IN THE COURT OF APPEALS OF IOWA

No. 0-442 / 10-0128
Filed October 6, 2010

IN RE THE MARRIAGE OF
CHAD WILLIAM CLINTON AND
TANYA MARIE CLINTON

Upon the Petition of
CHAD WILLIAM CLINTON,
Petitioner-Appellant,

And Concerning
TANYA MARIE CLINTON,
Respondent-Appellee.

Appeal from the Iowa District Court for Carroll County, Joel E. Swanson, Judge.

A father appeals from the district court's order denying his application to modify physical care of his children. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

A. Eric Neu of Neu of Minnich, Comito & Neu, P.C., Carroll, for appellant.

Dee Ann Wunschel, Carroll, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

VOGEL, P.J.

Chad Clinton appeals from the district court's order denying his request to modify physical care of his and Tanya Clinton's three children.[1] He also asserts the district court erred in calculating child support. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

Chad and Tanya Clinton's marriage was dissolved in March 2001. Three children were born of the marriage: Chris, born in 1994; Alex, 1996; and Haley, 1998. At the time of the dissolution, Chad worked at Pella Corporation, and Tanya worked for an insurance company. After a trial on the issues, the parties were granted joint legal custody of their three children, with Tanya having physical care and Chad reasonable visitation. Chad was ordered to pay child support. We affirmed the district court decision. *In re Marriage of Clinton*, No. 01-0563 (Iowa Ct. App. Jan. 28, 2002). In May 2009, citing a substantial change of circumstances, Chad sought to modify the physical care of the children. In her response, Tanya requested Chad's child support obligation be increased. After a December 2009 trial, the court found there had not been a substantial change in circumstances to modify the custodial arrangement, but found child support should be increased. Chad appeals.

II. Standard of Review

Our review is de novo. *In re Marriage of McKenzie,* 709 N.W.2d 528, 531 (Iowa 2006). However, we recognize that the district court was able to listen to

[1] We note noncompliance with the rules of appellate procedure, requiring the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*).

and observe the parties and witnesses. *In re Marriage of Zabecki,* 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Sullins,* 715 N.W.2d 242, 247 (Iowa 2006). The controlling consideration in child custody cases is always what is in the best interests of the children. *In re Marriage of Thielges,* 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

III. Physical Care

Chad contends a material and substantial change in circumstances occurred since March 2001, warranting modification of physical care from Tanya to him.

> 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).

Chad states he presented evidence of numerous incidents, which when combined, created a substantial change in circumstances warranting a change in physical care. Chad's primary arguments for modification centered around what he perceived to be his superior ability to parent the children and provide a more

stable home atmosphere, given some of the poor choices Tanya has made for the children. While Chad blamed negative changes in the children's behavior and decline in their school grades on Tanya, the court found,

> In the case of the Clinton family, what perhaps are expected behavioral problems of children, become issues for change in custody. . . . The Court rejects these and accepts [the changes in grades] as logical given the decision of Chad and Tanya to separate.

Both Chad and Tanya testified, offering a laundry list of criticisms of the other and their interpretation of the effect each other's parenting styles had on the children. The district court found nothing in evidence to warrant a change in physical care, concluding,

> Changing physical custody of the three minor children and placing them in the physical care of their father would serve no useful purpose at this time and would simply add another inconsistent factor in the lives of the Clinton children. Chad and Tanya should attempt to cooperate in their efforts to give the children the benefit of the best of both parents.

On our de novo review, we agree with the district court's assessment of the evidence and conclude Chad did not prove a material and substantial change in circumstances sufficient to warrant a change in physical care.

IV. Child Support

Chad asserts the district court erred in its modification of child support and the increased amount he was ordered to pay Tanya. A child support amount may be modified if there is a substantial change in circumstances, as in "changes in the employment, earning capacity, income, or resources of a party." Iowa Code § 598.21C(1)(a) (2009). If the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most

current child support guidelines, a substantial change of circumstances exists. *Id.* § 598.21C(2)(a). The court shall not vary from the amount of child support resulting from application of the guidelines unless a substantial injustice would result to the payor, payee, or child or due to justice between the parties under the special circumstances of the case. Iowa Ct. R. 9.11. On appeal, we will not disturb the trial court's conclusion unless there has been a failure to do equity. *In re Marriage of Wahlert*, 400 N.W.2d 557, 560 (Iowa 1987). While contemplating modification of an order, or determining the appropriate amount, courts may consider several factors, including the parties' economic circumstances, ability to pay support, and the needs of growing children. *In re Marriage of Bolick*, 539 N.W.2d 357, 360 (Iowa 1995). Specifically, there are a number of principles a court can consider:

> (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983).

> At the time of the original decree, the district court found:
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> Tanya . . . is now thirty years old. She too appears to enjoy good health. Tanya has an Associate of Science degree and works for Farmers Mutual Insurance Company in sales. She works from 8:30 a.m. to 4:30 p.m. and too appears to have a solid and secure future. Her January to December, 2000 earnings showed gross wages in the amount of $25,957. She expects to earn a similar amount this year with no expectation of increase.

Utilizing both Chad's and Tanya's income level, child support was set at $791.76 per month for the three children. In the modification ruling the district court found, "Tanya works part time for Remedy Glass and her Exhibit 113 would establish a gross annual income of $15,080.00." Remedy Glass is a company solely owned by the man with whom she is currently co-habitating, Neal Eischeid, who also provides a home and financial support for Tanya. Tanya testified that she currently works "about twenty minutes every day" helping Neal out with his bookwork. For approximately four more hours a day, she remains at Remedy Glass doing, "my stuff and I have things together, and yeah, I'll use their Internet. Play a lot of Solitaire, sorry."

Tanya admitted that from 1999-2006 she worked for two different insurance companies, with both salary and commission pay. Tanya testified that when working for the first insurance company, she earned an estimated $50,000 a year. In 2004 she completed a degree in Industrial Technology Management. From 2006 to 2007, Tanya was employed by Remedy Glass, working approximately thirty-five hours per week and being paid $10.50 per hour. With the aid of a new computer program for the company and a change in staff, her services were no longer needed at that level, and she began working approximately twenty minutes per day. Since that time, Tanya claims she has not been able to find any other suitable work. While Neal pays the majority of Tanya's bills, in the last year or two, she testified she has received food stamps "off and on," with the most recent receipt lasting about one year.

Since 1992, Chad has continued to work for Pella Corporation. At the time of the dissolution, Chad's net monthly income was $2199.34, and at the time of the modification, $2890.16. The district court found Chad's increase in salary combined with Tanya's decrease in salary, created a substantial change of circumstances. *See* Iowa Code § 598.21C(2)(a). The court modified Chad's child support, increasing his obligation to Tanya from $791.76 to $1000.80 per month.

On our de novo review under the special circumstances of this case, we find this increase does not do equity as between the parties. *See* Iowa Ct. R. 9.11. Tanya clearly has the education and the capacity to earn a good income. While Tanya's loss of employment in 2007 may have been involuntary, her decision to remove herself from the job market and not actively look for employment was a conscious decision. When a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guidelines. *In re Marriage of Glass*, 213 N.W.2d 668, 671 (Iowa 1973); *In re Marriage of Malloy*, 687 N.W.2d 110, 115 (Iowa Ct. App. 2004) (holding that child support modification can be refused when the obligee spouse voluntarily relinquishes the position he or she held when the decree was entered). Tanya stated that she had interviews, but did not obtain employment. We find no evidence to support that she actively engaged in gaining employment, or utilized her past employment experience and education to find a new job. To the contrary, she admittedly "just hangs out" at her boyfriend's business for about

three-and-one-half hours a day playing on the computer. When both parties are in reasonable health, and capable of working to support themselves, each needs to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for permanent support. Iowa Code § 598.21B(2)(b)(1); *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988) ("Consideration shall be given to the responsibility of both parents to support and provide for the welfare of the minor child and of a child's need.").

Not every change in circumstances constitutes a sufficient basis for modification. *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). Tanya bore the burden to establish her change in circumstances was permanent and not temporary. *See In re Marriage of Robbins*, 510 N.W.2d 844, 846 (Iowa 1994) (explaining that the burden of proof of these matters and of the applicability of the child support guidelines falls on the petitioner for a modification of child support); *In re Marriage of Mayer*, 347 N.W.2d 681, 683 (Iowa Ct. App. 1984) ("Modification should be based upon a change of circumstances more or less permanent or continuous, not temporary."). While Tanya's income has generally trended downward, she failed to meet this burden and prove these were permanent changes, or that she could not find alternative suitable employment. *See In re Marriage of Kern,* 408 N.W.2d 387, 390 (Iowa Ct. App.1987) ("[A] petition for modification will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets."). Under these circumstances, we find it is appropriate to

consider Tanya's earning capacity at a greater level than the district court imputed to her in reviewing her request for an increase in child support.

We find Tanya did not show a substantial change of circumstances such that would support an imputed income to her of only $15,080. Taking herself out of the job market when she has both education and marketable skills only serves to skew the amount of child support Chad is ordered to pay. Chad asks that Tanya be imputed an income "at least $21,840 per year." The record supports that Tanya has an earning capacity of at least that amount. We therefore reverse and remand to the district court to make the appropriate award of child support utilizing the figure of $21,840 as Tanya's gross annual income.

V. Appellate Attorney Fees

Both Chad and Tanya request appellate attorney fees. "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 Courtade,* 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). 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 trial court's decision on appeal. *In re Marriage of Maher,* 596 N.W.2d 561, 568 (Iowa 1999). After considering the appropriate factors, we decline to award either party appellate attorney fees. Costs on appeal assessed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.