IN THE COURT OF APPEALS OF IOWA

No. 0-469 / 10-0023
Filed July 28, 2010

IN RE THE MARRIAGE OF SCOTT D. FORD AND BETH ANN FORD

Upon the Petition of

SCOTT D. FORD,
Petitioner-Appellant,

And Concerning

BETH ANN FORD,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinksi, Judge.

Scott Ford appeals from the district court's denial of his petition to modify his child support obligation to his two daughters. **AFFIRMED AS MODIFIED AND REMANDED.**

J. Terrence Denefe of Kiple, Denefe, Beaver, Gardner & Zingg, L.L.P., Ottumwa, for appellant.

Gregory G. Milani of Orsborn, Milani, Mitchell & Goedken, L.L.P., Ottumwa, for appellee.

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

TABOR, J.

Scott Ford appeals from the district court's denial of his petition to modify his child support obligation to his two daughters. We affirm the district court's determination of Scott's earning capacity, but remand for the court to calculate whether the ten-percent rule in Iowa Code section 598.21C(2)(a) (2007) requires modification.

I. Background Facts and Proceedings

Scott and Beth Ford married in 1996 and separated in 2004. During the marriage, the couple had two daughters: the first born in December of 1996 and the second in August of 2003. A New Mexico court had jurisdiction over the dissolution of the Fords' marriage and issued a marital settlement agreement and parenting plan in January of 2005. By the time the divorce decree was final, Beth was living with the girls in Iowa. Scott relocated to Florida to work for the Palm Beach Post. The decree ordered Scott to pay monthly child support of $991 based on his annual salary of $55,000. In the year following the divorce, Scott earned a salary and bonuses totaling approximately $88,000.

In the fall of 2007, however, Scott's employer downsized its workforce and terminated his advertising sales position. After several months of fruitless searching for replacement work in newspaper advertising, Scott decided to start a small business in an unrelated field. His business, which opened in August 2008, offers tailoring, alteration, and dry cleaning services to retail clothing stores. Scott invested $125,000 in the venture with roughly half of the start-up costs coming from a home equity loan and half from a cash contribution from

Scott's new wife, Tabitha. Scott managed the business and its seven employees. Despite logging as many as eighty hours per week getting the business off the ground, Scott did not take home any salary as of the date of the modification hearing. He testified he expected to be able to pay himself a monthly salary of $500 to $1500 by June of 2010. Tabitha works as an investment banker earning approximately $104,000 per year. Tabitha and Scott own a home in Florida, but are "upside down" on their mortgage—owing at least $133,000 more than the appraised value of the house. After losing his job, Scott liquidated his retirement savings and accepted help from his father to make seventy-five dollar monthly payments toward his child support.

Beth works out of her home in Ottumwa as a technical writer, earning $57,000 annually. She testified that she pays for all of her daughters' extra-curricular activities and does not submit the children's medical bills to Scott, despite provisions in the decree for sharing those expenses.

On August 5, 2008, Scott applied for modification of the final dissolution decree, alleging a substantial change in circumstances warranting modification of the child support provision. The district court held a hearing on the modification request on August 20, 2009. Scott submitted a child support guideline worksheet as a hearing exhibit; he calculated his annual income at zero and his monthly support obligation as twenty dollars. On October 23, 2009, the district court issued its order, finding no material change in circumstances warranting reduction of Scott's child support obligation. Scott filed a motion to enlarge and amend the findings of fact and conclusions of law. The motion advanced a

fallback position, urging the court to impute to Scott an annual income of $20,800, representing a forty-hour work week with wages of ten dollars per hour. Scott attached a child support guideline worksheet to his motion, showing his monthly obligation as $405. The court denied Scott's motion and this appeal followed.

II. Scope of Review

We exercise de novo review in child support modification actions. Iowa R. App. P. 6.907; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We give weight to the trial court's factual findings, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Bolick,* 539 N.W.2d 357, 359 (Iowa 1995). We recognize the district court "has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Vetternack,* 334 N.W.2d 761, 762 (Iowa 1983).

III. Merits

The party seeking to modify a child support order bears the burden of proving by a preponderance of the evidence a substantial and material change in circumstances from the time of the decree. *In re Marriage of Bergfeld*, 465 N.W.2d 865, 869 (Iowa 1991). In deciding whether to modify a decree, we are mindful of the following principles:

> (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.

Vetternack, 334 N.W.2d at 762.

Scott bases his action for modification of child support on Iowa Code sections 598.21C(1)(a) and 598.21C(2)(a). Section 598.21C(1)(a) allows the district court to modify a child support order if the obligor has experienced a substantial change in his or her employment, earning capacity, income or resources. Notwithstanding the modification criteria in section 598.21C(1), section 598.21C(2)(a) deems a variation of ten percent or more between the amount ordered in the decree and the amount which would currently be due under the child support guidelines to be a substantial change in circumstances. Scott contends his job loss—exacerbated by the recession in south Florida where he moved following the divorce and the demise of the newspaper industry in which he was employed—meets the criteria for modification under section 598.21C(1)(a). He further argues that because his child support obligation of twenty dollars per month, based on his 2008 income of zero,[1] varies more than ten percent from the New Mexico court decree that he pay $991 per month, he is entitled to modification under section 598.21C(2)(a). While the calculation using Scott's actual income does exceed the ten-percent variation, our inquiry requires an additional step. Beth urges us to consider Scott's earning capacity in lieu of his actual income.

---

[1] The variation also is more than ten percent under Scott's alternative argument that the court should impute to him an income of $20,800, resulting in a monthly child support obligation of $405.

Under the child support guidelines,

> 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.

Iowa Ct. R. 9.11(4).

The district court determined in its written order denying modification: "If Scott is allowed to frame his support responsibility with his claim of no income, he is excused from supporting his daughters to his full ability; that undermines their ongoing need for support and perpetrates an injustice upon Beth." Having rejected Scott's actual income calculation of zero, the district court imputed to him an income of $55,000 based on his prior earnings in sales work. We concur with the district court's decision to consider Scott's earning capacity instead of his actual income at the time of the modification hearing. *See Vetternack*, 334 N.W.2d at 763 (noting trend in case law toward considering a parent's long-term earning capacity over parent's current ability to pay).

Using a parent's earning capacity rather than his or her actual income is appropriate where the parent's inability to earn a greater income is self-inflicted or voluntary. *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006) (citing *In re Marriage of Duggan*, 659 N.W.2d 556, 562 (Iowa 2003)). The district court acknowledged Scott's termination from the Palm Beach Post was not voluntary. Still, the court concluded Scott's subsequent election to launch his own business—without enough capital to compensate his day-to-day services—created his current fiscal uncertainty. In other words, his reduction in income and

difficulty in paying child support was self-inflicted. Scott testified that he did not try to find hourly wage work because he was "committed to the business right now." While Scott's entrepreneurial spirit is commendable, it does not excuse his obligation to provide adequate support for his daughters. Our first consideration under these circumstances is not what is in Scott's best interests, but what is in the best interests of his daughters. *See McKenzie*, 709 N.W.2d at 533-34.

We also may consider the combined incomes of Scott and Tabitha to determine whether a strict application of the guidelines would result in a substantial injustice under rule 9.11(4). *See McKenzie,* 709 N.W.2d at 533. Tabitha's annual income of $104,000 and ability to invest $75,000 in Scott's business plan detracts from Scott's argument for a strict application of the child support guidelines dramatically reducing his obligations. Tabitha's financial resources may be considered to the extent they relate to his overall financial condition. *See In re Marriage of Mueller*, 400 N.W.2d 86, 88 (Iowa Ct. App. 1986). Scott's purported income of zero looms less dire when we consider his wife's monetary contributions. In looking only to his job loss, Scott promotes an overly narrow view of his changed circumstances. *See McDermott-Yeargin v. McDermott*, 79 P.3d 245, 250 (Mont. 2003) (rejecting mother's request to modify child support obligation because she was asking the court "to disregard her personal choice to step into the entrepreneurial world, accompanied by her husband's ability to finance that endeavor").

Strict application of the child support guidelines based on Scott's actual income would not meet the needs of his daughters and would be unfair to Beth.

Whether Scott is entitled to a modification of his child support obligation should be determined by considering his earning capacity. Presumably recognizing that earning capacity is the better measure of his ability to pay, Scott argues on appeal that imputing to him an income of $20,800 would provide substantial justice to the parties. Scott did not offer any evidence or otherwise explain why his earning capacity should be pegged at ten dollars an hour (which times a forty-hour week would result in the imputed annual salary of $20,800). We agree with the district court that it is equitable to assign Scott an annual earning capacity of $55,000, based upon his salary at the time of the decree. *See McKenzie*, 709 N.W.2d at 534 (best indication of earning capacity is salary parent previously earned). Scott holds a bachelor's degree in business administration and a minor in public administration, preparing him, by his own estimation, for "life in the business world." The attention Scott devoted to researching the market for his new business and the hours he worked to make it profitable support the district court's conclusion that his current financial predicament is not permanent. *See In re Marriage of Flattery*, 537 N.W.2d 801, 803-04 (Iowa Ct. App. 1995) (holding not every change in circumstances constitutes a sufficient basis for modification). Scott falls short of showing a substantial change in his earning capacity that would entitle him to a modification under section 598.21C(1)(a).

The remaining question is whether section 598.21C(2)(a) should be applied to determine if there is more than a ten percent variation between the $991 per month child support obligation incorporated into the 2005 New Mexico decree and the amount that would be owed at the imputed salary of $55,000

under Iowa's guidelines, which became effective July 1, 2009. The district court did not perform that calculation, concluding: "Without the requisite proof of a substantial change in income-producing ability, the court is without basis to modify terms of financial and medical support." However, the legislature mandated application of the ten-percent variation rule in section 598.21C(2)(a) "notwithstanding" section 598.21C(1). *See generally In re Marriage of Wilson*, 572 N.W.2d 155, 157 (Iowa 1997). We remand for the district court to determine whether Scott's monthly child support would fall within the ten-percent variation rule in section 598.21C(2)(a) when his annual earnings are fixed at $55,000. If there is a variation of more than ten percent, we direct the district court to modify Scott's child support obligation accordingly. We do not retain jurisdiction.

IV. Appellate Attorney Fees.

Beth seeks attorney fees for this appeal. An award of attorney fees is not a matter of right. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). When contemplating a request for appellate attorney fees, we look to the needs of the party making the request and whether the party was obligated to defend the trial court's decision. *Id*. We do not see Beth's financial needs outstripping those faced by Scott at this point in time. Accordingly, we conclude each party should pay his or her own attorney fees for this appeal. Costs of appeal are assessed equally to each party.

AFFIRMED AS MODIFIED AND REMANDED.