IN THE COURT OF APPEALS OF IOWA

No. 8-281 / 07-1458
Filed June 11, 2008

IN RE THE MARRIAGE OF ANDREW NEIL WILLIAMS AND DEBORAH WILLIAMS

Upon the Petition of
ANDREW NEIL WILLIAMS,
Petitioner-Appellant,

And Concerning
DEBORAH WILLIAMS,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Father appeals from a district court order modifying mother's child support obligation. **AFFIRMED.**

Dorothy L. Dakin of Kruse & Dakin, L.L.P., Boone, for appellant.

Lauren E. Jacobson of Newbrough, Johnston, Brewer, Maddux & Howell, L.L.P., Ames, for appellee.

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

MILLER, P.J.

Andrew Williams appeals from a district court order modifying the decree dissolving the parties' marriage to increase Deborah Williams's child support obligation because of changes in the parties' incomes. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

A decree dissolving the seventeen-year marriage of Andrew and Deborah was entered in February 2001. The decree incorporated a stipulation the parties entered into regarding custody, visitation, and child support for their three children: Forrest, Emily, and Grace. The parties agreed the children should be placed in their joint legal custody and in Andrew's physical care. They further agreed Deborah would have visitation with the children every other weekend, alternating holidays, and six weeks during the summer. In addition, they agreed Deborah would have an overnight visit with one child every Thursday. Finally, they agreed Deborah should receive an extraordinary visitation credit to her child support obligation. She was accordingly ordered to pay $535 in child support per month.

In July 2006, Andrew requested review and modification of Deborah's child support obligation through Iowa Code chapter 252H (Supp. 2005). The Child Support Recovery Unit (CSRU) of the Iowa Department of Human Services (DHS) notified the parties of its intent to review the support order in August 2006. Deborah requested a court hearing pursuant to section 252H.8 following the second notice of decision issued by CSRU increasing her child support obligation.

A hearing was held in May 2007. At the hearing, Andrew testified that under the schedule set forth in the decree, Deborah had overnight visits with all three children simultaneously “about 100 nights a year.” He further testified she did not exercise all of the visitation she was granted under the decree. Deborah, however, testified that in 2006 there were 159 nights when she had at least one child in her care. In addition to the visitation provided for in the parties’ decree, she testified that the children stayed with her at least twice a year for eight to ten days while Andrew was gone on business trips. Deborah further testified that she is a seventh grade science teacher at her children’s school, which allows her to have frequent daily contact with the children.

Following the hearing, the district court entered a ruling, finding the amount of Deborah’s child support payments deviated by more than ten percent from the amount due under the existing child support guidelines. The court found Andrew had a gross annual income of $71,036 and a net monthly income of $4744, while Deborah had a gross annual income of $56,491 and a net monthly income of $3309. Deborah’s child support obligation for all three children was accordingly increased to $804 per month. The court’s child support calculation included a fifteen percent credit for extraordinary visitation under Iowa Court Rule 9.9.

Andrew appeals. He claims the district court erred in continuing to allow Deborah credit for extraordinary visitation.

II. SCOPE AND STANDARDS OF REVIEW.

A petition for review and adjustment of a child support obligation proceeds as an ordinary civil action in equity, and our review is de novo. *State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 690 (Iowa 1993).

III. MERITS.

In ordering child support, the court must look to the amount specified in the uniform child support guidelines adopted by the Iowa Supreme Court. *See* Iowa Ct. R. 9.4; *In re Marriage of Jones*, 653 N.W.2d 589, 593 (Iowa 2002). There is a rebuttable presumption that the child support determined by application of the guidelines is correct. *Id*. Although deviation from the guidelines is discouraged, *Jones*, 653 N.W.2d at 593, the amount specified by the guidelines may "be adjusted upward or downward . . . if the court finds such adjustment necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case." Iowa Ct. R. 9.4. The guidelines also provide an extraordinary visitation credit to a noncustodial parent's child support obligation when that parent's "court-ordered visitation exceeds 127 days per year." Iowa Ct. R. 9.9. Under rule 9.9, a noncustodial parent exercising between 128 and 147 days of visitation per year "shall receive a [fifteen percent] credit to the guideline amount of child support." For the purposes of this credit, "days" means overnights spent caring for the child. *Id.*

Andrew claims the district court erred in continuing to allow Deborah to have a fifteen percent extraordinary visitation credit, because her "court-ordered visitation" with all three children simultaneously does not exceed 127 days per

year.[1] Under the visitation schedule set forth in the decree, Deborah is entitled to visitation with all three children simultaneously approximately ninety-three days in odd years and ninety-four days in even years. She has an additional fifty-two days of visitation with at least one child every year. Deborah agreed at trial that under that schedule it was not possible for her to have more than 127 days of visitation per year with all three children simultaneously due to the provision allowing for a weekly overnight visit with only one of the children. She asserts, however, that the court correctly continued to allow the credit when modifying her support obligation, because the parties agreed she should receive the credit when they first entered into the stipulated decree and because she exercises at least as much visitation as provided for by the schedule in the decree. We agree.

The provisions of a dissolution decree may be modified when there has been a substantial change in circumstances. *See* Iowa Code § 598.21C(1). "However, not every change in circumstances constitutes a sufficient basis for modification." *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991). A substantial change of circumstances for modifying a child support obligation "exists when the court order for child support varies by ten percent or

[1] He also appears to claim that the court erred in allowing the credit because Deborah did not exercise the visitation provided for in the parties' decree. *See* Iowa Ct. R. 9.9 ("Failure to exercise court-ordered visitation may be a basis for modification."). However, our review of the record does not reveal whether this argument was presented to or passed upon by the court. *See Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) ("Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal."). Furthermore, the record indicates that the parties cooperated with one another and were flexible with the visitation schedule set forth in the decree. Andrew acknowledged at the hearing there were occasions when he was "scheduled to have the children but [Deborah] had them instead." Deborah likewise testified she often "switched visitation schedules with Andrew." We therefore reject this claim.

more from the amount which would be due pursuant to the most current child support guidelines. . . ."[2] Iowa Code § 598.21C(2)(a).

The parties do not dispute that Deborah's income has increased, resulting in the required substantial change of circumstances for modifying her child support obligation. Andrew, however, argues that the district court should have also modified the agreed-to provision that provides Deborah with the extraordinary visitation credit, because "a noncustodial parent may [not] get the extraordinary visitation credit by adding the days of visitation with three separate children, to reach the 128 days necessary" under rule 9.9. Based on the particular facts involved in this case, for the following reasons we agree with the district court's decision on this issue.

Looking to the language of section 598.21C, we do not believe the legislature intended to allow the parties to agree to and have the court order a visitation schedule and an extraordinary visitation credit based on that schedule, and then later secure modification based on that very schedule. *But see In re Marriage of Wilson*, 572 N.W.2d 155, 156-57 (Iowa 1997) (finding the ten percent deviation rule set forth in section 598.21C supported modification of child support obligation involving split physical care and an agreement by the parents to forego child support); *In re Marriage of Guyer*, 522 N.W.2d 818, 821 (Iowa 1994) (rejecting father's argument, which relied on doctrine of res judicata, that because the mother agreed to the original amount of child support and its

[2] We note, however, that the administrative rules promulgated by DHS under section 252B.5(7) to implement its duty to review requests to modify support obligations provide that "[p]rocedures to adjust the support obligation shall be initiated only when the financial and other information available . . . indicates that the: (1) Present child support obligation varies from the . . . guidelines by more than twenty percent."

variance from the guideline amount, she could not claim a substantial change in circumstances based on that variation). Modification is appropriate only upon a substantial change in circumstances. The amount of visitation to be exercised by the "noncustodial" parent is the "circumstance" relevant to whether an extraordinary visitation credit should be allowed. The record in this case demonstrates no change in that circumstance.

In arguing that the visitation schedule set forth in the stipulated decree, which the parties and the court previously agreed supported an extraordinary visitation credit, is not sufficient to support such a credit in this modification proceeding, Andrew is effectively asserting that he struck a bad, inequitable, or invalid bargain at the time the original decree was entered.[3] Child support provisions in a decree may not be modified simply on the ground that they were originally inequitable. *Chmelicek,* 480 N.W.2d at 574. Rather, relief from an inequitable provision may be effected only by appeal. *Id.* "Provisions for child support payments in a decree are final as to the circumstances then existing." *Id.* "The 'then existing' circumstances are those which were known or, through reasonable diligence, should have been known to the court when the original decree was entered." *Id.*

---

[3] Andrew additionally argues under rule 9.11(1) that substantial injustice would result if Deborah is granted the extraordinary visitation credit. Rule 9.11(1) provides that the court "shall not vary from the amount of child support which would result from application of the guidelines without a written finding that the guidelines would be unjust or inappropriate as determined" by the fact that "[s]ubstantial injustice would result to the payor, payee, or child." The district court did not make a written finding under rule 9.11 that application of the guidelines would be unjust or inappropriate in this case. Instead, the court determined Deborah was entitled to the extraordinary visitation credit set forth in rule 9.9. We conclude Andrew's argument regarding rule 9.11 has no application to the circumstances presented in this case.

In entering the original decree in this case, the district court and the parties were aware that the decree did not provide for Deborah to exercise more than 127 days of visitation with all three children simultaneously. However, they reasonably expected, and the decree provided, that she would have substantially more than 127 days of visitation with one or more of the children, based in part upon the weekly overnight visits with one child. The decree also stated, "The parties shall cooperate to allow additional visitation to [Deborah] as reasonably requested." As Deborah testified, the parties cooperated with one another in allowing visitation beyond that provided in the decree to such an extent that in 2006 she had at least one child in her care for 159 nights. *See Jones*, 653 N.W.2d at 593 ("[T]he incentive of a reduction in child support may have the effect of promoting the involvement of both parents in the upbringing of their children, a generally desirable circumstance."). We believe this case is analogous to *Jones* where our supreme court approved application of the extraordinary visitation credit even though the visitation schedule in that dissolution decree "might not always result in 128 days or more of visitation" because the court also ordered that the noncustodial parent should have "liberal access" to the children with the reasonable expectation that he would have "128 days of visitation, if not more, each year." *Id.* at 594. In light of the foregoing, we reject Andrew's argument that the court erred in denying his request to modify the decree to disallow the extraordinary visitation credit.

IV. CONCLUSION.

In modifying the decree dissolving the parties' marriage to substantially increase Deborah's child support obligation, the district court did not err in

declining to further modify the decree to disallow the extraordinary visitation credit provided for in the parties' stipulated decree. The judgment of the district court is therefore affirmed.

AFFIRMED.