IN THE COURT OF APPEALS OF IOWA

No. 6-618 / 05-1576
Filed October 11, 2006

IN RE THE MARRIAGE OF SUSAN P. PULLEY AND JOHN W. PULLEY

Upon the Petition of
SUSAN P. PULLEY,
Petitioner-Appellee,

And Concerning
JOHN W. PULLEY,
Respondent-Appellant.

Appeal from the Iowa District Court for Dallas County, Sherman Phipps, Judge.

John Pulley appeals the district court's refusal to modify part of his dissolution decree. **AFFIRMED.**

Michael Oliver of Oliver Law Office, Des Moines, for appellant.

Leslie Babich and Alexander R. Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellee.

Considered by Huitink, P.J., and Mahan and Eisenhauer, JJ.

MAHAN, J.

John Pulley appeals the district court's refusal to modify part of his dissolution decree. He argues the district court erred when it determined he failed to show a substantial and material change in circumstances to modify his child support obligation. He claims the court also abused its discretion when it ordered him to pay $10,000 in attorney fees. We affirm.

I. Background Facts and Proceedings

John and Susan Pulley were married on June 14, 1986. They had two children, born July 30, 1988 and August 5, 1990, respectively. John is a mechanical engineer and worked in his family's business, Frank Pulley and Associates. He became president of the business, which changed its name to Pulley and Associates, in 1991. On January 1, 2001, he merged the business with a larger firm, Durrant Group, becoming Pulley Durrant. John became the managing principle of Pulley Durrant and sustained a reduction in his income from between approximately $250,000 and $300,000 in salary and bonuses to approximately $130,000 in salary. Susan worked in mostly clerical jobs until 1994, when she became a nail technician and later, an independent consultant.

The marriage was dissolved by a stipulated decree on September 21, 2001. The parties agreed to joint legal custody of the children, with Susan having primary physical care. John's child support obligation was set at $4000 per month. According to the decree,

> The child support amount and/or term shall not be subject to modification for any reason, including but not limited to, the children not residing with the Petitioner or any changes concerning legal custody and/or physical care and/or visitation provisions concerning the parties' minor children. The child support shall only terminate

> earlier upon the death of the Petitioner or Respondent. In the event of Respondent's death, the present value of the total amount of child support remaining through the payment due on May, 2008, for the month of May, 2008, shall be immediately due and payable.

John received visitation on every other weekend, every Tuesday evening, alternating holidays, one-half of winter school vacation, alternating spring school vacation, two weeks in the summer, alternating birthdays of the children, Father's Day, and his birthday. No alimony was awarded.

Subsequent to the dissolution, John remarried, became president of the international division of Parker Durrant International, and moved to Australia. His salary was reduced to approximately $120,000. Susan went back to work in a clerical capacity in 2005. According to her child support guidelines worksheet, Susan's income is $26,196.

On September 30, 2004, John filed a petition to modify the dissolution decree. He alleged (1) there had been a material and substantial change in circumstances due to his move to Australia; (2) it was in the youngest child's best interests to reside with him; (3) child support should be recalculated with Susan retaining physical care of the oldest child and John receiving physical care of the youngest child; and (4) visitation should be modified to accommodate his move to Australia and reflect the change in physical care.

In her answer on October 21, 2004, Susan denied that John should be granted physical care of their youngest child, acknowledged that John's visitation should be modified, and requested that John pay attorney fees and court costs. In a counter-application filed on February 16, 2005, Susan requested that if John's child support obligation was reduced, he be required to pay alimony so

that she receives support in the net amount of $4000 per month. She also requested again that John pay her attorney fees and the court costs. In his answer, John requested Susan's counter-application be dismissed at her cost.

At trial, John abandoned his request for primary care of the couple's youngest child, but requested visitation to accommodate his travels to and from Australia. He agreed to be responsible for all expenses of the children's international travel.

In its order modifying a portion of the dissolution decree, the district court determined that, though the original decree indicated child support could not be modified, Iowa Code section 598.21(8) (2003) makes it clear that child support is within the court's jurisdiction and subject to modification. However, it determined no change existed in John's income to justify reducing his child support obligation. It did find substantial change to modify John's visitation and awarded him additional visitation. Finally, the court awarded Susan $10,000 in attorney fees. John appeals the district court's ruling on the issues of child support and attorney fees.

II. Standard of Review

We review the modification of a dissolution decree de novo. Iowa R. App. P. 4.6; *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 331 (Iowa 2005). Though they do not bind us, we give weight to the district court's credibility determinations. Iowa R. App. P. 6.14(6)(*g*). Furthermore, we will only disturb the ruling when there has been a failure to do equity. *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998).

III. Merits

A. Child Support

John claims the district court erred in determining there was no substantial change in circumstances to support decreasing his child support obligation. He argues that since his obligation deviates more than ten percent from the child support guidelines, it should be modified. Susan argues that, according to the decree, no modification to child support may be made. She alleges she and John agreed he would pay child support in excess of the child support guidelines, she would waive a request for alimony, and the child support amount would be non-modifiable.

There is no evidence in the record indicating the basis for the $4000 child support amount. According to our child support guideline rules,

> [a] stipulation of the parties establishing child support and medical support shall be reviewed by the court to determine if the amount stipulated and the medical support guidelines are in substantial compliance with the guidelines. A proposed order to incorporate the stipulation shall be reviewed by the court to determine whether it is justified and appropriate, and, if so, include the stated reasons for the variance in the order.

Iowa Ct. R. 9.13. Because no stated reason for the variance from the guidelines exists, we evaluate the child support provision in the Pulley's dissolution decree as we would any other.

Pursuant to Iowa Code section 598.21(8), we may modify support orders if there is a substantial change in the parties' circumstances. One of the factors we may consider is a change in income. Iowa Code § 598.21(8)(a). The Code defines a "substantial change" to be "when the court order for child support varies

by ten percent or more from the amount which would be due pursuant to the most current child support guidelines." *Id.* § 598.21(9).

John is correct that his child support obligation deviates from the guidelines by more than ten percent. However, it also deviated by more than ten percent at the time of the dissolution. We have three reasons to reject his modification proposal. First, John changed jobs and sustained his salary loss prior to the couple's dissolution. He became managing principle of Pulley Durrant on January 1, 2001. At the time of the dissolution in September 2001, John knew his salary itself had decreased. He testified about his salary at the modification hearing as follows:

> Q. Now, by the time you got divorced on September 21 of 2004—excuse me—2001, obviously you were nine months into the calendar year as far as income goes; is that correct? A. Yes.
> Q. And by that time you knew already that your income was going to be significantly less that year than it was the year before you merged with the Durrant Group; isn't it? A. That's not correct.
> Q. Well— A. I knew that my salary was—what my salary was, but I had no idea regarding bonuses or earn-out. That would have been at the end of the year. I had no idea.

Nonetheless, he stipulated to the $4000 child support obligation.

Second, John's income has not changed since the dissolution. His 2001 tax return lists his wages and earnings as $112,786 and his total income as $173,527. He testified at the modification hearing that his salary was now at least $125,000, and the child support guidelines worksheet he submitted dated June 2005 lists his total income as $168,202. To equal his pre-2001 salary, the end-of-the-year bonus to which he refers in his testimony would have had to have been at least $100,000.

Third, John neither (1) filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) to enlarge or amend the dissolution court's ruling on child support nor (2) appealed that court's child support determination.

John urges us to now mechanically apply section 598.21(9). Both Susan's testimony and the parties' attempt to make the child support decree unmodifiable, however, indicate that the parties intended to raise the child support in lieu of alimony. John agreed to a substantial deviation from the child support guidelines at the time of the decree; we cannot allow him to now take advantage of that deviation to modify his child support. *See In re Marriage of Handeland*, 564 N.W.2d 445, 447 (Iowa Ct. App. 1997) (noting parties may contract away an alimony claim through a deviation in child support); *In re Marriage of Okonkwo*, 525 N.W.2d 870 (Iowa Ct. App. 1994) (same). Because (1) John's salary decreased prior to the dissolution; (2) his income was substantially the same in 2001 as it is now; and (3) he never filed an appeal of the initial decree, he cannot show the requisite change of circumstances to modify his child support obligation.

B. Attorney Fees

John argues the district court abused its discretion when it ordered him to pay $10,000 of Susan's attorney fees. Susan argues the district court correctly awarded the fees. She further requests appellate attorney fees.

Attorney fees are not a matter of right but are within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We review the district court's award of attorney fees for abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). In the district court, the controlling

factor in determining an award of attorney fees is the ability to pay the fees. *Id.* When awarding appellate fees, we look to the need of the party requesting fees, the other party's ability to pay, and the merits of the appeal. *Id.* We conclude the district court did not abuse its discretion in awarding Susan attorney fees.

Susan requests appellate attorney fees. An award of appellate 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). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We award Susan appellate attorney fees in the sum of $1500. Costs are taxed to John.

IV. Summary

Because we conclude both that John cannot show a change of circumstances to modify his child support obligation and that the district court did not abuse its discretion in awarding Susan's attorney fees, we affirm the district court's ruling. We also award Susan $1500 in appellate attorney fees. Costs are taxed to John.

AFFIRMED.