IN THE COURT OF APPEALS OF IOWA

No. 0-440 / 09-1911
Filed July 14, 2010

**IN RE THE MARRIAGE OF MICHAEL USS
AND TAMI USS**

**Upon the Petition of
MICHAEL USS,**
Petitioner-Appellant,

**And Concerning
TAMI USS,**
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Paul R. Huscher, Judge.

Michael Uss appeals from the district court's order denying his request for a reduction of his child support obligation. **AFFIRMED.**

Kristine M. Dreckman of Rosenberg & Morse, Des Moines, for appellant.

Tammi M. Blackstone of Gaudineer, Comito, & George, L.L.P., West Des Moines, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Michael Uss appeals from the district court's order denying his request for a reduction of his child support obligation as recommended by the Iowa Child Support Recovery Unit (CSRU) in an action initiated under Iowa Code chapter 252H (2009). Upon our de novo review, we affirm.

***I. Background Facts and Proceedings*.**

Michael Uss and Tami Uss's marriage was dissolved in November 2002. The parties were granted joint legal custody of their three children (born 1996, 1994, and 1988), with Tami having physical care and Michael visitation. Michael was ordered to pay child support in the amount of $754.49 per month, and then $631.14 per month after the oldest child reached the age of majority.

Michael has a Bachelor of Science degree. At the time the parties' decree was entered, Michael was employed as a manager at the Flying J truck stop in Clive, Iowa, and earned approximately $32,000 annually. Sometime after the divorce, Michael was laid off from his job at the Flying J. Thereafter, he worked for a period of time as a manager at various restaurants, earning about the same amount as he had in his previous employment.

Michael remarried to a Chinese citizen. The couple planned to live together in the United States. However, Michael's wife's visa application was denied after she applied to move to the United States. In May 2006, Michael moved to Beijing, China, to live with his new wife. Michael stopped paying child support to Tami thereafter.

Upon moving to China, Michael searched for employment. Although he encountered difficulties because he did not speak Chinese, Michael eventually

gained employment as an English teacher at a university in Beijing, teaching six class hours a week. Michael's gross monthly income at the time of the hearing, converted into U.S. dollars, was approximately $528.78 per month. At the time of the hearing Michael's wife had no job. His 2008 U.S. income tax return showed his reported income for 2008 to be $10,980 and his wife's income to be $10,548.

In December 2008, Michael filed a request to modify his child support obligation pursuant to Iowa Code chapter 252H. Following a review, the CSRU issued its decision reducing Michael's child support obligation to fifty dollars per month. Tami subsequently filed her notice challenging the administrative adjustment of support.

A hearing on the matter was held before the district court in December 2009. Michael testified by phone that because his wife's visa application was denied, he had no choice but to move to China. He testified the wage he earned from his employment at the university was considered a high wage for his position and a good salary under Chinese standards, as the cost of living there was a lot less compared to the United States. Michael testified that his employment at the university was full-time employment and that he was prohibited by his employer from obtaining additional employment teaching at another university. He said, "In the Chinese educational system, you're permitted to have one teaching job at a time." He advised that he and his wife now had their own child, born in 2009, and he testified his wife was currently unemployed. He requested the court accept the CSRU's proposed modification of his child support obligation.

After hearing Michael's testimony and receiving exhibits into evidence, the district court ruled from the bench and denied Michael's request that his child support obligation be reduced. The court reasoned:

> This seems to me to be one of those cases that's unfortunate. There is an obligation on the part of [Michael] to support his minor children. And it is the presumption of the courts and the presumption of this court in particular that that is or those are individuals who are entitled to the support of a parent as much as a spouse is entitled to the support of another spouse. And so we're faced with a situation where [Michael], having at least two dependants and an obligation to support them, incurred an additional obligation for support which could only be met by him leaving the United States.
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> The court does not find that that is a basis to reduce the obligation of [Michael] to support his minor children. And while it may be a terrible decision to have to make, whether to stay in the United States and provide care for his children or to leave the United States and supply support for a spouse acquired later, the court cannot find that that voluntary decision on the part of [Michael] justifies a reduction in the support obligation.

The court's follow-up calendar entry denied Michael's request for reduction in child support "for the reasons stated on the record."[1]

Michael now appeals.[2] He asserts the district court erred in finding his reduction in income was voluntary.

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[1] It is noted that the court rules governing child support guidelines were amended effective July 1, 2009. Iowa Court Rule 9.5(10) provides in part:

> To determine gross income, the court shall not impute income under Rule 9.11 except:
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> *a.* Pursuant to agreement of the parties, or
>
> *b.* Upon request of a party,
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> and a *written determination is made by the court* under Rule 9.11. (emphasis added).

Iowa Court Rule 9.11(4) provides:

> The court shall not use earning capacity rather than actual earnings unless *a written determination is made* that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

(Emphasis added.)

***II. Scope and Standards of Review*.**

A petition for review and adjustment of a child support obligation is heard as an ordinary civil action in equity. *State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 690 (Iowa 1993). Our review of an action in equity is de novo. Iowa R. App. P. 6.907 (2009).

***III. Discussion*.**

Child support provisions of a dissolution decree may be modified when there has been "a substantial change in circumstances." Iowa Code § 598.21C(1). In determining whether there has been a substantial change in circumstances, the court may consider "[c]hanges in the employment, earning capacity, income, or resources of a party." *Id*. § 598.21C(1)(a); *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). The party seeking modification must establish the change in circumstances by a preponderance of the evidence. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 2005).

> One of the factors we consider in determining if we will use a parent's earning capacity, rather than a parent's actual earnings, in order to meet the needs of the children and do justice between the parties is whether the parent's inability to earn a greater income is self-inflicted or voluntary.

McKenzie, 709 N.W.2d at 533. "Under our case law, 'a party may not claim inability to pay child support when that inability is self-inflicted or voluntary.'" *In re*

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[2] Navigation of the parties' appendix, although short, was made more difficult by the parties' noncompliance with applicable rules of appellate procedure. Content was not in the order prescribed by Iowa R. App. P. 6.905(2)(*b*). Names of the witnesses were not inserted at the top of each transcript page included in the appendix. *Id*. 6.905(7)(*c*). Omitted pages of transcript were not indicated by a set of three asterisks. *Id*. 6.905(7)(*e*). There was a lack of a listing of relevant docket entries. *Id*. 6.905(2)(*b*)(2). Although these rules infractions are seemingly trivial, compliance promotes judicial efficiency, thus aiding this court in meeting its mandate to achieve maximum productivity in deciding a high volume of cases. *See* Iowa Ct. R. 21.30(1).

Marriage of Duggan, 659 N.W.2d 556, 562 (Iowa 2003) (quoting *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993)). The unique circumstances in each case determine whether a parent's inability to earn a greater income is self-inflicted or voluntary. *See In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998) (setting forth cases where modification has been granted and where modification has been refused).

On appeal, Michael argues his move to China and resultant reduction of income was not voluntary with a reckless disregard for his support obligation or with improper intent of depriving his children of support. To be sure, "parents who reduce their income through an improper intent to deprive their children of support or in reckless disregard for their children's well-being are not entitled to a commensurate reduction in child support payments." *In re Marriage of Swan*, 526 N.W.2d 320, 324 (Iowa 1995). But, such a finding is not a requisite to holding that a parent's actions were voluntary or self-inflicted. *See McKenzie*, 709 N.W.2d at 533-34. We find this case to be similar to *In re Marriage of McKenzie*, 709 N.W.2d at 531.

In *McKenzie*, some years after the father in that case divorced the mother, the father's girlfriend moved from Iowa to South Carolina. *Id*. at 532. Wanting to be with his girlfriend, the father followed her to South Carolina. *Id*. at 533. The father left a well-paying job in Iowa and did not have a job lined up in South Carolina. *Id*. The father and his girlfriend married, and he eventually found a job that paid about half of what he had been earning in Iowa. *Id*. Based upon his reduced actual earnings, the father sought a reduction in his child support

obligation. *Id*. at 529. The district court denied the father's request, finding he voluntarily quit his employment. *Id*. at 530.

On appeal, this court reversed, finding the father did not voluntarily quit his job with the intent "to deprive his [child] of support or had a reckless disregard for [her] well-being." *Id*. On further review, the Iowa Supreme Court reversed our opinion and affirmed the district court, finding the father's earning capacity should be used to establish his child support obligation. *Id*. at 534-35. Although the court made no reference to whether it found the father had intended to deprive the child of support or had a reckless disregard for the child's well being, the court concluded that "a strict application of the child support guidelines using [the father's] actual earnings under the circumstances of this case would not provide for the needs of his child and would result in a substantial injustice between the parties." *Id*. at 534.

Here, Michael claims the reason he voluntarily left his employment in Iowa was to live with his wife, and not to avoid his child support obligation. We have no reason to believe otherwise and recognize Michael's desire to move and continue his relationship with his wife is only natural. *See id*. at 533. However, like the *McKenzie* court held, our first consideration under these circumstances is not what is in Michael's best interests, but what is in the best interests of his children to whom he owes an obligation of support. *See id*. at 534-35. If we consider Michael's reason for moving as the primary consideration in deciding this case, we would place his selfish desires over the welfare of his children and the custodial parent, not provide for the needs of his children, and create a substantial injustice between the parties. *Id*. at 533-34.

Like the father in *McKenzie*, when Michael left Iowa for China, he had no idea what his earning capacity in China would be, and he did not have another job lined up. Michael was not free to plan his future without regard to his obligation to his former wife and children. *See id*. at 534. At the time Michael left Iowa, he knew he had a pre-existing duty to provide monthly child support for his children and could earn approximately $2055 per month if he stayed in Iowa. Nevertheless, Michael left his Iowa employment and traveled to China with no apparent idea what his earning capacity in China would be. Under these circumstances, similar to the ones in *McKenzie*, Michael's desire for self-fulfillment is outweighed by the pre-existing duty he had to his former spouse to provide adequate support for his minor children. *Id*. Upon our de novo review, we agree with the district court that Michael's reduction in income was voluntary. Further, we find that if Michael's actual earnings were used, substantial injustice would occur. Consequently, we affirm the district court's denial of Michael's request to reduce his child support obligation, because it is necessary to use Michael's earning capacity to determine his child support obligation, rather than his actual earnings, to provide for the needs of his children and do justice between the parties under the special circumstances of this case.

AFFIRMED.