IN THE COURT OF APPEALS OF IOWA

No. 1-440 / 10-2028
Filed July 13, 2011

IN RE THE MARRIAGE OF
AIMEE J. HOLMQUIST
AND MARK B. HOLMQUIST

Upon the Petition of
AIMEE J. HOLMQUIST,
Petitioner-Appellee,

And Concerning
MARK B. HOLMQUIST,
Respondent-Appellant.

Appeal from the Iowa District Court for Bremer County, Bryan H. McKinley, Judge.

A father appeals an order temporarily modifying his child support obligation. **AFFIRMED.**

Dale E. Goeke of Goeke & Goeke, Attorneys at Law, Waverly, for appellant.

Linda A. Hall of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, J.

Mark Holmquist appeals an order temporarily modifying his child support obligation.

I. Background Facts and Proceedings

Mark and Aimee Holmquist divorced in 2006. The district court granted them joint physical care of their three children and ordered Aimee to pay Mark child support of $582.41 per month.

Aimee later petitioned to modify the child support obligation, alleging a change in Mark's income. After the petition was filed, Aimee asserted that the couple's oldest child made a decision to live exclusively with her. This fact, in her view, justified a temporary modification of child support to reflect the new living arrangement. Mark did not dispute that the oldest child was living with Aimee but asserted Aimee was impermissibly seeking to modify the physical care arrangement through a temporary support proceeding without showing a substantial change of circumstances. He also noted that he had recently been diagnosed with a heart condition and was receiving temporary disability benefits which should have resulted in an increased support figure payable by Aimee.

The district court found that the oldest child was "presently in the care of Aimee and shared care of the eldest child is not occurring." Based on this finding, the court determined that a variance from the child support guidelines was necessary to avoid substantial injustice to the payor, payee, and the child, and that the adjustment was necessary, provided for the needs of the children, and did justice between the parties, payor, and payee, "under the special circumstances of this case." The court did not directly address Mark's health

condition, but used his temporary disability income as the basis for calculating the support figure. The court temporarily modified the child support obligation from $582.41 per month payable by Aimee to $76 per month payable by Mark. Mark appealed. Our review is de novo. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983).

II. Analysis

Iowa Code section 598.21C(4)[1] (2009) authorizes the temporary modification of child support orders "[w]hile an application for modification of a child support or child custody order is pending." Mark concedes this provision would allow the temporary modification of support based on changes in income but asserts the provision does not allow consideration of changes in the physical care arrangement. He hangs his hat on additional language in section 598.21C(4), which provides, "The court shall not hear any other matter relating to the application for modification, respondent's answer, or any pleadings

[1] Section 598.21C(4) provides:

> While an application for modification of a child support or child custody order is pending, the court may, on its own motion or upon application by either party, enter a temporary order modifying an order of child support. The court may enter such temporary order only after service of the original notice, and an order shall not be entered until at least five days' notice of hearing and opportunity to be heard, is provided to all parties. In entering temporary orders under this subsection, the court shall consider all pertinent matters, which may be demonstrated by affidavits, as the court may direct. The hearing on application shall be limited to matters set forth in the application, the affidavits of the parties, and any required statements of income. The court shall not hear any other matter relating to the application for modification, respondent's answer, or any pleadings connected with the application for modification or the answer. This subsection shall also apply to an order, decree, or judgment entered or pending on or before July 1, 2007, and shall apply to an order entered under this chapter, chapter 252A, 252C, 252F, 252H, 252K, or 600B, or any other applicable chapter of the Code.

connected with the application for modification or the answer." We are not convinced the district court violated this proscription.

In considering the undisputed fact that one of the children was no longer participating in the joint physical care arrangement, the court relied on a statute and rule that authorize variances from the child support guidelines under special circumstances. *See* Iowa Code § 598.21B(2)(c) (stating there is "a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded"); 598.21B(2)(d) (allowing court to consider varying from the guideline amounts with a written finding that adherence to the guidelines would be unjust or inappropriate); Iowa Ct. R. 9.11 (setting forth criteria for variances). Two of the criteria for granting a variance are as follows:

> 9.11(1) Substantial injustice would result to the payor, payee, or child.
>
> 9.11(2) Adjustments are necessary to provide for the needs of the child or to do justice between the parties, payor, or payee under the special circumstances of the case.

As noted, the district court invoked these criteria and did so only as a basis for temporarily modifying child support. The court did not modify the physical care arrangement and, indeed, stated that the issue was "not even before the court." We conclude the court acted well within the authority conferred by section 598.21B(2)(d) and rule 9.11 in temporarily modifying the child support based on the undisputed circumstances existing at the time the temporary modification decree was entered.

Alternately, Mark argues that the court should have considered his "tenuous" employment situation in calculating the temporary child support figure.

He asserts that if his heart condition rendered him unable to work, he would be entitled to $1141.50 per month in child support payments from Aimee.

Mark's own filing states this sum would be due only "if he is unable to work." The record does not suggest he is unable to work. To the contrary, his temporary disability benefits were slated to end within a month of the court's order. The district court did not calculate the child support figure by using Mark's earnings prior to the onset of the heart condition. Instead, he gave Mark the benefit of the doubt by using the monthly disability benefit figure in effect at the time of the court's order. We conclude this was equitable.

III. Appellate Attorney Fees

Both parties request appellate attorney fees. An award rests within this court's sound discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Mark is not the prevailing party. Therefore, he is not entitled to appellate attorney fees. Aimee is the prevailing party but has sufficient income to bear her own appellate attorney fees. We decline to order either side to pay the other's attorney fees.

AFFIRMED.