

IN THE COURT OF APPEALS OF IOWA

No. 8-035 / 07-1261
Filed February 13, 2008

**IN RE THE MARRIAGE OF JANE ELLEN
NEDDERMEYER AND ROSS ERIC NEDDERMEYER**

**Upon the Petition of
JANE ELLEN NEDDERMEYER,
n/k/a JANE ELLEN NEDDERMEYER HOUT,**
Petitioner-Appellee,

**And Concerning
ROSS ERIC NEDDERMEYER,**
Respondent-Appellant.

Appeal from the Iowa District Court for Ida County, Duane E. Hoffmeyer,
Judge.

A father appeals from the child support provisions of a district court
modification decree. **AFFIRMED.**

Bradford Kollars and Michele M. Lewon of Kollars & Lewon, P.L.C., Sioux
City, for appellant.

Peter Goldsmith of Boerner & Goldsmith Law Firm, P.C., Ida Grove, for
appellee.

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

BAKER, J.

In this case we are asked to decide whether the district court's failure to explicitly adopt a child support guidelines calculation precludes the court from deviating from the guidelines in its modification of the parent's monthly support obligation. We hold it does not. We further hold that, under the circumstances of this case, the application of the guidelines would lead to an unjust or inappropriate result. We affirm the district court's modification.

I. Background and Facts

Jane and Ross Neddermeyer were married on June 10, 1988. In August 2001, Ross was arrested and incarcerated in Colorado. He has been incarcerated since his arrest and will not be eligible for parole until approximately 2016.

Jane filed a petition for dissolution of marriage in June 2002. The parties agreed to Jane having physical care of the children and Ross paying \$1000 per month in temporary child support. The support was reduced to \$750 after the November 2002 death of one of their children.

On June 6, 2003, a decree of dissolution was entered. At that time there were two surviving minor children, Rebecca, born in June 1992, and Margaret, born in February 1996.¹ Jane was granted sole legal and physical custody. The decree also provided that Ross would not pay child support while in prison. In lieu of monthly child support, however, a percentage of the inheritance Ross was to receive from the Chris Neddermeyer estate was to be set aside in a trust for

¹ There were three other children born to the marriage: Anna, who died in infancy in 1999; Marcus, who died in infancy in 2000; and Christian, who died in November 2002.

the children's support and maintenance. The trust provided that Jane would receive at least \$500 per month to support the children and contemplated that the trust may be exhausted before the children reached age eighteen.

In 2004, Jane used approximately \$11,000 from the trust without court approval to make a down payment on a house where she and her husband, Don Hout, and the children reside. The house was placed solely in Don's name because Jane had bad credit. Don signed an agreement that, if the marriage ended for any reason, he would make no claim on the first \$10,582.52 in equity.

Because Jane's health has deteriorated, she is no longer able to perform the work she could previously. She currently earns \$600 per month providing in-home child care. In December 2004, the monthly amount Jane received from the trust increased from \$500 to \$750. The trust was depleted in May 2006.

Ross has over \$36,000 from the remaining share of his inheritance from the Chris Neddermeyer estate. In 2005, Ross's grandmother died. Ross received an inheritance of over \$102,000 from her estate. These assets have been placed into certificates of deposit (CD). They generate income at 5.28%.

On May 25, 2006, Jane filed a petition for modification of child support. The district court granted the petition and ordered Ross to pay \$500 per month in child support. Ross filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asking, in pertinent part, that he be credited \$233 per month due to the down payment on the residence, and that the court clarify its failure to order a reduction in child support when the older daughter turns eighteen. The court denied the motion. Ross appeals.

II. Merits

Modification proceedings are equitable proceedings; 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 Vetterneck*, 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).

A court may modify child support orders when there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (Supp. 2005). In determining whether there has been a substantial change in circumstances, a court may consider: “a. Changes in the employment, earning capacity, income, or resources of a party. b. Receipt by a party of an inheritance, pension, or other gift l. Other factors the court determines to be relevant in an individual case.” *Id.* “Courts . . . will not hesitate upon proper showing to modify provisions for the care, maintenance and education of children.” *Smith v. Smith*, 239 Iowa 896, 897, 32 N.W.2d 662, 663 (1948).

A. Substantial Change in Circumstances

In Ross’s statement of facts he asserts that he disagrees with several of Jane’s claims of substantial changes in circumstances. For example, because

his grandmother's death was expected at the time of the dissolution, he claims his inheritance from her was not a substantial change in circumstances. He does not identify this as an issue, argue against, nor cite any sources to support an argument against the district court's finding that there has been a material and substantial change in circumstances. Therefore, we will not address the issue on appeal. See Iowa R. App. P. 6.14(1)(c) ("Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue.").

Even if we were to address this issue, we would reach the same result. In the original decree, there was a downward departure from the guidelines to an award of no monthly child support due to the transfer of assets to the trust and Ross's lack of income. There has been a substantial change in circumstances due to the depletion of the trust's assets and Ross's receipt of the additional inheritance. See Iowa Code § 598.21C(1)(b); see also *Smith*, 239 Iowa at 897, 32 N.W.2d at 664 (holding the acquisition of inheritance that was not reasonably contemplated at the time of the decree is a substantial change in circumstances).

B. Consideration of Net Income

Ross argues the district court erred in failing to determine his net income for child support calculation purposes. Since the court did not calculate his net monthly income, he argues, it could not have determined the correct amount of support.

Jane asserts that Ross failed to preserve this issue and the second issue (whether the court erred in failing to apply the child support guidelines) for review because these issues were not raised in Ross's 1.904(2) motion. See Iowa R. Civ. P. 1.904(2). A rule 1.904(2) motion is a precondition to an appeal only if the

district court failed to resolve an issue that had been properly submitted. *West Branch State Bank v. Gates*, 477 N.W.2d 848, 852 (Iowa 1991). Because these issues are related to errors Ross claims the district court made in computing the child support award, and the court clearly ruled on the amount of the award, a 1.904(2) motion was not required in order to preserve these issues for our review.

The purpose of Iowa's child support "guidelines is to provide for the best interests of the children by recognizing the duty of both parents to provide adequate support for their children in proportion to their respective incomes." *State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 695 (Iowa 1993). As a rule, the guidelines are to be strictly followed. *State ex rel. Reaves by Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). The court may deviate from the guidelines, however, if it finds a deviation is "necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case." *Nicholson*, 494 N.W.2d at 695; see also Iowa Code § 598.21B(2)(c) and (d).

Ross argues the district court failed to compute his monthly income in determining his child support obligation, and therefore could not have determined the correct amount of support. Ross's assertion that the court was required to determine the guidelines amount first is generally correct. See *Reaves*, 514 N.W.2d at 104 ("[T]he preferable procedure is to determine the guideline support amount first. Only when that figure is known can the court decide whether an adjustment of that amount is warranted under the special circumstances of the case."). The court was not required, however, to make a written finding of the

specific support amount calculated under the guidelines prior to deviating from the guidelines.

In this case, the district court implicitly determined the guidelines amount. The court ordered support “[b]ased upon the present financial circumstances of the parties and the mandatory child support guidelines” and noted that “[b]efore applying the guidelines, there needs to be a determination of the net monthly income.” The court also referenced the child support worksheets attached to the modification order. Even though the court did not make a specific written finding of Ross’s net monthly income under the guidelines, the district court was not precluded from deviating from the guidelines in its modification of Ross’s monthly support obligation. The court was not required to explicitly make a written finding of the guidelines calculation prior to deviating from the guidelines.

C. Application of Child Support Guidelines

Ross next argues that the district court erred in failing to apply the child support guidelines to the parties’ net income in determining his obligation. We agree with the court that, under these circumstances, the application of the guidelines would lead to an unjust or inappropriate result.

Ross asserts that, by applying his and Jane’s monthly incomes to the child support guidelines, he would be required to pay \$75 per month. Net income, however, is not the only basis for calculating a parent’s support obligation. The fact that Ross has assets from which his child support obligation could be satisfied is an important consideration in determining his ability to pay. See *Walters*, 575 N.W.2d at 742 (noting that an incarcerated parent’s ability to pay is a necessary consideration in child support modification proceedings).

A court may deviate from the guidelines if it makes a written finding that applying the guidelines would be unjust or inappropriate. Iowa R. Civ. P. 9.11; see also Iowa Code § 598.21B(2)(d). The criteria for determining this is whether:

- 9.11(1) Substantial injustice would result to the payor, payee, or child.
- 9.11(2) Adjustments 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 R. Civ. P. 9.11(1) and (2).

The district court deviated from the guidelines based upon Ross's limited personal needs and the possibility that his assets would be depleted. In this case, substantial injustice would result to the children if Ross were allowed to pay only \$75 per month in child support while he retains his assets. See *Vetternack*, 334 N.W.2d at 763 (holding it would be inequitable for incarcerated parent's equity in family "home to remain set off to him while his children were being supported by others"). Under the special circumstances of this case, the strict application of the guidelines would lead to an unjust or inappropriate result. Notwithstanding Ross's incarceration, it is still "necessary to care, feed, and provide for his children. He remains responsible for those expenses." *Id.*

D. Credit for Children's Equity in Residence

Ross next argues that, if we affirm the \$500 per month in child support, the award should be modified to credit him for the children's equity interest in Jane's residence, thereby reducing his monthly obligation to \$267. Neither party cites any authority to support its argument on this issue. We therefore consider this issue waived and will not consider it on appeal. See Iowa R. App. P. 6.14(1)(c).

E. Attorney Fees

Jane requests an award of \$2500 in appellate attorney fees. 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). We consider the parties' respective abilities to pay and whether the requesting party was defending the district court's decision on appeal. *Id.* Jane was forced to defend the court's decision and was successful in her defense. Further, she has a relatively low income, and Ross has sizeable assets available. We therefore award Jane \$2500 in appellate attorney fees.

III. Conclusion

Upon our de novo review, we find the district court was not required to explicitly adopt a child support guidelines calculation in order to deviate from the guidelines. Therefore, the court's failure to make a written finding of the guidelines amount did not preclude it from deviating from the guidelines. Further, under the circumstances of this case, the application of the guidelines would lead to an unjust or inappropriate result. Therefore, the court appropriately deviated from the guidelines. Having considered all issues presented on appeal, we affirm the child support modification set forth by the district court.

AFFIRMED.