

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 30 1987

CLERK SUPREME COURT

IN RE THE MARRIAGE OF KATHIE BENGSTON AND LARRY BENGSTON

Upon the Petition of	)	29
KATHIE BENGSTON,	)	Filed September 30, 1987
Petitioner-Appellant,	)	
And Concerning	)	<u>7-203</u>
LARRY BENGSTON,	)	86-956
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Scott County (35594), C.H. Pelton,
Judge.

Petitioner appeals from the trial court's decree dissolving her marriage
with respondent. **AFFIRMED AS MODIFIED AND REMANDED.**

Emil Trott, Jr., and Griff Wodtke of Barrett & Trott, Des Moines, for
petitioner-appellant.

Alan R. Havercamp, Davenport, for respondent-appellee.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

HAYDEN, J.

Petitioner, Kathie Bengston, appeals from the trial court's decree dissolving her marriage with respondent, Larry Bengston. She asserts trial court acted beyond its scope of authority by allegedly retroactively reducing past-due the temporary child support payments. In the alternative, she contends there was no substantial evidence the support obligations were satisfied. Kathie also asserts the alimony award of \$65 per week for four years is inadequate and that Larry should be ordered to pay child support for the two children in college. She also requests attorney's fees on appeal. We affirm as modified.

I. Temporary Child Support. On September 24, 1984, five days after the filing of the petition for dissolution, trial court entered an ex parte order for temporary child support. This order required Larry to pay \$50 per week per child for the support of the three minor children born to the parties. It stated that such order "shall become a judgment in favor of Petitioner and against Respondent each week that it is due and is unpaid" and that "[o]bjections to the entry of this Order shall be made in writing and filed with the Clerk of this Court with a financial affidavit attached." It is undisputed Larry did not file an objection.

On May 15, 1986, trial court held the final hearing on the petition for dissolution. Trial court found Larry had paid Kathie \$3,200 toward temporary child support obligation. These payments were made directly to her and not through the clerk of court. Trial court calculated the unmodified order created an arrearage, not accounting for the \$3,200 paid, in excess of \$12,000. However, trial court found it "appropriate to look to the facts rather than the letter of the order and declare that the temporary support order is satisfied." Trial court relied on the following: The parties' eldest son, Larry Jr., never lived with Kathie during the approximately twenty months in question, and the middle

son, Michael, did so for only four months. Both boys lived primarily with Larry during this time. The youngest son, Kevin, remained with Kathie. During a period of attempted reconciliation in the summer of 1985, Larry supported Kathie and the children. Trial court determined the foregoing facts constituted satisfaction of the temporary support order.

Kathie asserts the trial court lacked authority to retroactively reduce the overdue child support payments. We find trial court did not attempt to assert such authority. The issue is whether trial court's conclusion that Larry satisfied the temporary child support obligation was correct.

Our scope of 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 we are not bound by them. Iowa R. App. P. 14(f)(7).

Trial court found it significant Larry provided physical care for Larry Jr. and Michael for much of the time in question. Although we agree this fact would be significant were this an action to modify the temporary child support order, we do not find it relevant to a determination of what amount Larry has paid Kathie under the original order. Larry could have objected to the entry of the order or applied to have its provisions modified. He did neither and thereby waived his right to review on those issues. See In re Marriage of Prybil, 230 N.W.2d 487, 488 (Iowa 1975).

Larry asserts he additionally provided Kathie \$1,000 for a down payment on an automobile and \$142.55 for a car payment. These payments were part of the \$3,458.60 drawn from the joint checking account during the time reconciliation was attempted. We find these payments commendable but conclude they may not be considered child support under the order. They were clearly meant to satisfy the transportation needs of the family at the time of reconciliation.

We observe the remainder of the \$3,458.60 was spent on additional automobile expenses and vacations. Similarly, these expenditures may not be considered child support.

Larry also asserts \$789.72 from the joint checking account was spent by Kathie for furnishings for the mobile home purchased as the residence for her and Kevin. Larry contends such expenditures could have been deemed child support payments by trial court. We disagree. Since the money was in a joint checking account, it is not clear whose funds they were originally. It is clear the transfer of funds, if actually made, was not in the form of payment from Larry to Kathie, as mandated by the order. We conclude funds utilized by Kathie which were taken from the joint checking account did not constitute child support payments from Larry to Kathie.

The record reflects Larry has directly paid \$3,200 to Kathie. We remand to trial court for a determination of the arrearage under the original order, taking only this \$3,200 into account. Larry shall pay Kathie the amount of this arrearage through the office of the clerk of court.

II. Alimony and Child Support. Kathie also appeals from trial court's alimony award and its decision not to order Larry to pay child support for the two children in college. A determination of alimony is based on the respective earning capacities and needs of the parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 436-37 (Iowa 1981). Factors to consider are found in Iowa Code section 598.21(3). Based on our review of the evidence and the applicable principles, we conclude the alimony award to Kathie was adequate. We also uphold trial court's finding the two children in college are now receiving ample, voluntary support from Larry. There is no reason to believe this voluntary support will be discontinued.

III. Attorney's Fees. Kathie requests appellate attorney's fees. The primary considerations in awarding attorney's fees are the needs of the requesting party and the ability of the other party to pay. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Factors to consider in determining the amount of the award include the complexity of the case and the extent of the work performed by the attorney. See In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972). We conclude Larry should pay \$750 of Kathie's appellate attorney's fees.

AFFIRMED AS MODIFIED AND REMANDED.