

IN THE COURT OF APPEALS OF IOWA

No. 8-534 / 07-2022

Filed July 30, 2008

**IN RE THE MARRIAGE OF CARMELYN LAFAVE AND LESLIE ALLEN
LAFAVE**

**Upon the Petition of
CARMELYN LAFAVE,**
Petitioner-Appellee,

**And Concerning
LESLIE ALLEN LAFAVE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Jones County, Mitchell E. Turner,
Judge.

Respondent appeals the district court's denial of his application to modify
the child support provisions of the stipulation and decree dissolving the parties'
marriage. **AFFIRMED.**

Dawn Mastalir of Berenstein, Moore, Berenstein, Heffernan & Moeller,
L.L.P. and Roger W. Mastalir, Sioux City, for appellant.

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

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Respondent, Leslie Allen LaFave, appeals the district court's denial of his application to modify the child support provisions contained in the decree dissolving his marriage to petitioner, Carmelyn LaFave. We affirm.

BACKGROUND.

The parties' twenty-three year marriage was dissolved on September 23, 2005. The decree incorporated the parties' stipulation. They agreed, among other things, that Leslie would pay \$900 per month in child support, provide health insurance for the child, and pay seventy percent of the child's uncovered medical expenses. They stipulated Carmelyn would receive the family home, subject to the first mortgage, and Leslie would retain all right title and interest in the business he formed, LaFave Trucking. The parties agreed that neither party would receive spousal support.

On April 9, 2007, Leslie filed a petition to modify the child support provision asserting there was a substantial change in his financial circumstances. Leslie subsequently fell into arrears on several child support payments and Carmelyn requested the court to hold Leslie in contempt of the decree. The matters came on for hearing on October 2, 2007.

Leslie and his company's bookkeeper testified the loss of LaFave Trucking's largest customer, increased fuel costs, and the shortage of competent and dependable drivers threatened the livelihood of the business. Therefore, in early 2007, Leslie reorganized the business, forming Wilderness Transport. LaFave Trucking still exists but only as a vehicle to lease trucks to Wilderness Transport. Leslie testified that he only receives a draw of \$750 per week from

Wilderness Transport and makes \$39,000 per year, approximately the same amount he reported on income tax statements prior to the divorce. He stated he cannot make payments on his house, boat, or his personal truck. He testified that he agreed to pay \$900 per month in child support because the divorce process had been going on for two years and Carmelyn would not agree to release any interest in the company unless he agreed to pay that amount.

Carmelyn testified that before the original decree she made approximately \$11,000 per year as LaFave Trucking's part-time bookkeeper and estimated her current yearly income earned as a school secretary at \$25,000. She agreed that she and Leslie had difficulty reaching an acceptable amount of child support. Carmelyn testified that the tax returns and financial statements from the company, in her experience, did not reflect Leslie's true income.

The district court denied both parties' requests, finding no substantial change in circumstances justifying a reduction in Leslie's child support obligation and finding he was not in willful violation of the decree when he was unable to make a few payments. Leslie appeals, contending there is a substantial change in circumstances under Iowa Code section 598.21C(2) (2007) warranting modification of his child support obligation in that the amount of his obligation calculated under the child support guidelines using the parties' current incomes varies from the amount set in the original decree by over ten percent.

SCOPE OF REVIEW.

A petition to modify a dissolution decree is tried in equity and thus our review is de novo. Iowa R. App. P. 6.4; *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 331 (Iowa Ct. App. 2005). We give weight to the district court's fact

findings, especially in its credibility assessments, but we are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). “[T]he 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.’” *Walters*, 575 N.W.2d at 741 (quoting *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983)). The party seeking modification must prove by a preponderance of the evidence that there has been a substantial change in circumstances since the decree was entered. *Kupferschmidt*, 705 N.W.2d at 331.

ANALYSIS.

Section 598.21C(2) provides in relevant part, “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” Leslie argues under *In re Marriage of Wilson*, 572 N.W.2d 155 (Iowa 1997), the district court was required to modify his child support obligation to comport with the current guidelines. We disagree. *Wilson* concerned whether the ten percent variance rule applied to a petition for modification when the parties originally stipulated in the decree they would split physical care of their children with neither party being obligated to pay child support, and one of the children later becomes emancipated. *Wilson*, 572 N.W.2d at 157. The reasoning in *Wilson* hinged on the determination that the parties’ agreement to not pay child support was a set off or cancelling out of each others’ obligations but nonetheless still functioned as a court order for support that could be modified. *Id.* In applying this analysis, one child’s emancipation

was found to be a substantial change in the parents' child support obligations that could cause a ten percent variance under section 598.21C(2). *Id.* Leslie cannot show any actual change implicating section 598.21C(2). His tax return statements show his reported income is relatively the same as it was when the decree was entered. He is taking steps to increase his business profits and, to his credit, has stayed current on nearly all of his child support payments. We do recognize however, Leslie's income estimates were found not credible during the original dissolution proceedings and noted by the district court in this action.

Though *Wilson* made clear the guidelines are implicated under the ten percent rule of section 598.21C(2), it did not hold that this section permits a party to reduce the child support obligation he negotiated in the decree absent an actual change in circumstances. Parties are free to negotiate a child support payment that deviates from the guidelines in exchange for waiving a claim to spousal support. See *In re Marriage of Handeland*, 564 N.W.2d 445, 446-47 (Iowa Ct. App. 1997). We will give effect to such agreements unless it is clearly inequitable. *Id.* at 447. Here the parties negotiated a higher child support payment in exchange for Carmelyn's waiver of claims to spousal support or an interest in LaFave Trucking. The district court correctly concluded Leslie failed to prove there was a substantial change in circumstances warranting a modification of his child support obligation.

Carmelyn requests appellate attorney fees. We have discretion in determining whether to award appellate attorney fees. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We consider the requesting party's needs,

the opposing party's ability to pay, and the merits of the appeal. *Id.* We award her appellate attorney fees of \$500.

AFFIRMED.