IN THE COURT OF APPEALS OF IOWA

No. 3-483 / 93-391

FILED
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CLERK SUPREME COURT
000499

IN RE THE MARRIAGE OF MARVIN LEROY ROUSH AND REBEKAH LUANNE ROUSH

Upon the Petition of

MARVIN LEROY ROUSH,

Appellee,

And Concerning

REBEKAH LUANNE ROUSH, n/k/a **REBEKAH LUANNE SCHWARZ,**

Appellant.

Appeal from the Iowa District Court for Jefferson County, James D. Jenkins, Judge.

Former wife appeals from the modification of the dissolution decree. **AFFIRMED IN PART AND REMANDED.**

Steven J. Swan and J.W. McGrath of McGrath & McGrath, Keosauqua, for appellant.

Timothy W. Greene of Timothy W. Greene Law Office, Des Moines, for appellee.

Heard by Schlegel, P.J., and Habhab, J., and Perkins, S.J.* Donielson, J., takes no part.

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J. 000500

Rebekah Roush n/k/a Rebekah Schwartz and Marvin Leroy Roush (hereafter "Leroy") were married in 1978. They have two children, April, born August 13, 1978, and Michael, born March 26, 1980. In 1985 the court dissolved the parties' marriage.

The dissolution decree awarded Leroy sole custody of the children, but awarded Rebekah visitation, including weekend and extended summer visitation. The decree ordered Rebekah to pay $20 per week per child for support.

In 1992 Rebekah applied for modification of the decree, seeking to be awarded joint custody and to have primary physical care transferred to her. The parties stipulated that custody should be joint. The court found that Leroy was dependent on his social security benefits, as he had been at the time of the dissolution. He receives approximately $800 per month. The court found that under the child support guidelines, his income was zero. Rebekah works as a hospital aide, as she had at the time of the dissolution. Her net income, however, had increased from $600 to $1173 per month.

The court gave the parties joint custody but did not change the award of physical care. The court changed Rebekah's support obligation to $436 per month and ordered her to maintain health insurance on the children if she had it available to her through her work.

Rebekah appeals. We affirm in part and remand.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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).

I. Custody of Children.

Rebekah claims the parties' dissolution decree should be modified to award her custody of the parties' two minor children.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

Rebekah states that she has matured since the original decree. She claims that Leroy is doing a poor job caring

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for the children and that the children want her to have primary care. Rebekah alleges that the children had been abused and neglected.

From our de novo review of the record, we find there has not been a substantial change in circumstances sufficient to justify a change in custody. We agree with the trial court that the record shows Leroy has done a good job raising the children. Both Rebekah and her new husband admit that Leroy is a fit parent. Witnesses describe the children as being alert, well mannered, responsible children. One of their teachers testified the children have good class attendance, appearing in school clean, and appropriately clothed. Their homework was done and returned on time. She described them as being "model students" and "super kids."

We find no merit in Rebekah's allegations that Leroy has abused and neglected the children. Rebekah claims that Leroy intentionally kicked April in the eye. The incident was investigated by the Department of Human Services and declared unfounded.

Rebekah also claims that Leroy has done little to foster the relationship between herself and the children. However, she testified that her relationship with Leroy was pretty good, and that when there was a conflict in the visitation schedule Leroy gave her make-up visitation. She also stated Leroy has never denied her extra visitation when she has asked for it, and that her summer visitation was for however long she wanted, sometimes for six weeks.

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The children have expressed a desire to live with their mother. The children's stated preference is a factor to be considered by the court in determining custody arrangements, however, it is not controlling. In re Marriage of Erickson, 491 N.W.2d 799, 803 (Iowa App. 1992); In re Marriage of Udelhoffen, 444 N.W.2d 473, 476 (Iowa 1989); In re Marriage of Bugg, 492 N.W.2d 452, 454 (Iowa App. 1992); see also Iowa Code § 598.41(3)(f) (1991). The district court found that in this case, the children's preference was not a sufficient reason to change custody. We agree. We affirm the trial court on this issue.

II. Child Support.

Rebekah next claims the trial court should have included Leroy's social security benefits as income for child support purposes.

Income of a party refers to net income as defined in the child support guidelines. In re Marriage of Lee, 486 N.W.2d 302, 304 (Iowa 1992). Net income is gross income less certain allowable deductions. Id. Among the allowable deductions are federal and state income tax payments (properly calculated), social security payments, and dependent health insurance costs. Id. at 304-5.

Public assistance payments are also specifically excluded as income under the guidelines. Id. at 305. Our supreme court has ruled that social security disability payments are not public assistance payments and should be

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considered as income in determining the amount of child support. Id. However, supplemental security income (SSI) payments are considered public assistance and are therefore not considered income when determining child support. In re Marriage of Benson, 495 N.W.2d 777, 781 (Iowa App. 1992).

We are unable to determine from the record before us what type of social security payments Leroy receives. Leroy testified he received social security disability. However, in his financial affidavit Leroy stated he received SSI. We therefore remand this case to the trial court to determine whether Leroy receives social security disability or SSI. We also ask the trial court to make a specific finding about what amount is for the children and what amount is for Leroy.

Rebekah also claims the trial court erred in calculating her income for child support purposes because it did not deduct federal and state taxes from her gross income. We agree with Rebekah that federal and state taxes should be deducted from her income. On remand the trial court is to make a specific finding on what portion of Rebekah and her current husband's tax liability is attributable to Rebekah's income. With these principles in mind, the trial court is to determine the amount of child support. We do not retain jurisdiction.

III. Trial Attorney Fees. 000505

Rebekah next claims the trial court's award of attorney's fees and court costs is excessive.

Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974); In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show that 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).

Leroy requested over $11,000 in attorney fees, explaining that much of his attorney's billing was due to excess discovery demands made on him by Rebekah's counsel. The trial court noted that Leroy's attorney had not filed a request for protection from claimed abusive discovery. The trial court found that Rebekah was financially better off than Leroy. It therefore ordered Rebekah to pay $2500 towards Leroy's attorney fees and costs of the trial proceedings. We conclude the trial court did not abuse its discretion here. We find no merit in Rebekah's argument that the trial court did not allow her to present her side

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of the attorney's fees issue. We affirm the trial court on this issue.

IV. Appellate Attorney Fees.

Leroy also requests attorney fees for this appeal.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

We determine Rebekah should contribute $500 toward Leroy's appellate attorney fees. Cost of this appeal are assessed two-thirds to Rebekah and one-third to Leroy.

We determine any other issue the appellant may have raised were not properly preserved for our review or are without merit.

AFFIRMED IN PART AND REMANDED.