IN THE COURT OF APPEALS OF IOWA

No. 8-130 / 07-1280
Filed May 14, 2008

**IN RE THE MARRIAGE OF REGINA ANN PREUL
AND ROGER RAYMOND PREUL**

**Upon the Petition of
REGINA ANN PREUL,
a/k/a REGINA ANN MACLAINE,**
Petitioner-Appellee,

**And Concerning
ROGER RAYMOND PREUL,**
Respondent-Appellant.

Appeal from the Iowa District Court for Crawford County, James Scott, Judge.

Roger Preul appeals from the district court's ruling on his application to modify the child support, health insurance, and postsecondary education subsidy provisions of a prior dissolution decree. **AFFIRMED AS MODIFIED.**

Dee Ann Wunschel, Carroll, for appellant.

J. C. Salvo, Harlan, for appellee.

Heard by Vogel, P.J., and Zimmer and Baker, JJ.

ZIMMER, J.

Roger Preul appeals from the district court's ruling on his application to modify the child support, health insurance, and postsecondary education subsidy provisions of a prior dissolution decree. We affirm as modified.

I. Background Facts and Proceedings.

The marriage of Roger and Regina was dissolved in December 1997. Regina was granted custody of the parties' three minor children, Zachary, Jesse, and Cassandra.[1] Roger was granted visitation on alternating weekends, alternating Wednesday nights, alternating holidays, and six weeks during the summer. Roger was ordered to provide medical and hospital insurance coverage for the children or to reimburse Regina if she was able to obtain insurance through her employment, and to pay one-half of all uncovered medical expenses. Additionally, Roger was ordered to pay $400 per month as child support. Roger was allowed to claim the three minor children as dependents for state and federal income tax purposes beginning in 1997 until Regina obtained full-time employment, at which time Regina was allowed to claim Cassandra as her dependent, Roger was allowed to claim Jesse, and the parties were to alternate claiming Zachary.

In December 2000 Roger's child support was increased to $621 per month after Regina filed a motion for administrative adjustment of child support. In July 2001 Roger filed a petition for modification requesting that his child support payments be reduced. Regina filed a counterclaim in which she stated that Roger was delinquent in child support and medical and hospital insurance

[1] Zachary was born in 1988, Jesse was born in 1992, and Cassandra was born in 1994.

coverage, and requested that Roger should lose his tax exemptions unless he satisfied those obligations. The court heard and ruled on this case in July 2002. After Roger orally agreed to dismiss his petition for modification, the court found Roger owed Regina $1517.12 for reimbursement of medical insurance premiums and $734.99 for past due child support. The court modified the divorce decree to provide that Roger was allowed to claim exemptions for a tax year only if his child support and medical insurance premium obligations were current at the end of the year. If they were not paid in full, then Regina would have the right to claim the exemptions for all three of the children for that year.

In September 2002 Roger filed a petition to modify the custodial provisions of the decree. Regina counterclaimed, requesting modification of the child support provision by increasing the amount Roger should pay her. The case was tried in March 2003, and in July 2003 the court entered a ruling denying Roger's request to modify and sustaining Regina's request. As a result, Roger's child support obligation was increased to $763 per month.

On December 14, 2006, Roger filed a third petition to modify the decree.[2] Roger contended that a substantial change in circumstances had occurred which warranted a change in custody to grant him physical care of Jesse, a reduction of child support, and credit toward his child support and health insurance obligations pursuant to an alleged oral agreement with Regina. Roger also sought an award of the children's dependency deduction and asked that Regina be ordered to pay a postsecondary education subsidy for Zachary. Roger served Regina with his petition on March 8, 2007, approximately three months after he

[2] It is the court's ruling on this petition that is the basis of the current appeal.

filed the petition. Regina filed a resistance asking that Roger be ordered to pay his arrearage.

A hearing on the petition for modification was held on July 12, 2007. At the time of the hearing, Roger was $3474 in arrears on his child support. He had also failed to reimburse Regina $7677 for the children's health insurance premiums and $471 for his share of their uncovered medical expense. At the time of the hearing, Regina had primary physical care of Jesse, age fifteen, and Cassandra, age twelve, under the terms of the parties' decree. However, only Cassandra was living with Regina. Jesse and Zachary, who was eighteen years old at the time of the hearing, lived with Roger.[3]

In its ruling entered on July 19, 2007, the court concluded that, as Regina conceded, Jesse should be transferred to Roger's primary physical care. Applying the child support guidelines and giving Roger the offset for the amount Regina owed for Jesse, the court set Roger's support for Cassandra at $288 per month until Jesse graduated from high school, and $718 per month thereafter until Cassandra graduated from high school or turned eighteen. The court ordered Regina was entitled to claim Cassandra as a dependent, and Roger was entitled to claim Jesse and, if qualified, Zachary, for purposes of calculating income tax beginning in 2007. The court denied Roger's request that Regina be ordered to pay a postsecondary education subsidy for Zachary, finding that Zachary had repudiated his mother. The court also concluded Regina's health insurance plan was reasonable in cost and equity did not require a change in that

[3] The district court determined that Jesse moved in with Roger in April 2006, and Zachary moved in with Roger in July 2006.

provision of the decree. The court ordered Roger to pay his past due obligations within thirty days, and awarded Regina $1000 in attorney fees.

Roger appeals from the court's decision. On appeal, he asserts: (1) the court was without basis in law or fact to deny a postsecondary education subsidy for Zachary, (2) the court erred in not including Regina's wages from her second job in determining the child support payment, (3) the court incorrectly found Regina was entitled to multiple payments for health insurance premiums and uncovered medical expenses, (4) the court erred in allowing Regina to receive child support for three children after August 1, 2006, and (5) the court erred in awarding Regina attorney fees based on false success rather than ability to pay.

II. Scope and Standard of Review.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). Although not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Merits.

A. Postsecondary Education Subsidy.

Iowa Code section 598.21F(1) (Supp. 2005) provides that the "court may order a postsecondary education subsidy [for the children of divorced parents] if good cause if shown." The court found that good cause for ordering Regina to pay part of Zachary's college expense had not been shown because Zachary had repudiated his mother under Iowa Code section 598.21F(4). That section provides "[a] postsecondary education subsidy shall not be awarded if the child

has repudiated the parent by publicly disowning the parent, refusing to acknowledge the parent, or by acting in a similar manner." Roger claims the court was without basis in law or fact to deny a postsecondary education subsidy for Zachary because it was Regina who disowned Zachary. Regina contends Zachary's behavior toward Regina was very similar to that of the children in *In re Marriage of Pendergast*, 565 N.W.2d 354 (Iowa Ct. App. 1997), and *In re Marriage of Baker*, 485 N.W.2d 860 (Iowa Ct. App. 1992), where the children were found to have repudiated their parents.

While we agree with the district court that Zachary "has displayed behavior totally inconsistent with that of a respectful child," we do not believe the evidence in this case shows that Zachary repudiated Regina. After Zachary moved out of his mother's home, Zachary and Regina continued to spend a limited amount of time together. Although the interactions between the two were rare following a fight in January of 2007, Regina was invited to a graduation party for Zachary at Roger's home. Regina declined the invitation, but informed Zachary she would invite her family over to her house to have a party for him when he graduated from high school. We conclude there is insufficient evidence of repudiation in this case.

However, we do not believe good cause has been showN to warrant an award of a postsecondary education subsidy. *See Sullins*, 715 N.W.2d at 253 ("An award of postsecondary education subsidy first requires good cause."). In determining good cause, the court considers:

> the age of the child, the ability of the child relative to postsecondary education, the child's financial resources, whether the child is self-sustaining, and the financial condition of each parent.

Iowa Code § 598.21F(2). The record reveals Zachary failed to graduate from high school with his class in May 2007. He carried a grade point average of 1.97. At the time of the July modification hearing, Zachary had still not met the requirements necessary to graduate. Although he testified he had investigated beginning classes at a local technical college, there was no evidence he had been accepted to any postsecondary education program. Under the circumstances, we decline to award a postsecondary education subsidy.

B. Child Support Payment.

At the time of the modification, Roger was employed by McCord Insurance and Real Estate, where he made $62,000 annually. Regina worked full time for Tyson Fresh Meats where her annual income was $32,000. Additionally, Regina worked part-time as a bartender, where she earned an additional annual income of approximately $5000. In determining the amount of child support to be paid, the court determined that only the parties' full-time employment should be used in calculating their support obligation. The court did not include the amount Regina earned from her second job because it found her decision to take a second job was not totally voluntary given the amount of money Roger owed her. *See State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 691 (Iowa 1993) (finding that because a father's income from his second job in the National Guard was steady, voluntary, and not speculative that it should be included in calculating his child support payments). Roger contends Regina's earnings from her second job should have been included in the court's calculation of the amount of child support ordered.

Sometime in 2006, Regina began bartending one or two nights per week while the children were staying with Roger. She argues that her income from this job should not be included in the child support calculation because she was forced to take the second job in order to continue to provide for the children due to the amount Roger owed her in unpaid child support. *See In re Marriage of Close*, 478 N.W.2d 852, 854 (Iowa Ct. App. 1991) (stating a parent's child support obligation should not be so burdensome that a parent is required to work overtime to satisfy it). Roger, however, contends Regina's perceived financial difficulties had little to do with him and that she spent the money remodeling and purchasing furnishings for her new house.

At the time of the modification hearing, Roger owed Regina over $11,000 for past due child support, health insurance premiums, and uncovered medical expense. The record reveals that the amounts Regina spent on painting, carpeting, and purchasing new bedroom furniture were minimal, and that she used the money from her property settlement from her divorce from her second husband in paying for these items. Regina testified that she did not enjoy having two jobs and that she would make a decision as to whether to continue with the second job as the year went on. We agree with the district court that Regina's decision to take this job was not entirely voluntary and "[i]t would [be] unfair to require her to keep this second job indefinitely in order to satisfy her support obligation." We conclude the district court did not err in excluding Regina's income from her second job in calculating the amount of child support to be paid.

C. Health Insurance and Uncovered Medical Expenses.

On appeal, Roger argues that the trial court allowed Regina to request and receive reimbursement for medical insurance premiums incurred before the March 2003 petition for modification was filed or ruled upon. He argues that it was Regina's duty to request any amounts allegedly due to her in 2002 at the March 2003 modification hearing. However, Roger did not raise this issue before the district court; therefore, we will not review it on appeal. *See Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002) (stating we will not decide an issue on appeal that was not raised by a party or decided by the district court).

Even if we were to address the issue, we would find Roger's claim to be without merit. In support of his argument that Regina should have requested reimbursement for medical insurance premiums due to her in 2002 at the 2003 modification hearing, Roger claims she intended to waive that right. For the reasons discussed below, the record reveals no clear indication that Regina intended to waive her right to receive payment from Roger to cover the children's health insurance premiums and uncovered medical expense.

Roger argues that the trial court failed to find Roger had satisfied any of the indebtedness to Regina dating back to 2002. Under the parties' dissolution decree, Regina was to provide the children's health insurance with the requirement that Roger reimburse her for the premiums and one-half of the uncovered medical expense. At the time of the July 2007 modification hearing, the district court found Roger had failed to reimburse Regina $7677 for the children's health insurance premiums and $471 for his share of their uncovered medical expense. Roger sought a credit toward his health insurance obligations

pursuant to an alleged oral agreement with Regina under the theory of equitable estoppel.

Our supreme court has found that, in rare special circumstances, the doctrine of equitable estoppel should be applied to prevent collection of child support where equity clearly requires relief. *In re Marriage of Harvey*, 523 N.W.2d 755, 756 (Iowa 1994). The basic elements that must be established by the party seeking relief under the doctrine are: (1) a clear and definite oral agreement; (2) proof that a party acted to his detriment in reliance thereon; and (3) a finding that the equities entitle the party to relief. *Id*. at 756-57. The district court rejected Roger's equitable estoppel argument because Roger was unable to prove a clear and definite oral agreement existed between Roger and Regina that relieved him of his health insurance obligations. Upon our review of the record, we agree no clear and definite agreement had been reached.

Roger, a realtor, assisted Regina in selling her house located in Charter Oak in the fall of 2004 and purchasing a house in Denison. Roger did not charge Regina a commission on selling the Charter Oak house, but did charge a six percent commission to the seller of the Denison house. The commission on the Denison house was $9000; however, of that total commission, Roger waived $4050 of his commission to enable Regina to complete the purchase of the house.[4] Approximately a year and a half later, Roger assisted Regina in selling that house and purchasing another house in Denison, approximately one block from where he lived. Roger charged Regina a five percent commission on the sale of her house, but gave her credit for half of that amount, totaling $4062.50.

[4] The insurance and real estate firm Roger worked for retained the balance.

Roger also charged a six percent commission to the sellers of the other house in Denison, but gave Regina a credit for half that amount, or $2397.[5] Roger claimed he and Regina agreed he would not have to meet any of his obligations under the court's orders, including the health care expense, in exchange for the unpaid commissions he credited to her and for the additional payments he made for the children. Regina denies that they reached such an agreement.

At the modification hearing, Zachary and Jesse testified that their parents had agreed the commission satisfied any amount Roger owed Regina. The court also heard testimony on this matter from Seth Osterlund, Roger's best friend and godson. Seth testified to a conversation he witnessed between Roger and Regina in the fall of 2006 during which Regina told Roger he had given her more than enough and she would not ask for anything more. In its ruling the district court stated, "After observing the witness[es]' demeanor and having considered all of the evidence, including the children's testimony, the Court concludes that the parties never reached an agreement for Roger to be released from past obligations." Because the district court is able to listen to and observe witnesses, we give weight to the court's credibility findings. *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

When Roger presented Regina with child support calculation papers in August 2006, she refused to sign the papers. We agree with the district court that this offers strong evidence that the parties did not have an agreement. While Regina signed real estate closing statements showing reductions in

[5] Roger's firm retained the balance of these commissions.

commission, she did not sign anything indicating these reductions were to be applied to Roger's health insurance reimbursement delinquency.

Furthermore, even if a clear and definite oral agreement existed, Roger is not able to prove he detrimentally relied on this agreement, as he also received a benefit in helping Regina and the children to move. *See Harvey*, 523 N.W.2d at 756-57 (Iowa 1994) (stating a party must have acted to his detriment in reliance on a clear and definite oral agreement). As the district court noted,

> Roger's donation of his services was not as benevolent as he contends. If Regina returned to Denison, he would be able to see his children more often. The move had the desired effect and the boys in particular began spending considerably more time at Roger's house once they all lived in Denison.

Aside from the unpaid commissions, Roger also claims a credit for providing car insurance for Zachary, asserting Regina agreed he could pay for that instead of the children's health insurance. Similarly, Roger asserts that other expenses for the children paid directly by him, including purchasing cars, clothing, and meals, were part of the agreement between him and Regina. However, Regina denied making such an agreement. Additionally, addressing the car insurance for Zachary, Regina pointed out that Zachary did not have a driver's license due to a number of criminal offenses. The trial court noted that these expenses paid directly by Roger are "types of things most parents want to do for their children." We agree that these expenses paid by Roger do not equate to a clear and definite agreement reached between the parties eliminating

Roger's obligation to provide reimbursement for the health care insurance and uncovered medical expenses.[6]

Additionally, Roger asserts the court should have allowed him credit for the medical bills he personally satisfied for Zachary and Jesse in 2006 and 2007, totaling $734.37. Our review of the record reveals there was no disagreement as to the existence of these bills or the fact that Roger paid them. At the modification hearing, Regina agreed Roger should receive credit for the bills Roger paid directly. We conclude Roger should receive a credit for these payments.

D. Effective Date of Modification.

At the modification hearing, Roger asked that child support be modified effective August 2006. The trial court determined that because Roger did not serve Regina with notice of his petition to modify until March 8, 2007, the earliest effective date of child support modification was June 7, 2007. *See* Iowa Code § 598.21C(4) ("Judgments for child support or child support awards entered pursuant to this chapter . . . which are subject to modification proceeding may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party."). Roger asserts that based on the concept of equitable estoppel, Regina was not entitled to child support for three children after August 1, 2006.

[6] On appeal, Roger further asserts that if Regina is allowed to receive payments for health insurance in addition to the unpaid commissions from Roger, then unjust enrichment would result. However, Roger did not raise this issue before the district court. Therefore, we will not review it on appeal. *See Meier*, 641 N.W.2d at 537.

We apply the doctrine of equitable estoppel to prevent collection of child support only under the most compelling circumstances. *Harvey*, 523 N.W.2d at 756. As we have previously discussed, we do not believe the record in this case supports the essential finding of a clear and definite agreement that Roger would not have to fulfill his court ordered obligations in exchange for the unpaid commissions he credited Regina and additional payments he made. Therefore, we affirm the trial court's ruling that Roger's child support obligation should be reduced effective July 1, 2007.[7]

E. Attorney Fees.

The district court ordered Roger to pay $1000 of Regina's attorney fees because she was the prevailing party on "virtually all counts" raised below, and because her income and ability to pay is less than Roger's. Trial attorney fees rest within the district court's broad discretion. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). Upon our review of the record, we conclude the district court did not abuse its discretion in the award of attorney fees.

IV. Conclusion.

Because we find good cause has not been shown, we conclude that no postsecondary education subsidy should be awarded. We conclude the district court did not err in excluding Regina's income from her second job in calculating

[7] We note that in *In re Marriage of Barker*, 600 N.W.2d 321, 324 (Iowa 1999), our supreme court held that the court "may not reduce or eliminate periodic child support obligations that have accrued prior to the time that modification is ordered." In this case, the court reduced Roger's child support obligation effective July 1, 2007, even though the ruling was not filed until July 19, 2007. Regina states in her brief on appeal, that even though Roger's child support was erroneously reduced retroactively, she chose not to cross-appeal because the duration of the retroactive reduction was only about three weeks. Because Regina chose not to cross-appeal, the issue is considered waived and we will not alter the trial court's ruling on this date.

the amount of child support to be paid because Regina's decision to take the job was not totally voluntary based on the amount Roger owed her in arrearages. We affirm the trial court's ruling that Roger's child support obligation should to reduced effective July 1, 2007. We also affirm the court's award of attorney's fees to Regina. We award Roger $734.37 credit for the children's medical bills he previously paid. Costs of appeal are assessed to Roger.

AFFIRMED AS MODIFIED.