iowa Code section 598.1(2) authorizes the court, in its discretion, to award support of children through college under the proper circumstances. Id. Among the factors to be considered are the financial condition of the parent, ability of the child for college work, age of the child, and whether the child is self-sustaining or not. In re Marriage of Vrban, 293 N.W.2d 198, 202 (Iowa 1980).

A party should not be responsible for regular child support payments plus college expenses, however, unless the children are living at home while attending classes. See Richards, 439 N.W.2d at 880. The record in this case shows

the children live on campus and, therefore, do not live with Judith during the majority of the year. Under these circumstances we believe the decree should be modified to terminate LeRoy's regular child support obligation when each child reaches eighteen years of age.

LeRoy is still responsible for a portion of the children's college expenses. As discussed in Richards, the children of divorced parents should not be given an open-ended ticket for college expenses. Id. With families of moderate means, the amount of these expenses should be limited to that of a state university in the state where the child resides. See In re Marriage of Boehlje, 443 N.W.2d 81, 84 (Iowa App. 1989). In this case the children are residents of Illinois. The record shows Gillian's expenses in attending the University of Illinois are $7,314. LeRoy's financial responsibility for the college expenses of the three children should be based on this amount.

Once it is determined that support for college is justified, it is equitable for both parents to furnish financial assistance for higher education in such an amount as their financial condition will permit. Richards, 439 N.W.2d 876, 879 (Iowa App. 1989). We believe each parent should pay one-third of the children's books, tuition, room, and board and let the child pay for the other one-third. See In re Marriage of Smith, 351 N.W.2d 541, 543 (Iowa App. 1984). This places it within the children's

discretion whether to obtain student loans to cover his or her share of the expenses. Id.

In summary, we modify the dissolution decree to eliminate LeRoy's regular child support obligation when each child reaches eighteen years of age or completes high school, whichever is later. We order LeRoy to contribute one-third to what the children's expenses would be for attending a state university in Illinois, which is one-third of $7,314, or $2,438 per child per year. LeRoy must continue to pay this amount for each child until each child reaches twenty-two years of age.

IV. Finally, LeRoy contends the district court should not have ordered him to pay $1,500 for Judith's attorney fees.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We believe the district court acted within its discretion here. Judith brought this modification action solely because LeRoy was not contributing toward the expenses of the college-age children.

The costs of this action are taxed one-half to Judith and one-half to LeRoy.

AFFIRMED AS MODIFIED.