IN THE COURT OF APPEALS OF IOWA

No. 7-911 / 07-0564
Filed February 27, 2008

Upon the Petition of
COLLEEN F. GERST,
Petitioner-Appellee,

And Concerning
JOHN S. HARMS,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

John Harms appeals the trial court's modification decree increasing his support obligation for the parties' minor child. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.**

Janette S. Voss of Remley, Willems, McQuillen & Voss, L.L.P., Anamosa, for appellant.

Mark J. Seidl of Seidl & Chicchelly, P.L.C., Cedar Rapids, for appellee.

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

HUITINK, P.J.

John Harms appeals the trial court's modification decree increasing his support obligation for the parties' minor child. We affirm in part, vacate in part, and remand with instructions.

I. Background Facts and Proceedings

John Harms and Colleen Gerst are unmarried parents of one child, John S. Harms Jr. The trial court's February 25, 1999 decree awarded John Jr.'s primary care to Colleen and ordered John to pay $672.75 monthly child support. John's child support obligations were computed pursuant to the guidelines based on the parties' net monthly incomes as stated in a "Joint Child Support Guidelines Worksheet." According to the worksheet, Colleen's annual income was $22,594 and her net monthly income was $848.38. John's annual income was $54,744, including $19,800 combined employment income from the Jones County Fair Board ($9000) and Subway, Ltd. ($10,800), a "C" corporation wholly owned by him, as well as $35,944 in specified imputed income. John's net monthly income for computing his child support under the guidelines was $3314. John's net worth at that time was $650,787.

In December 2005 Colleen filed a petition to modify John's child support obligation, citing "a substantial material change in circumstances of the parties in that [John's] income has increased such that there is a deviation of 10% or more from the guidelines at this time." John denied these allegations, and the matter proceeded to trial on its merits.

On his child support guidelines worksheet filed in this matter, John stated his gross income was $55,000, including $20,400 combined income from the

Jones County Fair Board ($15,000) and Subway, Ltd. ($5400). John claimed $34,600 in unspecified imputed income. He stated his net monthly income was $3158.36. John's current net worth is approximately $1.2 to $1.3 million. Colleen's child support guidelines worksheet filed in this matter stated her total annual income was $19,592 and her net monthly income was $1467.41.

At the conclusion of the trial, the trial court requested the parties submit proposed findings of fact and conclusions of law. The trial court's February 22, 2007 modification decree includes the following findings of fact:

> In calculating income for child support purposes, the Court will take Respondent's Line 26 net income from his Iowa personal tax returns for the past two years for which records are shown (2004 and 2005) as a starting point: an average of $19,334. To this, the Court will add all expenses claimed for vehicles in 2004 and 2005 on the corporate returns. The Court finds that use of these several vehicles is exclusively personal. None of the vehicles are used for delivery of goods and service by Respondent's restaurants, nor are they part of any farming operation. . . . [D]isallowed deductions for depreciation, fuel, gas, oil, and "vehicle" result in an increase in Respondent's income for child support purposes of $80,205, an average of $40,103 each year for 2004 and 2005.
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> The claimed expenses for fertilizer and chemicals, as well as the accelerated depreciation for the tractor, mower, and bagger must be disregarded, as Respondent's farm ground is entirely rented out on a cash rent basis. The Court does not accept that mowing the yard of Respondent's farm tenant, who uses his own equipment to mow waterways, qualifies the tractor, mower, and bagger as business property.
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> Next, a claimed $17,284 loss from the sale of a pet grooming business must be disallowed, as it appears that this business was no more than a hobby or tax shelter manipulated to allow the write off of the purchase of a vehicle and a trailer. This adds another $8,642 to tax years 2004 and 2005 when averaged.
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> Finally, a claimed expense for "supplies" in 2005 must be disallowed to the extent it exceeds the previous year's "supplies" expense by $66,000. It is disingenuous for Respondent to claim that he must have transposed an expense from costs of goods sold just coincidentally in the year when a child support modification

> action was pending. This bumps each year's income up by another $33,000.
>
> Adding adjustments to income together results in an income for child support purposes of $101,079. This figure is corroborated by comparison to the average amount of personal income claimed by Respondent for the past seven years ($21,242) plus his average increase in net worth over the same time ($79,720), which totals $100,962 annually. It should be noted that there are several items of MACRS not taken into account by this Court in arriving at Respondent's income.

Based on these findings of fact and conclusions of law, the trial court recalculated John's child support obligation pursuant to the child support guidelines. The original decree was modified to increase John's child support obligation to $932.26 retroactive to March 23, 2006. The trial court also calculated John's resulting arrearage at $9322.60 and ordered him to pay the arrearage at the rate of $93.23 over a period of one hundred months.

On appeal, John claims the trial court erred in (1) modifying the child support, (2) retroactively modifying the child support and calculating the amount of the arrearage, (3) refusing to award as court costs the fee submitted by an expert witness, and (4) adopting almost verbatim Colleen's findings and conclusions.

II. Standard of Review

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem

appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Proposed Decree

The resolution of this issue is controlled by our standard of review. *See In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa Ct. App. 1996) (stating the trial court's verbatim adoption of proposed decree does not require a separate standard of review). As already mentioned, we review the evidence anew disconnected from the trial court's findings. *Id.* We affirm on this issue.

IV. Modification

The child support provision of an original decree may be modified if there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (Supp. 2005). The court may consider changes in a party's income. *Id.* § 598.21C(1)(a). "[A] substantial change of circumstances exists 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.* § 598.21C(2)(a). In addition to income, the court may consider the parties' net worth in setting or modifying child support. *State ex rel. Pfizter v. Larson*, 569 N.W.2d 512, 515 (Iowa Ct. App. 1997), *overruled on other grounds by In re Marriage of Belger*, 654 N.W.2d 902, 904 (Iowa 2002). The party seeking modification bears the burden of proof by a preponderance of the evidence. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992).

"In determining child support, the court must first look to the child support guidelines." *In re Marriage of Hilmo*, 623 N.W.2d 809, 811 (Iowa 2001). A rebuttable presumption exists that "the amount of child support which would result from the application of the guidelines . . . is the correct amount of child support to be awarded." Iowa Code § 598.21B(2)(c); Iowa Ct. R. 9.4. The amount of child support may, however, be modified upward or downward. Iowa Code § 598.21B(2)(d); Iowa Ct. R. 9.4. The court must make a written finding that the guidelines would be unjust or inappropriate because "[s]ubstantial injustice would result to the payor, payee, or child" or "[a]djustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case." Iowa Ct. R. 9.11.

Before applying the guidelines, the net monthly income of both the parents must be deduced. *In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa Ct. App. 1995). Under the guidelines, "net monthly income" means gross monthly income minus enumerated deductions. Iowa Ct. R. 9.5. "Gross monthly income" is the "total taxable" income on the Federal 1040 and "net income" on the IA 1040. *In re Marriage of Cossel*, 487 N.W.2d 679, 683 (Iowa Ct. App. 1992). Our supreme court has adopted the view that "some consideration must be given to business expenses *reasonably necessary* to maintain the business or occupation." *In re Marriage of Gaer*, 476 N.W.2d 324, 329 (Iowa 1991) (emphasis added). Although the guidelines do not provide for a deduction for depreciation, our case law has allowed a deduction for straight-line depreciation, given a finding the guidelines would otherwise be unjust or inappropriate. *See In*

re Marriage of Knickerbocker, 601 N.W.2d 48, 52 (Iowa 1999); *In re Marriage of Gaer*, 476 N.W.2d at 326, 329; *In re Marriage of Worthington*, 504 N.W.2d 147, 151-52 (Iowa Ct. App. 1993). *But see In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa Ct. App. 1994) ("We are not required to give any consideration to those 'business expenses reasonably necessary' to maintain a farming operation which is neither a business nor an occupation, but is instead a hobby or a tax shelter."). The allowance of a depreciation deduction in calculating income for child support should be left to the discretion of the court, depending upon the circumstances of each case. *In re Marriage of Gaer*, 476 N.W.2d at 328.

The gist of John's argument is that the cases permitting the addition of depreciation or business expenses to net income are inapplicable because Subway, Ltd. is a "C" corporation. We agree.

A corporation generally is a separate legal and taxable entity even if it has only one shareholder who exercises total control over its affairs. *Moline Props., Inc. v. Comm'r*, 319 U.S. 436, 439, 63 S. Ct. 1132, 1134, 87 L. Ed. 1499, 1502 (1943); *Bell v. C.I.R.*, 200 F.3d 545, 548 (8th Cir. 2000); *In re Marriage of Murray*, 213 N.W.2d 657, 660 (Iowa 1973). Although we have found no controlling Iowa authority, the general rule appears to be:

> In determining the personal income of a father for purposes of setting the amount of child support payments where the father is the only stockholder and has control of all the income and disbursements of a corporation, the trial court cannot add depreciation to the personal income of a wholly owned corporate proprietor to determine his present ability to pay child support because there is no authority that permits depreciation to be added directly to the personal income of the parent-owner, as depreciation is not a reimbursement or in-kind payment (self-generated income) that reduced personal living expenses.

24 Am. Jur. 2d *Divorce and Separation* § 1027, at 414 (1998); *see also Sizemore v. Sizemore*, 603 N.E.2d 1032, 1036 (Ohio Ct. App. 1991) (distinguishing corporate depreciation from payment of personal expenses).

In her brief, Colleen states "the respondent is not claiming petitioner receives an employee benefit which should be elevated and added to income." Our review of Subway, Ltd.'s income tax returns confirms Colleen's description of the corporate deductions disallowed by the trial court. Even if we assume without deciding the trial court correctly disallowed the disputed deductions, the result is an increase in Subway, Ltd.'s taxable income without any attendant increase in John's personal income. Moreover, the trial court's additions to John's personal income were made without regard for any increase in Subway, Ltd.'s corporate income tax liability. Because the trial court's calculation of John's net income erroneously included corporate depreciation and deductions for nonpersonal expenses, the resulting mathematical increase in John's personal income is not reliable evidence of John's net income for purposes of determining his child support obligation under the guidelines. We, therefore, vacate that portion of the trial court's modification decree determining John's net monthly income for child support purposes, as well as the resulting amount of child support awarded.

Although we disagree with Colleen's argument concerning John's net income, we conclude she has otherwise met her burden of proof in establishing a substantial change in circumstances. Our supreme court has observed: "It is not uncommon for an owner to cover many normal personal living expenses through the corporation or to over-depreciate or undervalue inventory, all of which would

decrease profits while increasing the owner's standard of living. . . ." *In re Marriage of Wiedemann*, 402 N.W.2d 744, 747 (Iowa 1987). The tax returns referred to in the earlier-quoted portions of the trial court's modification decree overwhelmingly establish John has used Subway, Ltd.'s salary structure, depreciation schedule, and net operating losses to minimize his income and exposure to increased child support. We also conclude John's earlier-mentioned substantial increase in net worth is sufficient to establish the requisite change in circumstances. *Pfizter*, 569 N.W.2d at 515.

The remaining issue is the amount of increased child support to which Colleen is entitled based on John's current income and financial condition. Although we have rejected Colleen's modification request premised on additions to John's net income, the foregoing change in circumstances justifies an upward departure from the child support guidelines using the parties' stated net monthly income. *See In re Marriage of Huisman*, 532 N.W.2d at 159. Because we find the record insufficient for that purpose, we remand to the trial court to make a discretionary decision concerning the amount of an upward departure from the child support guidelines by using each party's net income stated on his or her respective child support guidelines worksheet.

V. Expert Witness Fee

Finally, John argues the trial court erred in refusing to award as court costs the fee submitted by an expert witness. We conclude error has not been preserved because the trial court did not rule on this issue and Harms did not

request a ruling on this issue.[1] *See Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) ("The [preservation of error] rule requires a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue.").

We have carefully considered the remaining issues raised on appeal and conclude they have no merit or their resolution is controlled by the foregoing. We also decline to award either party appellate attorney fees. Costs are taxed equally to the parties.

The trial court's modification decree is affirmed in part, vacated in part, and remanded to the trial court with instructions.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

[1] We note Harms filed a motion to enlarge or modify the trial court's ruling on the retroactivity of child support and amount of arrearage issue.