IN THE COURT OF APPEALS OF IOWA

No. 8-022 / 07-0811
Filed March 14, 2008

IN RE THE MARRIAGE OF MICHAEL DEAN MARQUIS AND ANGELA LOUISE MARQUIS

Upon the Petition of
MICHAEL DEAN MARQUIS,
Petitioner-Appellant,

And Concerning
ANGELA LOUISE MARQUIS,
n/k/a ANGELA LOUISE INGLE,
Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County, William H. Joy, Judge.

The petitioner appeals following the district court's grant of the respondent's modification petition. **AFFIRMED AS MODIFIED.**

Sharon Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Bradley McCall of Brierly Charnetski, L.L.P., Grinnell, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Michael Marquis appeals after the district court granted a petition to modify certain child support provisions of the couple's dissolution decree. Upon our review, we modify the incomes of the parties and support obligations and affirm.

I. Background Facts and Proceedings.

Michael and Angela's marriage was dissolved by stipulated decree in 1998. The parties' two children, Mitchell (born in May 1990) and Michelle (born in February 1995), have changed physical care arrangements several times over the course of years from Mitchell being in Michael's physical care and Michelle in Angela's physical care, to both children in Angela's physical care, and then separated again. The last modification between the parties occurred in July 2001. By stipulation, Mitchell was transferred to Michael's physical care, Michelle remained in Angela's physical care, and support was fixed between the parties based upon the split physical care arrangement with Michael paying $254.19 per month to Angela. Both Michael and Angela had remarried at the time of the 2001 modification. Michael was the head basketball coach at Indian Hills Community College in Ottumwa with annual earnings of $41,706. Angela was not employed at the time, having been fired from her job as a dental assistant in February 2001, but stipulated an annual earning capacity of $20,800 should be imputed to her. Child support was set based upon these income figures, taking into account earning disparities and set-offs for the split physical care arrangement.

Approximately three weeks after entry of the July 2001 modification order, Michael accepted a teaching and coaching job at Tyler Junior College and moved with his family to Texas. Michael held this position at the time of the most recent modification on appeal, where he receives both a salary for his position as a kinesiology professor and a coaching stipend. His contract for the academic year of September 1, 2006, through August 31, 2007, set his salary at $47,000 and the stipend at $7000. Testimony at the modification trial revealed that Michael had additional income from conducting sports camps through Tyler College and for taking on duties when an assistant basketball coach was not hired by the school. Michael's income has increased from approximately $42,000 at the time of the last modification to at least $54,000 at the time of trial. Once Michael moved with his family, including Mitchell, to Texas in August 2001, he has paid for the travel expenses of Mitchell's and Michelle's visitation with him.

Angela has a degree in and worked as a dental assistant from 1985 until 2001, when she was fired for excessive absenteeism. At the time, the couple's daughter, Michelle, was ill often requiring Angela to miss work. Angela did not return to work as a dental assistant, and her license lapsed. Just prior to the previous modification, Angela had remarried and has since had two children, ages two and four at the time of the modification trial. Angela and her husband made the decision that her working any more than on a part-time basis when her husband could provide child care would not be financially feasible. Michelle also participates in extra-curricular activities that require her transportation to and from different locations at varying days of the week. Angela was most recently

previously employed at Capstone Behavioral Health Care earning $9.90 per hour, but quit due to losing a family member as a free child care provider. Due to these circumstances, at the time of trial Angela worked for First Resources Corporation as an in-home respite care provider less than twenty hours per week for $8.00 per hour with gross earnings of $7090 through November 15, 2006.

Angela filed a modification petition in March 2006 requesting modification of Michael's child support obligation, a review of the transportation costs for visitation, specified minimum visitation, and attorney fees. Following the modification trial in December 2006, the district court determined that a significant change in circumstances had occurred requiring modification of the parties' child support obligations. The district court expressed a certain amount of frustration and difficulty at determining Michael's salary, as his tax records and payment records from Tyler College were not synonymous. Finding Michael's testimony and explanations for the disparity less credible, the court followed the payment records from Tyler College to establish gross annual earnings of $63,866.86. The court also found that Angela's reasoning for not pursuing her chosen career was reasonable, but did impute a full-time minimum wage annual salary of $10,920 to her for purposes of child support calculations. The new support level was set at $721.40 per month from Michael to Angela, with $3737.68 in retroactive support from three months following Michael's answer to Angela's modification petition. The court set repayment of the retroactive support on a two-year schedule, bringing monthly payments to $877.14 for the first twenty-four months. As there was no evidence or plans presented on the issues of visitation or travel expenses, the court directed the parties to continue to

cooperate on those issues. Finally, the court awarded $1900 in attorney fees to Angela payable by Michael. Michael now appeals.

II. Scope and Standards of Review.

Modification proceedings are equitable proceedings and our review, therefore, is de novo. Iowa R. App. P. 6.4; *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). Although we give weight to the findings of fact made by the district court, especially as to the credibility of witnesses, we are not bound by those findings. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). "We recognize that the district court 'has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity.'" *Id.* (quoting *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)). Our primary consideration "is not what is in the best interest of [the parent], but what is in the best interest of his child[ren]." *In re Marriage of McKenzie*, 709 N.W.2d 528, 533-34 (Iowa 2006).

III. Issues on Appeal.

A. Child Support Modification.

Michael argues on appeal that the district court erred when it determined the salary levels of both he and Angela in the modification, concluding a significant change had occurred and modifying his level of support. He contends that Angela's earning potential should be used to impute an experienced dental assistant's salary to her for purposes of support calculations, pointing to the fact that she worked full-time as a dental assistant while their children were young and went to day care. While we disagree with Michael that Angela should be

imputed a salary of $24,960 for experience and years in a career that she is no longer presently capable to maintain, we conclude equity requires more than a minimum wage salary of $10,920 should be imputed to her due to her work history and ability to obtain more highly-skilled and compensable employment. Angela's actual income for a part-time position at the time of trial was $7954.09, although she had previously held employment at a higher-paying position but quit due to child care concerns. The district court imputed a full-time minimum wage salary at $5.25 per hour to her for an annual gross salary of $10,920. Within the range of the evidence presented at trial, *see In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007), we conclude a more equitable imputed income for the circumstances and facts presented in this case would be an annual gross salary of $15,000 for Angela. We therefore modify Angela's imputed income to this amount.

Michael also argues that the district court erred in its calculation of his annual gross salary. He contends the court should have been bound by his Tyler College contractual salary and stipend totaling $54,000, even though other evidence showed his actual income exceeded this amount. The district court found Michael's testimony explaining the discrepancies less credible than other evidence, and we defer to this finding. Iowa R. App. P. 6.14(6)(*g*). Regardless of additional income attributed to basketball camps or other duties Michael undertook, we conclude the contractual salary and stipend rate established by Michael's most recent employment contracts from Tyler College are the most reliable evidence at trial for purposes of support calculations. We modify that portion of the court's findings to reflect Michael's gross annual salary in 2006 for

child support calculation purposes is $54,000. Based upon the salaries reflected in this opinion and a split-physical care situation, Michael's child support obligation to Angela would be $494.88. An additional sum for retroactive amounts for the support difference owing between July 7, 2006, and the district court's March 8, 2007 order, is $1925.52 ($240.69 over eight months). Allowing payment of the retroactive amounts over twenty-four months would increase Michael's monthly obligation to $575.11 for two years. We affirm the district court's order as modified above.

B. Angela's Attorney Fees.

Michael finally asserts that the district court should not have awarded Angela trial attorney fees in the amount of $1900. 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). Due to the facts presented in the case, we cannot say that the district court abused its discretion in awarding trial attorney fees to Angela in that amount. We therefore affirm, but decline to award the attorney fees requested by Angela on appeal, *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997) (stating an award of attorney fees is not a matter of right, but rests within the court's discretion). Costs on appeal are assessed against Michael.

AFFIRMED AS MODIFIED.