IN THE COURT OF APPEALS OF IOWA

No. 1-222 / 10-1606
Filed May 25, 2011

IN RE THE MARRIAGE OF REBECCA RUTH APPLEGATE AND AARON MATTHEW APPLEGATE

Upon the Petition of

REBECCA RUTH APPLEGATE,
Petitioner-Appellee,

And Concerning

AARON MATTHEW APPLEGATE,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

Aaron Applegate appeals from the child support provisions of the decree dissolving his marriage to Rebecca Applegate. **AFFIRMED.**

Michael O. Carpenter of Gaumer, Emanuel, Carpenter & Goldsmith, P.C., Ottumwa, for appellant.

Alison Werner Smith of Hayek, Brown, Moreland & Smith, L.L.P., Iowa City, for appellee.

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

TABOR, J.

Today we consider an unemployed father's challenge to his child support obligation. The dissolution decree ordered Aaron Applegate to pay $729 per month based on the district court's determination of his earning capacity as $54,839.60, calculated by averaging his annual income from 2005 to 2009. Aaron argues he should pay only $221.25 per month based on his current annual receipt of $18,592 in unemployment benefits. While exercising our de novo review, we also defer to the district court's factual finding that Aaron's current inability to earn a greater income is self-inflicted and the result of voluntary decisions. Because the district court's imputation of income was reasonable, we affirm the decree.

I. Background Facts and Proceedings

Aaron Applegate and Rebecca Mallory married in 2001. Their daughter was born in 2002.

At the time of the dissolution trial in July 2010, Aaron was thirty-six years old. Aaron studied biomedical engineering for four years at the University of Iowa, but did not graduate with a degree. In 1997, he went to work packing windows at Pella Corporation, where he met Rebecca. Rebecca is two years younger than Aaron. She received a degree from the University of Iowa in 1993 and then found a job at Pella Corporation.

Aaron left Pella Corporation after less than three years due to a back injury and his desire to pursue additional education. Aaron earned his associate of arts (A.A.) degree in electronics and telecommunications from Indian Hills

Community College in 2002. He then moved with Rebecca to New Mexico, where he had secured a job researching and developing weapons systems at the Los Alamos National Laboratory. Aaron started at an annual salary of $50,500 and earned approximately $55,000 when he left to join an engineering firm two years later. He worked for that firm for three years, ending at an annual salary of $57,000. After their daughter's birth, the parties agreed that Rebecca would be a stay-at-home mother.

In 2007, Aaron and Rebecca moved back to Iowa so that their daughter could start school here. Aaron landed a technical sales job with Powermation, earning approximately $50,000 with additional expenses paid for his car and cell phone. In March 2008, he moved to 3E Electrical Engineering and Equipment (3E), where his salary was $57,000. Aaron was fired from that job in December 2008. The district court noted that Aaron was terminated for cause, "specifically for providing false information, for tardiness, for inattention to his work, and for use of an office cell phone for personal calls, and importantly, for failure to comply with a remediation program."

Rebecca started working at Wal-Mart in 2008 as a cosmetics associate, earning eight dollars per hour. She advanced quickly to assistant store manager, a position which paid $38,000 per year with an annual bonus of $6000. When Wal-Mart restructured its workforce in 2009, Rebecca was offered a $65,000 per year position in Oklahoma, which she was unable to accept because a temporary injunction in the dissolution action prevented her from moving with their daughter. As a result, she lost her job with Wal-Mart.

Rebecca moved out of the family residence with their daughter in January 2009 and filed a petition to dissolve the marriage in April 2009. Rebecca continued to look for a new job after leaving Wal-Mart, but with no success. In July 2009, she enrolled in two-year health science program at Kirkwood Community College. In June 2010, she found employment with the Iowa Department of Transportation, earning a salary of $23,000 and receiving family health care benefits. Rebecca testified that even with her net monthly income of $1644 and temporary child support of $761 per month she cannot keep up with her monthly expenses.

After he was fired from 3E, Aaron tried to find employment in the insurance industry, but testified that he was unable to do so because of his unfavorable credit rating. He also applied for technical jobs, but was unable to secure a position. At the time of the dissolution trial, Aaron was receiving $1500 per month in unemployment benefits and had done so for about eighteen months. He testified that he did not look for part-time work because he would lose his benefits. He relocated to Fairfield with his fiancé, whom he relied upon for financial support. Aaron also started an on-line college program to obtain a degree in electrical engineering technology; he was not taking a full class load, but expected to finish the program by the spring of 2011.

The parties agreed by stipulation to the division of their property; both Aaron and Rebecca agreed to individually file for bankruptcy following the entry of the decree. The stipulation also provided for joint legal custody of their daughter with physical care to Rebecca and liberal visitation for Aaron. The only

issue to be resolved in the dissolution decree was the amount of child support to be paid by Aaron.

After a July 2010 hearing, the court ordered Aaron to pay $729 per month in child support. The court reached this figure by imputing to Aaron a yearly income of $54,839.60 through averaging his annual salary amounts for five years: specifically $65,644 in 2005; $66,383 in 2006; $54,800 in 2007; $66,379 in 2008, and $20,992 in 2009. Aaron appeals the child support order. Rebecca requests appellate attorney fees.

II. Scope and Standards of Review

The district court tried the dissolution case in equity, so our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Beecher*, 582 N.W.2d 510, 512 (Iowa 1998). Our job is to examine the entire record and decide anew the issue raised on appeal. *Beecher*, 582 N.W.2d at 512-13. We defer to the district court's opinion regarding the credibility of the parties because of the trial judge's superior ability to gauge their demeanor. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). We review the district court's interpretation of the child support guidelines for errors at law. *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004).

III. Analysis

A. Child Support

The purpose of Iowa's child support guidelines is to further the best interests of children by recognizing the duty of both parents to contribute to their children's financial welfare in proportion to their respective incomes. *Beecher*,

582 N.W.2d at 513. In ordering child support, courts must first look to the guidelines. Iowa Ct. R. 9.4. The guidelines impose a rebuttable presumption that the amount of support which would result from the application of the guidelines is the correct amount to be awarded. *Id.* When a court opts to calculate a parent's child support obligation by using earning capacity rather than actual earnings, it must make a written determination 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).

Aaron takes the position that the court should have calculated his child support obligation by using the actual annual income of $18,592 that he was receiving from unemployment benefits. Rebecca advocates for using Aaron's earning capacity rather than his actual income, urging that a decrease in child support to the degree suggested by Aaron would "compromise her daughter's quality of life." She contends that relying on Aaron's unemployment benefits would result in child support that would "not even cover the cost of monthly before and after school care, much less basic expenses."

In determining if it is appropriate to use a parent's earning capacity rather than a parent's actual earnings to meet the child's needs or do justice between the parties, courts will consider whether 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). This "self-infliction rule" applies equitable principles to the determination of child support to prevent parents from gaining an advantage by

reducing their earning capacity and ability to pay support through improper intent or reckless conduct. *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993).

The district court concluded, “Aaron’s current low income situation is not only temporary, but self-inflicted or voluntary.” The court reasoned that Aaron’s termination from 3E was based on his own misconduct and “a reasonable person, particularly one offered a remediation program to keep his job, would know or should know that being fired would result in depriving [his daughter] of support.” The court also cited Aaron’s pursuit of an on-line degree part-time while remaining on unemployment as a voluntary decision contributing to his reduced income. Finally, the court noted that Aaron’s move to Fairfield admittedly restricted his employment options in his selected career field.

Aaron acknowledges his misconduct on the job led to 3E terminating his employment, but argues that under *Foley*, being fired for cause is not the equivalent of intending to deprive his child of support or a reckless disregard for her well-being. *Id.* Appellate courts from other jurisdictions have held a parent’s diminution in income to be voluntary if it results from job loss based on a wrongful act. S*ee, e.g., In re Marriage of Imlay*, 621 N.E.2d 992, 994 (Ill. App. Ct. 1993) (holding trial court could properly consider father’s loss of employment as voluntary where his drunk driving conviction resulted in being fired for failure to call on sales customers); *Woehl v. Woehl*, 639 N.W.2d 188, 191-92 (S.D. 2002) (rejecting notion that father’s assaultive conduct in the workplace and termination of employment cannot be considered voluntary because he did not provoke termination for express purpose of avoiding child support); *Edwards v. Lowry*,

348 S.E.2d 259, 261 (Va. 1986) (finding father was not entitled to reduction in child support obligation based on income reduction where job loss was direct consequence of his theft from employer).

But even if Aaron's firing from 3E cannot by itself be considered a voluntary reduction in income under *Foley*, Aaron's subsequent conduct is distinguishable from the father's actions in that case. As the district court discussed, Aaron has "not done all he could to obtain employment"—he curtailed his job search, moved to a location with less employment opportunities in his field, and returned to college classes on a part-time basis. These voluntary choices separate Aaron from Kenneth Foley, who was "diligent in obtaining a new job." *See Foley*, 501 N.W.2d at 500. When a parent opts to finish his education rather than maintain employment, our courts have determined that the inability to pay child support is self-inflicted. *See, e.g., In re Marriage of Dawson,* 467 N.W.2d 271, 275 (Iowa 1991) (father quit job to finish education and take job with less earnings); *Reed v. Reed,* 260 Iowa 1166, 1168-69, 152 N.W.2d 190, 191 (1967) (father voluntarily quit to return to school). Giving due deference to the district court's factual findings, we agree that Aaron's reduced income status is the result of a series of voluntary choices. A strict application of the child support guidelines using Aaron'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. Accordingly, the court properly used Aaron's earning capacity rather than his actual income to calculate his child support obligation.

The next question is whether the court adopted a reasonable method for determining Aaron's earning capacity. At trial Rebecca offered three possible scenarios for imputing his income. First, she recommended imputing his income as $67,000.00, which was his income level in 2009 before he was fired from 3E. Second, she proposed imputing his income at $54,839.60, which represented an averaging of his annual incomes for the past five years, including his 2009 income of $20,992.00 in unemployment benefits. As a third option, she suggested the court could impute Aaron's income as $33,500.00, which represented half of what he was making prior to their separation. She testified: "[W]ith his educational background, I would find that very reasonable that he would be able to at least obtain employment with that amount of money per year." On appeal, she argues that the five-year average was "the most reasonable imputed income figure." The district court embraced the five-year averaging approach.

Aaron argues that the district court overestimated his present earning capacity. He asserts that the use of income averaging is only appropriate where a party's income changes significantly from year to year. It is true that averaging income for child support purposes is an appropriate and accepted practice when a parent has a history of fluctuating income. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 52 (Iowa 1999). But the appropriateness of averaging in fluctuating income cases does not foreclose its use in this case. We must determine a parent's income from the most reliable evidence presented. *See In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991) (finding father's

unemployment to be temporary and endorsing necessity of averaging income over a "reasonable period" when determining currently monthly income). The record here demonstrates Aaron's ability to earn more than $50,000.00 per year with his previous work experience and educational attainments, including his AA degree. Often the best indication of a parent's earning capacity is the salary he received in his prior position. *McKenzie*, 709 N.W.2d at 534. In this case, the court's use of a five-year average was more advantageous to Aaron than if the court had looked only to his most recent employment at 3E, where he earned $66,379.00 in 2008. We find adequate support in the record for imputing an annual salary of $54,839.60 to Aaron for purposes of calculating his child support.

B. Appellate Attorney Fees

Rebecca seeks attorney fees on appeal. We have broad discretion to decide whether an award of attorney fees is warranted. We consider the financial needs of the party seeking the award, the ability of the other party to pay, and the relative merits of their positions on appeal. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Both parties offered reasonable arguments on appeal. When we balance Rebecca's financial needs against Aaron's present ability to pay, we do not believe Aaron should be ordered to cover Rebecca's fees. Each party shall pay half of the costs of the appeal.

AFFIRMED.