

IN THE COURT OF APPEALS OF IOWA

No. 2-138 / 11-0947
Filed April 25, 2012

**IN RE THE MARRIAGE OF DOUGLAS JOHN EWING
AND LYNDA SUE EWING**

Upon the Petition of

DOUGLAS JOHN EWING,
Petitioner-Appellant,

And Concerning

LYNDA SUE EWING,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Timothy J. Finn,
Judge.

Douglas Ewing appeals from the district court's order modifying his child
support. **AFFIRMED AS MODIFIED AND REMANDED.**

Duane M. Huffer of Huffer Law, P.L.C., Story City, for appellant.

Michael Lewis, Cambridge, for appellee.

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

MULLINS, J.

Douglas Ewing appeals from the district court's March 24, 2011 order modifying his child support. He asserts several exhibits should not have been admitted at the modification trial as they contained hearsay and lacked foundation in the record. He also contends the district court erred in modifying the child support, and erred in switching the burden of proof to the non-moving party. Douglas claims the court improperly ordered him to pay past medical bills and provide an insurance card when those issues were not properly before the court. Finally, he accuses the district court of not being impartial. For the reasons stated below we affirm as modified and remand.

I. BACKGROUND AND PROCEEDINGS.

Douglas and Lynda Ewing's marriage was dissolved in November of 2002. The parties have four minor children who are placed in Lynda's physical care. The initial dissolution decree ordered Douglas to pay \$633.53 per month in child support. This amount was subsequently increased to \$900.00 per month in October 2005. This modification order also provided for Douglas to pay 71% of the uncovered medical expenses that exceed \$250 per child, or \$500 for two or more children.

Lynda filed the current petition to modify child support on May 7, 2010, and the case proceeded to trial on March 17, 2011. Lynda appeared at trial, but Douglas did not, instead appearing only through counsel. The district court entered its order on March 24, 2011, increasing the child support to \$1313.07. The district court ordered Douglas to pay \$147.70 to Lynda for his 71% share of

the uncovered medical bills from 2009, and ordered him to provide a copy of the children's dental insurance card to Lynda. The court changed the income tax deductions for the children awarding each party two of the four children.¹ Finally, the court ordered Douglas to pay court costs and to pay Lynda \$2700.00 in attorney fees. Douglas appeals.

II. SCOPE OF REVIEW.

Our review of dissolution cases is de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We give weight to the trial court's factual findings, especially its determinations of credibility, but we decided the issues anew. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005).

III. ADMISSION OF EVIDENCE.

Douglas first challenges the district court's admission of certain exhibits at the trial. He made foundation and hearsay objections to Lynda's offer to admit (1) Douglas's 2009 and 2010 income tax returns; (2) a letter from Douglas's attorney to Lynda's attorney referencing the fact Douglas "worked for a while in Ankeny cleaning an office or something"; (3) two documents from the Department of Human Services; and (4) Lynda's child support worksheet.

Normally, in equity proceedings the trial court receives all evidence in order to preserve the record. *In re Marriage of Leo*, 213 N.W.2d 495, 497–98 (Iowa 1973). Objections are noted, and exhibits and answers given thereafter are subject to the objection. *Id.* In order for us to consider the admissibility of evidence on appeal, the party objecting to the admission of the evidence must

¹ The previous decrees provided Lynda with one deduction and Douglas with three.

have made a sufficiently specific objection at trial. *State v. Buckner*, 214 N.W.2d 164, 167 (Iowa 1974).

At trial in this case, Douglas's attorney made a general objection to each of the identified exhibits by stating, "Foundation," "Lack of foundation," "There's no foundation." In order to properly preserve an objection on foundation grounds, Douglas "must point out in what particular or particulars the foundation is deficient so the adversary may have an opportunity to remedy the alleged defect, if possible." *State v. Means*, 211 N.W. 283, 287 (Iowa 1973). "Care must be taken that the objection strike at the very heart of the infirmity." *In re Det. of Palmer*, 691 N.W.2d 413, 422 (Iowa 2005). Because Douglas failed to identify in what way the exhibits lacked foundation at trial, we find he failed to properly preserve his foundation objection for appellate review.

Douglas also objected to the exhibits' admission on hearsay grounds. Hearsay is defined as a statement, other than one made by the declarant while testifying at trial, that is offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801(c). "Hearsay is not admissible except as provided by the Constitution of the state of Iowa, by statute, by the rules of evidence, or by other rules of the Iowa Supreme Court." Iowa R. Evid. 5.802.

First, Douglas objected on hearsay grounds to the court's admission of Lynda's child support worksheet. We note under Iowa Court Rule 9.10, "All parties shall file a child support guidelines worksheet prior to a support hearing or

the establishment of a support order.”² As this rule of the Iowa Supreme Court mandates that Lynda file the child support worksheet, we find district court properly accepted it into evidence and reject Douglas’s hearsay objection.

Next, we find the documents from the Department of Human Services should not have been admitted into evidence. No one from the department testified at trial. The documents are clearly hearsay, and Lynda offers no applicable exception.³ As these documents are hearsay, we will not consider them in our de novo review. See *In re Marriage of Williams*, 303 N.W.2d 160, 163 (Iowa 1981).

Finally, the remaining documents Douglas objects to on hearsay grounds are his 2010 and 2009 income tax returns that his attorney provided to Lynda’s attorney during the pendency of the modification action, and a letter sent from Douglas’s attorney to Lynda’s attorney asserting Douglas performed work in Ankeny cleaning offices in 2010. Douglas asserts both of these documents are hearsay. At the end of the modification hearing, Douglas’s attorney made a professional statement to the court in which he acknowledged he prepared the income tax returns on Douglas’s behalf and sent them and the letter in question to Lynda’s counsel. Based on our review of the record, we find these documents

² We note Douglas failed to file the Form 1 child support worksheet as required by the rule. Iowa Ct. R. 9.10 (“The parties shall use Form 1 that accompanies these rules, unless both parties agree to use Form 2. The Child Support Recovery Unit (CSRU) shall use Form 2.”) Douglas did admit into evidence the Form 2 child support worksheet prepared by Child Support Recovery Unit a year earlier in a different action to modify the child support.

³ We note the evidence could have been properly before the court if the district court had taken judicial notice of the court file, as the court file contained these same documents filed by the Child Support Recovery Unit under Iowa Code section 252H.8 (2009).

are not hearsay as they are admissions by a party-opponent under rule 5.801(d)(2).⁴ The attorney was Douglas's agent acting within the scope of the agency relationship. Douglas cannot now assert these documents lack reliability or trustworthiness as they originated with him. We find the district court properly admitted these documents.

IV. CHILD SUPPORT AMOUNT.

Douglas's next claim on appeal is that the district court improperly relied on Lynda's speculation and conjecture that he had a second job when it calculated the child support owed. He also complains the district court erred in (1) using Lynda's estimation of health insurance premium he pays; and (2) basing the child support on the incorrect number of dependent deductions.

In its ruling the district court specifically found Lynda's testimony regarding the income Douglas receives from his second job credible. As Douglas failed to show for trial, the record contains no statement from Douglas denying the existence of the second job or providing the court with a different amount of income he receives from the second job. The district court stated in its ruling:

⁴ Iowa Rule of Evidence 5.801(d)(2) provides:

(d) The following statements are not hearsay:

.....

(2) *Admission by a party-opponent.* The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in the furtherance of the conspiracy.

The Court notes that in his cross-examination of Lynda, Douglas's attorney raised a number of questions in regard to her calculation and foundation for these figures. However, since cross-examination merely raised questions and did not produce any evidence (as well as the fact the Court finds her testimony on income credible), the Court finds that the Petitioner's net monthly income for child support payments should be calculated to be \$3778.57. Stated succinctly, the evidence presented by Lynda is entitled to more weight than the questions raised by Douglas's lawyer.

We give weight to the credibility determinations of the district court. *Anliker*, 694 N.W.2d at 539. The monthly income figure the court used to calculate Douglas's child support is supported in the record.

Douglas also faults the district court's use of the health insurance premium figure used by Lynda in her child support worksheet. Lynda's worksheet stated the monthly health insurance premium amount paid by Douglas was \$33.41. Douglas claims the proper figure should be \$225.89, which he asserts is shown in the Child Support Recovery Unit Form 2 guideline worksheet offered into evidence by his attorney at the trial. That worksheet had not been signed or verified by either party, and was dated over a year before the time of trial. The district court must apply the guidelines from the most reliable evidence presented. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). In this case, the district court had Lynda's child support guidelines worksheet that was signed under oath to be true, complete, and correct based on all the information available to her. Douglas failed to file a guidelines worksheet as required by Rule 9.10. The court properly found that Lynda's worksheet was the most reliable evidence when applying the child support guidelines.

Finally, Douglas asserts the district court erred by entering a support order that did not take into consideration the change it made to the dependent deductions. We agree. The district court awarded two dependent deductions to each party, but entered the amount of child support based on Lynda's child support worksheet which allocated Douglas three deductions and Lynda one. We find the child support amount needs to be recalculated to take into consideration the change in the dependent deductions. We also note the district court apparently ordered child support in an amount shown on the worksheet just above the line that would have reduced Douglas's child support obligation by the health insurance premium it determined he paid. Therefore, this case must be remanded to the district court for recalculation of child support.

V. BURDEN OF PROOF.

Next, Douglas claims the district court improperly shifted the burden of proof in this case from Lynda to him. Upon our review of the trial transcript and the district court's decision, we see no evidence the district court placed the burden of proof on Douglas. In closing the trial, the district court stated, "Ms. Ewing has the burden of proof, and I will rely on the evidence presented." We find Douglas has failed to establish the district court improperly shifted the burden of proof to him.

VI. MEDICAL BILLS AND INSURANCE CARD.

Douglas also claims it was improper for the district court to order him to pay past due medical support and provide Lynda with the dental insurance card because these issues were not properly before the court in the modification

proceeding. Douglas fails to cite any authority to support his claim of error, and thus we deem this argument to be waived. Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed a waiver of that issue.”).

VII. COURT IMPARTIALITY.

Finally, Douglas claims the district court was not impartial and was abusive, demeaning, and oppressive. Douglas claims the filing of his post-trial motions preserved error on this issue; we disagree. Nowhere in the record is there a motion for recusal or any indication Douglas objected to the trial judge presiding over the trial. See *State v. Rodriguez*, 636 N.W.2d 234, 246 (Iowa 2001). We consider this issue waived.

VIII. CONCLUSION.

In conclusion, after considering the evidence we found to be properly admitted, we find the district court properly modified the child support; however, the amount of child support needs to be recalculated to account for the district court’s change in the dependent deductions and to credit Douglas’s payment of the health insurance premium. We reject the rest of Douglas’s claims of error. Costs on appeal are assessed to Douglas.

AFFIRMED AS MODIFIED AND REMANDED.