IN THE COURT OF APPEALS OF IOWA

No. 6-339 / 05-0495
Filed June 28, 2006

IN RE THE MARRIAGE OF GAIL C. WOODWARD and SCOTT F. WOODWARD

Upon the Petition of
GAIL C. WOODWARD,
Petitioner-Appellant,

And Concerning
SCOTT F. WOODWARD,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Carl D. Baker, Judge.

Petitioner appeals the district court order modifying the respondent's child support obligation. **AFFIRMED.**

Gail C. Woodward, Ames, pro se.

Scott L. Hippen of Pasley & Singer Law Firm, L.L.P., Ames, for appellee.

Considered by Sackett, C.J., Huitink, J., and Hendrickson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

HENDRICKSON, S.J.

Gail Woodward appeals from the district court order denying her application to modify the child support provisions of the decree dissolving her marriage of Scott Woodward. Scott cross-appealed from the district court order denying his application to retroactively reduce his child support obligation. We affirm.

I. Background Facts & Proceedings

A dissolution decree for Scott and Gail was entered on April 24, 2000. The decree awarded Gail physical care of the parties' children, Andrea, born in 1984, and Kevin, born in 1986. Scott was ordered to pay $1252 per month for the support of the two children, reduced to $855 per month when Andrea was no longer eligible for child support.

After Andrea was no longer eligible for child support, the parties agreed that Scott would pay $942.35 per month in child support for Kevin, rather than $855. An "ORDER/NOTICE TO WITHHOLD INCOME FOR CHILD SUPPORT" was filed in the district court in October 2002, and signed by a judge. There was no formal modification of the dissolution decree, however.

At the time of the dissolution, Scott was employed as a chief engineer with I & M Rail Link, L.L.C. I & M went out of business in August 2002. Scott received a severance package where he was paid his annual salary, about $97,000, for two years, until August 2004. Scott was unable to find other work as a chief engineer. In 2003 and 2004 Scott performed consulting work for a railway system in the country of Estonia. He was paid about $23,000, and expected to be paid an additional $11,000 for work already performed. In May 2004 Scott

began full-time employment with Iowa Interstate Railroad, where he was paid $60,000 per year. Throughout this time Gail has been employed as a legal secretary, and she earns about $34,000 per year.

In September 2004 Gail filed an application seeking to modify the parties' dissolution decree to increase Scott's child support obligation for Kevin. Scott accepted service of the original notice and application on September 17, 2004. In her application, Gail claimed that because Scott had withheld information from her about his consulting income, the increase in child support should be made retroactive to January 2003. Scott responded by seeking a decrease in his child support obligation. He also filed a motion for a declaratory ruling, asking the court to find that the October 2002 withholding order had not modified his child support obligation. Scott asserted that because the dissolution decree had not been formally modified he had been overpaying his child support and was entitled to a credit.

At the modification hearing, Scott testified that for his consulting work he had created a company, Track Evaluation and Management, L.L.C. He stated he had received legal advice that the income which went into the limited liability company was sheltered from his responsibility to pay child support. He stated that when he retained different legal counsel he learned this was not true, and he then provided Gail with the information about his income from consulting work. Scott testified that he expected to be paid $11,000 for work he had already completed, but as of December 2004 his work in Estonia was done.

The district court determined that under Iowa Code section 598.21(8)(k) (2003), an increase in Scott's child support could only be made retroactive to

January 2005. The court denied Gail's request to increase Scott's child support for the period of January 2003 to December 2004. The court also denied Scott's motion for a declaratory ruling, stating, "[t]ne request by Scott that child support be reduced retroactive to October, 2002, is also denied." The court determined Scott's income in 2005 would be $71,000. Scott was ordered to pay child support of $614 per month from January 2005 until August 2005, when Kevin would no longer be eligible for child support.[1]

Gail filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The court found that Scott had no deductions for Social Security because he participated in a federal railroad retirement system. The court increased Scott's child support obligation to $723.30 per month. The court denied the other issues raised by Gail in her motion to reconsider. Gail has appealed, and Scott cross-appealed.

II. Standard of Review

Our review in this equitable action is de novo. Iowa R. App. P. 6.4. "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them." Iowa R. App. P. 6.14(6)(*g*).

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[1] Kevin became eighteen in October 2004. The parties' stipulated dissolution decree provided that child support would continue through the child's high school graduation. Then, if the child intended to pursue a post-secondary education, child support would continue through the months of June, July, and August after high school graduation. Under the facts of the case Scott was responsible to pay child support for Kevin until August 2005.

III. Contempt

Gail contends the district court should have found Scott in contempt for failing to reveal his consulting income to her. However, Gail's application for modification did not request that Scott be found in contempt, the district court did not address this issue, and it was not raised in a post-trial motion. Notwithstanding her contention that the issue should be addressed based on a provision in the dissolution decree that the parties would exchange W-2s each year, we conclude this issue was not preserved for our review. *See In re Marriage of Maher*, 596 N.W.2d 561, 567 (Iowa 1999) (noting an issue which had not been raised at trial, or in a post-trial motion, had not been preserved for appellate review).

IV. Scott's Income

Gail claims the district court should have used Scott's earning capacity, rather than his actual income, to determine his child support obligation. Gail points out that Scott had three sources of income during the time period from 2002 through 2004—his severance pay from I & M, his consulting income, and his salary from Iowa Interstate Railroad. Gail asserts that from 2001 to 2004 Scott's average income, including bonuses, was $126,000 per year. She asks to have his child support obligation based on his average income.[2]

A court may consider a parent's earning capacity, rather than actual earnings, when the parent has voluntarily reduced his or her income. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). However, before a

[2] Under the parties' stipulated decree Scott separately pays Gail a percentage of his bonuses, "based on the child support guidelines percentage in effect for the parties at the time the bonus is paid."

parent's earning capacity is considered, the court must determine that substantial injustice would occur if actual earnings were used. *In re Marriage of Malloy*, 687 N.W.2d 110, 116 (Iowa Ct. App. 2004). "We examine the employment history, present earnings, and reasons for failing to work a regular work week when assessing whether to use the earning capacity of a parent." *Nelson*, 570 N.W.2d at 106.

We find that while in the past Scott had overlapping sources of income, these sources had come to an end. His severance pay ended in August 2004, and his consulting work was completed in December 2004. There is no evidence that Scott expected to earn more than $71,000 in 2005. There have been no allegations that Scott voluntarily reduced his income. Based on the record in this case, we cannot find that substantial injustice will occur if Scott's actual earnings are used to calculate his child support obligation. We conclude the district court properly used Scott's actual income for 2005 in calculating his child support obligation.

V. Variance from Guidelines

Gail asserts that the district court should have varied from the child support guidelines because application of the guidelines amount would result in substantial hardship to her. She states that she was accustomed to receiving $942.35 each month in support for Kevin, and she will not be able to provide for him as she had in the past if Scott's child support obligation is reduced to $723.30. Gail also points out that she assists in Andrea's college expenses.

There is a rebuttable presumption that the application of the child support guidelines results in the correct amount of child support. Iowa Ct. R. 9.4; *In re*

Marriage of McKenzie, 709 N.W.2d 528, 533 (Iowa 2006). Our supreme court has stated:

> If a strict application of the guidelines would be unjust or inappropriate, a court may adjust the guideline support amount upward or downward if such adjustment is "necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case."

McKenzie, 709 N.W.2d at 533 (quoting Iowa Code § 598.21(4)(a); Iowa Ct. R. 9.4).

In ruling on Gail's post-trial motion, the district court specifically denied her request for a hardship variance from the child support guidelines. We concur in the district court's conclusion. Gail has not shown that an adjustment is necessary to provide for Kevin. She has failed to rebut the presumption that application of the child support guidelines results in the correct amount of child support under the facts of this case.

VI. Withholding Order

The evidence in this case shows that after Andrea was no longer eligible for support, Gail proposed that Scott pay $917.26 per month in child support for Kevin. Scott adjusted Gail's calculations and told her he believed he should be paying $942.35. Gail then submitted a proposed withholding order to Scott. Scott replied by e-mail, "Gail, I looked at the proposed court order, and take no exception to it." Based on Scott's representation, Gail submitted an affidavit and withholding order to the district court. A district court judge signed the withholding order, and it was filed on October 21, 2002.

In his cross-appeal, Scott contends that the October 2002 withholding order did not effectively modify the dissolution decree. He claims that because

there was no formal modification of the dissolution decree, he was never actually obligated to pay $942.35. He states that his child support obligation should have been $855 per month after Andrea was no longer eligible for support. Scott asserts that because he was paying $942.35 per month after October 2002, he was overpaying his child support and is entitled to a credit.

Scott relies upon section 598.21(8), which provides:

> Unless otherwise provided pursuant to 28 U.S.C. § 1738B, a modification of a support order entered under . . . this chapter, or any other support chapter or proceeding between parties to the order is void unless the modification is approved by the court, after proper notice and opportunity to be heard is given to all parties to the order, and entered as an order of the court.

The Iowa Code gives district courts discretion to modify dissolution decrees, even if the proposed modification is based on the parties' stipulation. *In re Marriage of Van Zee*, 488 N.W.2d 721, 724 (Iowa Ct. App. 1992). For this reason, modifications of support orders must be by a court order. *Id.*

The withholding order would not have the effect of modifying the parties' dissolution decree. Our supreme court has stated:

> Statutory law provides the procedure for modifying support orders. Income withholding procedures are not designed to accomplish the same thing. Rather income withholding procedures are designed to ensure collection of support.

In re Marriage of Van Veen, 545 N.W.2d 263, 267 (Iowa 1996).

We note that although the dissolution decree was not modified to increase Scott's child support obligation, Scott voluntarily agreed to increase the amount of his payments. A voluntary overpayer child support is not entitled to a credit. *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004). We conclude Scott is not entitled to a credit for the overpayment of child support.

VII. Attorney Fees

Scott seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). Scott's income substantially exceeds that of Gail, and we determine he should pay his own attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed one-half to each party.

AFFIRMED.