IN THE COURT OF APPEALS OF IOWA

No. 0-014 / 09-0919
Filed February 24, 2010

IN RE THE MARRIAGE OF MARK L. GREINER AND LAURA E. GREINER

Upon the Petition of
MARK L. GREINER,
Petitioner-Appellant,

And Concerning
LAURA E. GREINER,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Chris Foy, Judge.

Husband appeals a district court order modifying child support and awarding attorney fees. **AFFIRMED.**

Mark L. Greiner, St. Paul, Minnesota, appellant pro se.

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellee.

Heard by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, P.J.

Mark Greiner appeals the increased child support and the attorney fee award in a proceeding to modify the parties' dissolution of marriage decree. We affirm.

Mark and Laura Greiner, the parents of three children, divorced in October 2004. The decree granted the parties joint legal custody, placed physical care with Laura, and required Mark to pay Laura child support. Mark, an attorney, has struggled with substance abuse and depression. Mark's work history includes both private and governmental legal practice. Most recently, Mark worked as a Wells Fargo mortgage loan broker.

In May 2008, Laura sought a modification to increase Mark's child support. In September 2008, Mark had a relapse and was briefly hospitalized, but returned to work. Mark continued to struggle with depression and in November 2008, he voluntarily quit his Wells Fargo job and was hospitalized for five days. Subsequently, Mark's health improved and he began to actively seek employment.

At the commencement of the January 2009 trial, Mark counterclaimed for a modification decreasing his child support due to his current unemployment. In April 2009, the trial court ordered an increase in Mark's child support and also ordered him to pay a portion of Laura's attorney fees.

I. Standard of Review.

"Our scope of review of a child support modification action is de novo." *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). 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 trial court's fact findings, especially regarding witness credibility, but they are not binding. *McKenzie*, 709 N.W.2d at 531.

II. Child Support.

The parties agreed a substantial change of circumstances had occurred since entry of the decree. Laura contended the change warranted an increase in child support and Mark requested a reduction because he was unemployed at the time of the modification hearing. Based on $0 income, Mark urged the district court to set his support at $100 per month. The issue thus became what income to use in determining Mark's child support obligation. During oral argument Mark conceded income should be imputed to him, but argues the district court should have utilized a lower amount.

Laura urged the district court to use the $77,461 average annual income earned during Mark's last three years as a mortgage loan broker for earning capacity. However, instead of averaging Mark's income, the court utilized $61,290, "the actual wages earned by Mark at Wells Fargo in 2008 before he quit." *See McKenzie*, 709 N.W.2d at 534 (holding "best indication" of obligor's earning capacity is the salary he made before he quit). In determining Mark's earning capacity, the court "considered a variety of factors, including [Mark's] age, his prior work experience, his education and law degree, his base wages at Wells Fargo and the commission income he received over the years." We agree with the court's analysis in rejecting the use of an averaging process:

> Almost sixty percent of the [$95,263] income earned by Mark in 2007 came from commissions on new loan closings. Given the current state of the economy, it is clear that the level of commission income Mark received in 2007 was unique and not likely to be repeated anytime in the near future. However, even with the downturn in the housing market that took place during 2008, Mark was still able to earn over $61,290 at Wells Fargo in a little less than eleven months.

Mark argues the court erred in using $61,290 as his earning capacity because forty-five per cent of his 2008 income came from commissions and the economic downturn decreased commissions in the last half of 2008. We conclude a reduction in commissions is recognized and balanced by using less than twelve months of Mark's actual earnings and by declining to average in the higher-commission years. The court correctly imputed $61,290 in income to Mark.

We have also reviewed the record in light of Mark's claims the court erred in not including Laura's gifts from her parents in her income and erred in making its order retroactive to "three months after notice of this modification action was accepted by Mark." We conclude the court's rulings are equitable. *See id.* at 531 (holding reviewing courts will not disturb a district court's modification "unless there is a failure to do equity"). We affirm the modification of child support.

III. Attorney Fees.

Mark appeals the district court's order requiring him to pay $2430 of Laura's $7310 attorney's fees. Attorney fees are not a matter of right, but rather rest within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court's award for abuse of discretion. *Id*. An attorney fees award is based upon the respective abilities of the parties to pay

and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). We conclude the fees awarded are fair and equitable and find no abuse of discretion.

Laura requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We decline to award appellate attorney fees. Costs are taxed to Mark.

AFFIRMED.