IN THE COURT OF APPEALS OF IOWA

No. 3-321 / 92-1710

FILED
APR 26 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JAMES T. BOURKE AND MARCIA KAY BOURKE

Upon the Petition of

JAMES T. BOURKE,

Appellant,

And Concerning

MARCIA KAY BOURKE,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

James T. Bourke appealed an order modifying the decree dissolving his marriage that requires him to pay support for a child while attending college. **AFFIRMED AS MODIFIED.**

C. R. Hannan of Perkins, Sacks, Hannan, Reilly & Petersen, Council Bluffs, for appellant.

Brian P. Andersen of Andersen Law Offices, Audubon, for appellee.

Considered by Sackett, P.J., Habhab, J., and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

GENERAL

PETERSON, S.J.

The marriage of James Bourke and Marcia Bourke was dissolved in 1982. They had three children, Tana, Shon and Casey. Tana was emancipated at the time, and Marcia was given primary care of Shon and Casey.

Marcia filed an application to modify the dissolution decree asking for, among other things, an extension of support for Casey from age eighteen through twenty-two while he is attending college full-time. The district court modified the dissolution decree ordering James to pay, among other things, $250 per month for Casey Bourke so long as he qualifies as a student pursuant to Iowa Code section 598.1(2). The effective date of that support payment was August 1, 1992.

James appeals. He contends that he should not be required to pay support while Casey attends college because Casey has acted as if his father never existed. James next contends that the district court should not have included certain expenses and excluded some income, scholarships, loans, and grants in determining the amount of his contribution for Casey's education. Finally James asks that this court either severely limit the application of In re Marriage of Baker, 485 N.W.2d 860 (Iowa App. 1992), or overrule that case.

Marcia contends that James has hardly made an effort to keep in touch with Casey and Casey has not disenfranchised himself from James. Marcia also next

contends the trial court correctly determined the amount of contribution. She also requests reasonable attorney fees.

Our review of this equitable action is de novo. Iowa Rule of Appellate Procedure 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

The marriage of James T. Bourke and Marcia K. Bourke was dissolved on April 21, 1982. Three children were born to this marriage, Casey Bourke, Shon William Bourke, and Tana Bourke, n/k/a Tana Stevens. At that time, Tana was emancipated and the sole care of custody and control of Casey and Shon was awarded to Marcia. The decree provided that James was granted reasonable rights of visitation and was required to pay child support in the sum of $135.00 per week until Shon became emancipated and then pay $62.50 per week for Casey. Shon was emancipated twelve weeks after the entry of this decree.

At the present time, James operates a plumbing business and has a net monthly income from that endeavor in the sum of $1,364. He also has rental income in the net amount of $137.80 per month. His total income on a monthly basis is $1,501.80. He shows assets in the sum of $59,400, which consist basically of a home with a net value of $35,400 and a value of $20,880 for his business. He also

shows a boat that has a value of $10,000, however, it has an encumbrance of $16,800.

The respondent is employed at a Super Valu store and has a net monthly income of $298. She also provides baby-sitting services and has a net monthly income from that endeavor of $202.36. Her total net monthly income is $500.36.

James was granted reasonable rights of visitation with Casey under the terms of the dissolution decree. James exercised those visitation rights for a period of time shortly after the dissolution of the marriage; however, apparently when Casey was in approximately sixth grade the visitation was, for all practical purposes, terminated. Prior to that time, Casey visited James in his home. Sometime during the school year of 1985-1986, when Casey was in the sixth grade, a situation occurred during a visitation at James' home which involved a discussion of James' wife. The details of that discussion were not developed in the record, however, apparently it had something to do with Casey not spending time with James, but spending time with James and his new family. At about that time, Casey advised James it was hard for him to see him any longer and he did not want to. Subsequent to that time, James, for a period of time, attempted to make telephone contact with Casey. James contends that Casey would not talk to him on the phone, however, Casey contends that he would always talk to James when he telephoned and never hung up on him.

Casey contends that he has spoken with his father approximately once a year for the last few years. James concedes that he has not called Casey in the last few years, but explains this by saying Casey told him he did not want to see him. The attempted contacts by James have been by telephone and he has not attempted to make a personal visit to Casey's home.

James explains his reluctance to call Casey by describing a phone call he received from Casey earlier in 1992. James said Casey called him and "really got cussed out." James said he did not know what it was all about, but it seemed Casey thought James was trying to turn his brother and sister against his mother.

Casey graduated from high school in May of 1992. During his high school career he participated in football and basketball and played in the band. He was elected as a representative for boys' state. He also participated in certain award banquets.

He did not send his father a graduation announcement or invite him to any of the sport banquets. He contends that he invited him to two football games, however, James recalls only one invitation which was relayed to him through his daughter. Casey admitted that the invitation was issued through Tana and explained this means of extending the invitation was because he felt it was easier for him to do it in this manner. James contends that he received the invitation too late in order to attend. He

apparently had business commitments of some sort which prevented him from attending the game. Casey did not tell James that he had been elected to boys' state and in the various publications about him during his career he did not indicate the name of his father, only that of his mother. Casey did not send any school pictures to James.

Casey has been injured a number of times. James said he had called to find out what had happened, but does not recall being called about the injuries.

James, in past years, has called Casey's school to get records, however, he has been unsuccessful. James said it was because "I wasn't in charge anymore."

Casey has not publicly disowned James and believes that a relationship could be established if a "hand was outstretched." James feels a relationship could be established if it was for a father/son purpose, but not for money alone.

James has purchased Christmas presents for Casey, however, kept them at his home in anticipation of Casey visiting. James contends invitations were extended to Casey, however, he simply did not accept them.

Casey maintains a relationship with James' mother. He sees her five to six times a year and provides his own transportation to maintain this relationship.

Casey was admitted to Central Missouri College on September 27, 1991. He desires to pursue a course in flight technology and wants to become an aviator. He did

not discuss either his desires to attend college or the selection of the particular college with James. The first James knew of Casey's intentions was when the Petition to Modify the Decree was served upon him. The relationship between James and Marcia is such that the two of them cannot discuss matters pertaining to their children. Consequently, education of Casey was not discussed by James and Marcia.

Casey contends that he has the following expenses for each semester while attending Central Missouri:

Housing	$969.00
Room and Board	$533.00
Fees	$884.00
Non-Resident Fees	$845.00
Truck Insurance	$448.00
Truck Payment	$808.00
Flight time	$1000.00
Spending Money	$200.00
Books	$ 67.00
Total	$5754.00

Casey purchased a 1991 Chevrolet S-10 pickup truck. He contends he needs this for transportation to and from school. His payments for the truck and the insurance are $1,256 per semester. Marcia has cosigned with Casey on the purchase of the vehicle.

Casey received a Pell grant of $975 and the Perkins loan of $900. He also has a guaranteed loan in the sum of $1180. He also received a scholarship for one year from the Oddfellows of $150 and a trust fund scholarship of $225. Casey has been employed on a part-time basis during his high school career and in 1991 had a net taxable income

of $4376. He indicated it was his intention to continue working while in school and his income from part-time work should be approximately the same.

James initially contends that the trial court erred in imposing the duty of support for secondary education. Chapter 598.1 identifies the obligations the court may impose for support. The statute authorizes, but does not require, support for a child between the age of eighteen and twenty-two years of age while attending a college. This support may be ordered under proper circumstances. The factors to be considered in determining whether support should be ordered are the financial condition of the parents, the ability of the child for college work, and whether the child is self-supporting or not. In re Marriage of Vrban, 293 N.W.2d 198, 202 (Iowa 1980). The case of In re Marriage of Baker, 485 N.W.2d 860 (Iowa App. 1992), recognized another exception to the college support obligation. It was held in that case that a parent would not be required to support a child if the child had disowned the parent. Id. at 862.

James contends that proposition applies in this case. We find otherwise. In Baker, the children involved had publicly disowned their father and specifically used that term. They refused to acknowledge him or his greetings when they met him in public and were, in essence, responsible for the breakdown of the relationship. Id. The parent in that situation had done everything in his

power to continue the relationship, however, he had been unsuccessful. Id.

Although the relationship between James and Casey is severely strained, it does not rise to the level of Baker. Casey indicated that if overtures were made toward him, a relationship could be established. James indicated that if it were for the purpose of a father/son relationship it would be possible, but not possible if it was for the purpose of securing monies. James has made some attempts by telephone to contact Casey, however, we believe that his efforts to maintain a relationship were not to the extent that were shown in Baker. We believe James could have made more of an effort to maintain a wholesome relationship with Casey.

We believe that in this situation James should be ordered to pay support for the period of time that Casey is a full-time student at Central Missouri College.

James next contends that the trial court erred in determining the amount of support that should be paid during Casey's college education. In determining the costs of a college education, the expenses considered are those of tuition, board and room, and books. The amount of these items are limited by the cost for those items in attending a state-supported school of the child's residence. In re Marriage of Frink, 409 N.W.2d 477, 481 (Iowa App. 1987); In re Marriage of Richards, 439 N.W.2d 876, 880 (Iowa App. 1989). The record does not show the cost of attending a

state- supported school, therefore, we cannot consider this limitation.

In this situation the opinion by the trial court does not set forth the means by which he determined the amount of support that James should pay. However, we believe that the expenses for the truck of $1256 should not be considered.

Consequently, we find that the semester costs to attend Central Missouri for board and room, tuition, and books would be $4,298.50. We know Casey has grants and loans and scholarships in the sum of $3,430 and, therefore, his shortage per semester is approximately $860. To determine the level of support that should be required of James, we review the financial conditions of the parties. Marcia's income is minimal, and it *appears she will be able* to contribute little, if anything, toward Casey's education. James's income is much larger; he does not enjoy a high income, but it is sufficient to support a contribution to Casey's education. Because of the amount of James's income, we also take into consideration Casey's income and his scholarship and grants. We believe that a reasonable amount of support for James to pay Casey would be in the sum of $110 per month, as long as Casey is a full time student or reaches 22 years of age.

James also invites us to reconsider the holding of In re Marriage of Baker, 485 N.W.2d 860 (Iowa App. 1992), or severely limit its application. We decline the invitation.

Marcia 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 condition. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We are to consider the needs of the party making the request, and the ability of the other party to pay. We determine that James should pay $500 toward Marcia's attorney fees for this appeal.

AFFIRMED AS MODIFIED.