

IN THE COURT OF APPEALS OF IOWA

No. 2-942 / 12-0628
Filed January 9, 2013

**IN RE THE MARRIAGE OF BARBARA K. DOUBEK
AND DARWIN J. DOUBEK,**

**Upon the Petition of
BARBARA K. DOUBEK,
n/k/a BARBARA K. RUNDLE,
Petitioner-Appellee,**

**And Concerning
DARWIN J. DOUBEK,
Respondent-Appellant.**

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Father appeals the court's order modifying child support. **AFFIRMED AS MODIFIED.**

Andrew C. Abbott of Abbott Law Office, P.C., Waterloo, for appellant.

Ronald L. Van Veldhuizen, Oelwein, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

EISENHAUER, C.J.

Darwin Doubek appeals from the district court's order requiring him to pay retroactive child support as of the date of a juvenile court order. We affirm as modified.

I. Background Facts and Proceedings.

In 2002, the district court approved Darwin and Barbara Doubek's stipulated dissolution decree granting joint legal custody of their two children, with physical care to Barbara. Darwin was ordered to pay Barbara monthly child support. Each party was entitled to claim one child for income tax purposes, with Darwin awarded the tax exemption for the younger child. In April 2005, a modification increased Darwin's monthly child support obligation.

In the summer of 2007, the older child began living with Darwin. Darwin continued to pay child support for both children even though only one child was in Barbara's care. By January 2008, both children were living with Darwin, and he filed an application for modification and a motion to terminate his child support payments and establish temporary support. In February 2008, the court terminated Darwin's support obligation and ordered Barbara to pay temporary child support for both children. The court also ordered Barbara's support obligation reduced to \$404 monthly when only the younger child remained eligible for support.

In August 2008, Barbara filed an application for immediate hearing on placement and asserted the older child was not living with either party. Barbara requested a reduction in her child support retroactive to the time the older child left Darwin's home. A September 2008 order states the parties mutually agreed

to continue a hearing, and no additional activity regarding either Darwin's or Barbara's 2008 application is found in the record. At some point, Barbara began paying \$404 monthly child support to Darwin. Support for the older child is not at issue in this appeal.

In the summer of 2011, a petition was filed in Buchanan County juvenile court alleging the younger child to have committed a delinquent act. On July 11, 2011, the juvenile court entered a consent decree and placed the child in Barbara's custody with juvenile court supervision. By its terms the consent decree expired, and the juvenile proceedings were dismissed on January 11, 2012.

On September 27, 2011, Barbara, n/k/a Barbara Rundle, filed an application for modification of the younger child's custody and support.¹ The sheriff's return of service states Darwin was served on September 28, 2011. In December 2011, Barbara filed an application for hearing.

Hearing was held February 9, 2012. At the hearing, Darwin requested the 2011 tax exemption for the child and agreed to Barbara having the 2012 tax exemption. The court's March 2012 order² recognized the Buchanan County juvenile court's July 11, 2011 placement of the now seventeen-year-old child with Barbara and ruled:

(1) Barbara's \$404 monthly support obligation terminated "effective July 11, 2011" and Darwin shall reimburse Barbara for

¹ Our record does not contain any reference to a grant by the Buchanan County juvenile court of concurrent jurisdiction to the district court under Iowa Code section 232.3(2) (2011) (allowing the juvenile court to authorize concurrent jurisdiction in the district court in order to adjudicate issues relating to custody and placement of the child).

² The court's order shows a February 9, 2012 effective date deleted and the handwritten insertion of a March 14, 2012 effective date.

\$3232 in child support payments Barbara made to Darwin from July 2011 through February 2012;

(2) Darwin's support obligation is \$457.40/month "effective July 11, 2011" and Darwin owes seven months "child support arrears . . . from July 11, 2011, through February 10, 2012 . . . for a total arrearage of \$3201.80"; and

(3) Barbara is entitled to claim the child as a tax dependency exemption for 2011 and 2012.

Darwin now appeals and seeks appellate attorney fees.

II. Standard of Review.

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.907.

III. Merits.

On appeal, Darwin does not contest the court's calculation of the *amount* of his monthly child support obligation at \$457.40. He first argues the Iowa Code only allows a retroactive modification of his child support obligation to commence three months after he was served with Barbara's pending motion for modification. We agree. Iowa Code section 598.21C(5) (2011) provides child support awards "subject to a modification proceeding may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party."³ See *In re Marriage of Johnson*, 781 N.W.2d 553, 559 (Iowa 2010) (stating the Iowa Code authorizes retroactive modification "only from three months after the date the opposing party received notice"). Under this code section, the district court has discretion in deciding whether Darwin's support payments should become effective on the date of the court's

³ We find no merit to Barbara's argument that Darwin's answer to her 2011 application for modification allowed the district court to enter a ruling in contravention of Iowa Code section 598.21C(5).

modification order or should become effective retroactively (at the earliest) from three months after service. See *In re Marriage of Ober*, 538 N.W.2d 310, 313 (Iowa Ct. App. 1995). Barbara's pending petition for modification was served on Darwin on September 28, 2011. Therefore, three months after service is December 28, 2011, and the court abused its discretion in ordering child support as of July 11, 2011, and in ordering payment of an arrearage from July 11. We modify the district court's order to begin Darwin's \$457.40 monthly child support obligation effective retroactively from December 28, 2011, which is the earliest effective date of child support modification.

Second, Darwin asserts the court erred in ordering him to reimburse Barbara \$3232. We agree. Iowa case law provides "although a support order may be retroactively increased, it may not be retroactively decreased." See *In re Marriage of Barker*, 600 N.W.2d 321, 323-24 (Iowa 1999) ("[W]e may not retroactively reduce periodic child support obligations that have accrued prior to the time that modification is ordered."). Accordingly, we strike Darwin's \$3232 reimbursement payment to Barbara.

Finally, Darwin argues the court erred in granting Barbara the tax dependency exemptions. Darwin asserts Barbara was able to utilize the exemption of the older child until that child turned eighteen and he should be able to do the same for the younger child. We find no merit to this claim. We recognize the younger child's physical placement with Barbara by the juvenile court in early July 2011 constituted a material and substantial change of circumstances. See *In re Marriage of Habben*, 260 N.W.2d 401, 403 (Iowa 1977) (stating provisions dealing with allocation of dependency deductions for income

tax purposes are subject to modification upon a substantial change in circumstances). We affirm the district court's modification order on this issue.

IV. Appellate Attorney Fees.

Darwin requests attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We decline to award attorney fees for this appeal. Costs on appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.