IN THE COURT OF APPEALS OF IOWA

No. 1999-375 (9-628) / 98-2052
Filed March 29, 2000

IN RE THE MARRIAGE OF CINDY J. NELSON AND CARL J. NELSON

Upon the Petition of
CINDY J. NELSON,
Petitioner-Appellee,

And Concerning
CARL J. NELSON,
Respondent-Appellant.

FILED
MAR 2 9 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Cedar County, Edward B. de Silva, Jr., Judge.

Carl Nelson, appeals from a modification order that awarded attorney fees to the petitioner-appellee. **AFFIRMED AS MODIFIED.**

James R. Keele of Keele Law Offices, P.C., West Liberty, for appellant.

Cindy J. Nelson, Iowa City, pro se.

Considered by Sackett, C.J., and Vogel and Hecht, JJ.

PER CURIAM.

Respondent-appellant, Carl Nelson, appeals from a modification order that awarded attorney fees to the non-prevailing party. Carl claims the court abused its discretion by awarding attorney fees to the petitioner-appellee, Cindy Nelson, who was the losing party; by awarding Cindy an excessive amount of attorney fees; and by failing to allocate fees owing to the guardian ad litem. We affirm as modified.

Carl Nelson filed an application for modification of his decree of dissolution of marriage, requesting primary physical care of his children and child support. The court awarded him custody and child support. The court also ordered him to pay half of Cindy Nelson's attorney fees and ordered the parties to split equally the cost of the attorney fees for the guardian ad litem. Both parties filed rule 179(b) motions. After a hearing, the court affirmed its earlier ruling and gave Carl a credit for a $500 retainer he allegedly paid to Cindy's counsel. Carl appeals.

Our scope of review for proceedings under Iowa Code chapter 598 is de novo. *In re Marriage of Ales*, 592 N.W.2d 698, 701 (Iowa App. 1999). Iowa Code section 598.36 (1997) gives the district court discretion to award attorney fees to the prevailing party in a modification action. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We review for an abuse of discretion. *In re Marriage of Koenig*, 503 N.W.2d 620, 622 (Iowa App. 1993).

Carl argues he was the prevailing party in all respects and the court should not have awarded attorney fees to Cindy, the losing party. He claims the court violated Iowa Code Section 598.36, which allows an award only to the

prevailing party. We agree. The discretion given to the district court only allows an award of attorney fees to the prevailing party. We determine the court abused its discretion in awarding attorney fees to the non-prevailing party. We modify the district court's order by deleting its award of attorney fees to Cindy. Our resolution of this issue moots Carl's claim the amount of fees awarded was inequitable.

Carl also claims the district court incorrectly determined the allocation of fees the parties were to pay to the guardian ad litem. He argues he should receive a credit for the $500 retainer he paid to the guardian ad litem. The district court apparently thought Carl paid the retainer to Cindy's attorney and gave him a credit in that amount against his attorney fee obligation. We find the trust account statement from the guardian ad litem shows Carl paid her a $500 retainer. We modify the district court's order to give credit to Carl for the retainer. His obligation to pay the guardian ad litem's fees is accordingly reduced to $806.

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *Ales,* 592 N.W.2d at 704. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision. *Id.* We order Cindy to pay $250 of Carl's appellate attorney fees. The costs of this appeal are taxed to Cindy.

AFFIRMED AS MODIFIED.