IN THE COURT OF APPEALS OF IOWA

No. 2-474 / 12-0303
Filed July 25, 2012

IN RE THE MARRIAGE OF
MICHELLE LYNN HUSEMAN
AND JOSEPH F. HUSEMAN III

Upon the Petition of
MICHELLE LYNN HUSEMAN,
Petitioner-Appellee,

And Concerning
JOSEPH F. HUSEMAN III,
Respondent-Appellant.

Appeal from the Iowa District Court for Clinton County, Gary D. McKenrick, Judge.

Joseph Huseman appeals the district court's order modifying a dissolution decree. **AFFIRMED.**

Stuart G. Hoover of Blair & Fitzsimmons, P.C., Dubuque, for appellant.

Michelle L. Huseman, DeWitt, appellee pro se.

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

VOGEL, P.J.

Joseph Huseman III appeals a district court's order modifying his child support obligations after his 2006 dissolution of marriage from Michelle Huseman. Because the overpayments Joseph made do not fall into the category of situations in which equity requires they be treated as credits, the voluntary payments will not count as such. Joseph's arguments as to why he should be awarded the tax exemptions for all the children are not persuasive. Further, the district court did not abuse its discretion in awarding attorney fees to Michelle. We therefore affirm.

I. Background Facts and Proceedings

Joseph and Michelle were married on March 31, 1993. The marriage produced three children: M.H., born in 1994, R.H., born in 1998, and J.H., born in 2003. The marriage of the parties was dissolved by decree of dissolution of marriage filed on September 7, 2006. The decree provided for joint legal custody and shared physical care between the parties. Joseph was ordered to pay child support for the three children in the amount of $897 per month. Because of changed circumstances, both parties filed applications in the district court to modify the physical care, visitation, and child support issues.

When Joseph started working out of state in May or June 2008, Michelle had physical care of the children. Starting in April 2008, Joseph made additional payments of $100 a week directly to Michelle for twelve months with the intention that when he returned to Iowa they would return to shared physical care and the additional money would cease. Joseph wrote Michelle an e-mail explaining this $100 per week was intended to be a gift to her. In September 2009, Joseph

increased his child support from $897 to $1400 per month, payable through the Child Support Recovery Unit. He testified that his intention in overpaying was to provide a cushion in case of future layoffs due to the inconsistencies in his employment. He now claims these overpayments should be counted as a credit toward any future child support obligations. In the modification order, the district court disagreed with Joseph's argument that he was simply "paying ahead"; granted Michelle the tax exemption for the eldest child; as well as awarded her $1500 for her attorney fees. Joseph appeals.

II. Standard of Review

Our standard of review of a proceeding to modify a dissolution of marriage decree subsequent to its entry is de novo. *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006). We review the district court's award of attorney fees for an abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Payments in Excess of Child Support

Joseph contends the district court erred in holding that the payments he made in excess of the child support judgment—approximately $14,000—were "in contemplation of the pending modification and not prepayments of the child support obligation." The original dissolution decree set child support for the parties' three children at $897 per month.[1] With his continued out-of-state employment, Joseph began paying $1400 per month in September 2009, to the

[1] The dissolution decree provided that when only two children were eligible for support, the amount would decrease to $688.80, and when only one child was eligible for support, the amount would decrease to $439.95. The eldest child will turn eighteen in December 2012.

Child Support Recovery Unit; he increased these payments to $1600 per month from March 2010 to December 2011. In the January 30, 2012 modification order, the district court increased Joseph's child support obligation to $1823.11, beginning on February 15, 2012.[2]

Joseph now contends the additional child support payments he made from September 2009 through December 2011 should be applied as a credit toward future child support obligations. In its order, the district court stated that it was "convinced that the intent of the parties concerning the extra child support paid by Joseph was to modify the child support de facto in coordination with their de facto modification of shared care to primary physical care with Michelle."

We agree with the district court's ultimate conclusion that Joseph is not entitled to receive a credit for the child support payments made from September 2009 through December 2011. *Pals*, 714 N.W.2d at 651 (holding no credit for voluntary payments except "when the equities of the circumstances demand it and when allowing a credit will not work a hardship on the minor children" (quoting *Griess v. Griess*, 608 N.W.2d 217, 224 (Neb. 2000))).

The joint physical care arrangement was not practical with Joseph out of the area for much of the time. It therefore fell on Michelle to care for the children, and Joseph voluntarily paid additional child support. While he may now claim that he was simply "budgeting ahead," the reality of Michelle taking on the role of physical caregiver cannot be ignored. The district court understood that the

[2] The modification order further stated that when only two children are eligible to receive child support, the monthly payment amount will decrease to $1556.13, and when only one child is eligible to receive child support, the payment amount will decrease to $1089 per month.

additional payments were made in accordance with the changed living situation of the children and we agree. Further, there are no equitable circumstances to find that Joseph's voluntary expenditures should not fall into the general rule that they are not a credit. *Id.* at 651.

IV. Income Tax Dependency Exemptions

Joseph next contends the district court erred in awarding the income tax dependency exemption for the eldest child to Michelle. The general rule is that the parent given physical care of the child is entitled to claim the child as a tax exemption. *In re Marriage of Okland*, 699 N.W.2d 260, 262 (Iowa 2005) (citing *In re Marriage of Kerber*, 433 N.W.2d 53, 54 (Iowa Ct. App. 1998)). A noncustodial parent may claim the right to declare a child as a tax exemption if it would "free up more money for the dependent's care." *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). Joseph testified that while the tax exemptions were beneficial to him, when asked if they helped defray the cost of his child support, Joseph answered "Well, I don't know they defray my child support, but they do lower my tax burden, yes." The district court found that by allowing Michelle to claim the eldest child, she will be making $100 more a month than if all three exemptions were given to Joseph. We find that this is an equitable outcome and find no reason to depart from the holding of the district court.

V. Attorney Fees

We turn to Joseph's final argument: the district court erred in ordering Joseph to pay $1500 toward Michelle's attorney fees. Iowa Code section 598.36 (2009) provides that in modification proceedings a court may award a reasonable amount for attorney fees to the prevailing party. Attorney fees in modification

actions are not a matter of right but may be awarded to the prevailing party in an amount deemed reasonable by the court. *In re Marriage of Kimmerle*, 447 N.W.2d 143, 145 (Iowa Ct. App. 1989). Whether fees ought to be awarded depends, in part, on the ability of the parties to pay. *In re Marriage of Rosenfeld*, 668 N.W.2d 840, 849 (Iowa 2003) (citing *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994)). In making the award, the district court analyzed the parties' incomes and fees incurred in litigation. Joseph testified that his attorney fees were between $3400 and $3800. Michelle's attorney's fees were $7785. Upon our review of the financial situation of the parties, we find the district court's order providing Joseph pay $1500 toward Michelle's attorney fees is not an abuse of discretion.

VI. Conclusion

Because we find Joseph's voluntary increase of child support should not be treated as a credit against future payments, and awarding the tax exemption of the eldest child to Michelle was proper, we affirm. We further find that the district court's award of attorney fees to Michelle was within its discretion, we affirm on this issue as well.

Costs on appeal are assessed to Joseph.

AFFIRMED.