IN THE COURT OF APPEALS OF IOWA

No. 1-348 / 10-1069
Filed June 29, 2011

IN RE THE MARRIAGE OF MICHAEL THOMAS JONES AND JANA K. JONES

Upon the Petition of
MICHAEL THOMAS JONES,
Petitioner-Appellant,

And Concerning
JANA K. JONES,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Father appeals the district court's order dismissing his application for a modification of child support. **AFFIRMED.**

Michael P. Holzworth, Des Moines, for appellant.

Stacey N. Warren and Kodi A. Brotherson of Babich Goldman, P.C., Des Moines, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

Michael Thomas Jones appeals a district court order dismissing his application for a modification of child support. We affirm.

I. Background Facts and Proceedings.

Michael and Jana Jones married in November 1989 and are the parents of three sons. Their stipulated decree of dissolution of marriage was entered in April 2007. The parties agreed to joint legal care of their children, with physical care to Jana and visitation to Michael.

Additionally, the parties agreed and the decree states:

> **5. CHILD SUPPORT.** [Michael] shall pay to [Jana] the sum of $4,000 per month as and for the support of the parties' three minor children. Said support shall be paid . . . commencing May 1, 2007 and continuing thereafter until all of the children have attained the age of 18 years or graduates from high school, whichever shall last occur, but in any event not later than 19 years of age, [youngest son born in 1998], unless said children marry, die, or become self-supporting sooner.
>
> This child support is based on stipulated annual income for [Michael] of $207,000 and a stipulated annual income for [Jana] of $52,000. Although the child support is greater than what is required by the Uniform Child Support Guidelines, [Michael] is agreeable to paying this amount.

Michael currently runs the same four businesses he owned and operated at the time of the decree: Mallard Printing and Promotions, Russell's Trophies and Engraving, Park Printers, and Jones Property Management. Jana continues to teach school in Urbandale.

Michael's 2005 income[1] was $77,860. Michael's August 2006 financial affidavit listed $60,000 gross income. The April 2007 decree ordered the parties to file separate tax returns for 2006.

Michael's 2006 and 2007 returns show $93,535 and $117,881 in income. In November 2007, Michael purchased a new home in Clive, Iowa, for $337,000. Michael testified he did substantial repairs on the home and is now trying to sell it for $469,900.

One year after the decree, Michael bought a $248,000 second home/condo in the Ozarks, paying $77,000 in cash. On his April 2008 condo loan application, Michael told the lender he had total monthly income of $17,812. Michael testified he believed, in April 2008, he could afford the $1200 additional monthly mortgage payment.

Six months later, in October 2008, Michael filed an application for modification of child support alleging his income, since entry of the decree, "has decreased by a substantial amount." Michael's 2008 tax return shows $93,892 income. Michael's January 2009 affidavit of financial status[2] shows $0 net worth and a gross yearly income of $117,881. Michael's 2009 tax return lists $85,585 income.

Prior to the March 2010 hearing, the parties filed updated affidavits of financial status. Michael's affidavit lists gross annual income of $84,860, net monthly income of $5171.68, and personal living expenses of $9331 (including

[1] Unless otherwise noted, references to Michael's income are the total of his W-2 income and his schedule C income on his tax return.

[2] Michael's requests for a temporary downward modification were denied by the court.

his child support obligation). Michael's affidavit shows his net worth is $563,609. This is $94,183 *more* than his half ($469,425) of the parties' combined net worth ($938,851) at dissolution.

Michael submitted child support guidelines worksheets using $3538 for Jana's average monthly income and resulting in support of: $1239 (three children); $1069 (two children); and $751 (one child). Michael testified, however, he was willing to pay $1250 for three children.

Jana's 2010 affidavit shows net monthly income of $3698 and details net monthly expenses of $7418. Jana provides the health insurance for the children. Jana's net worth has declined to $274,489, exclusive of her IPERS pension.

At the modification hearing, Michael testified he agreed to pay $4000 per month child support in order for: (1) Jana and the children to stay in the home; (2) Jana to keep the nanny; and (3) Jana and the children to be able to take air-travel vacations. He asserts that Jana's decisions to the contrary reduced her expenses and is a material change of circumstances. However, Michael admitted none of these stated reasons is in the decree. Jana testified her income has increased since the decree. Jana explained her current budgeting and her "downsizing" the house after the divorce to reduce her monthly mortgage payment from $3300 to $1474.

In June 2010, the district court dismissed Michael's application for modification and ordered Michael to pay $7724.82 towards Jana's attorney fees. The court found:

> 18. [Michael] has also increased his commercial real estate holdings since the divorce.

> 19. [Michael] pays for considerable personal expenses through the business and appears to frequently consent-mingle personal and business monies.
>
> . . . .
>
> 27. Michael's personal financial circumstances have not changed since the parties' divorce except . . . his net worth and income have increased.
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> 28. At the time the decree was entered, notwithstanding his actual income, [Michael] knowingly stipulated his annual income was $207,000, and agreed to the child support terms.
>
> 29. . . . It is not in the best interests of these children to lower the child support.
>
> 30. There is no provision in the decree that requires [Jana] to a) keep the family home, b) keep the nanny or c) take vacation with the boys requiring air flight.
>
> 31. There has not been a substantial change in circumstances of the parties, not contemplated at the time of the decree.

Michael appeals the court's dismissal of his application for modification.

II. Scope of Review.

As an equitable action, we review modification proceedings de novo. *In re Marriage of Johnson*, 781 N.W.2d 553, 554 (Iowa 2010). We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Merits.

We first discuss the general principles concerning the parties' stipulated dissolution decree:

> Although a stipulation of settlement in a dissolution proceeding is a contract between the parties, it becomes a final contract when it is accepted and approved by the court. "When the stipulation is merged in the dissolution decree it is interpreted and enforced as a final judgment of the court, not as a separate contract between the parties."

In re Marriage of Lawson, 409 N.W.2d 181, 182 (Iowa 1987) (citations omitted).

For Michael to successfully modify the child support judgment, he "must establish by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since the entry of the decree." *See In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 331 (Iowa Ct. App. 2005). "Furthermore, to warrant modification, 'it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in a positive wrong or injustice.'" *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991) (quoting *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)). "The trial 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 Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App.1987). In *Chmelicek*, we explained:

> Provisions for child support payments in a decree are final as to the circumstances then existing. The "then existing" circumstances are those which were known, or through reasonable diligence, should have been known to the court when the original decree was entered. A trial court may not modify child support provisions in a decree simply on the ground that they were originally inequitable; but rather, relief from an inequitable provision may be effected only by [direct] appeal. "Any other procedure would leave the matter

> open to the most undesirable result of endless litigation and continual uncertainty."

Id. at 574 (citations omitted). Michael did not appeal the stipulated decree; therefore, his subsequent request for modification cannot be supported on the grounds his original, agreed-upon child support is inequitable. We agree with and adopt the district court's conclusion:

> [Michael] claims that the amount of child support he currently pays varies by more than 10 percent from the amount which would be due under the current support guidelines. Based on the financial information in the record, the Court disagrees.
>
> What seems clear is that [Michael], now regretting his agreement at the time of the divorce, seeks to use a "mechanical" application of [the] Iowa Code[3] . . . to get out of his commitment.
>
> [Michael], an astute businessman, understood the terms of the decree and what he was agreeing to: child support in excess of the guidelines based upon an income not reflected on his income tax returns [and] payable until the parties' youngest child graduated from high school.

Second, we enforce stipulated settlements involving child support if they do not adversely affect the children's best interests. *In re Marriage of Zeliadt*, 390 N.W.2d 117, 119 (Iowa 1986). The district court ruled:

> Would a reduced amount of child support be in the children's best interests? No.
>
> This case involves a stipulated upward deviation in child support voluntarily undertaken by [Michael] that benefits his children beyond that minimally required. It is fair to leave this provision unchanged because the evidence shows [Michael's] income and net worth are higher today than when he signed off on the decree.
>
> It is not this Court's role to second-guess the parties' decision in 2007 or second-guess their motives at that time. There is no question that it is in the boys' best interests to be supported at a financial level substantially in excess of the guidelines amount.

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[3] Iowa Code section 598.21C(2)(a) (2007) provides: "[A] substantial change of circumstances exists when the court order for child support varies by ten percent or more from the amount . . . due . . . [under] current child support guidelines."

After our de novo review, we agree with the district court and conclude Michael did not establish a substantial change of circumstances justifying a modification of his child support judgment. Continued enforcement of the decree is in the children's best interests and, based on this record, does not result in "a positive wrong or injustice." *See Chmelicek*, 480 N.W.2d at 574. Even if we acknowledge Michael's actual income is/was less than $207,000 as stipulated in the decree, his actual income has increased since April 2007. Further, given Michael's increase in both income and net worth, he has failed "to show that the parties' circumstances today are not as they would have been envisioned by the trial court when the dissolution was granted." *See id*. at 576 (quoting *In re Marriage of Skiles*, 419 N.W.2d 586, 589 (Iowa Ct. App. 1987)). Finally, the trial court has exercised reasonable discretion, and its ruling does not constitute "a failure to do equity." *See Kern*, 408 N.W.2d at 389. Accordingly, we affirm.

IV. Attorney Fees.

Both parties request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the appellate court's sound discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Given our disposition of this case and given the parties' difference in income and net worth, we award Jana appellate attorney fees in the amount of $4000. Costs on appeal are assessed to Michael.

AFFIRMED.