IN THE COURT OF APPEALS OF IOWA

No. 9-984 / 09-0907
Filed February 10, 2010

SHAWN ECHELBERRY,
Petitioner-Appellant,

vs.

VIRGINIA MCKIM,
Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Peter A. Keller, Judge.

Petitioner appeals the district court's order refusing to modify the physical care provision of a paternity decree and modifying child support. **AFFIRMED AS MODIFIED AND REMANDED.**

Theodore Sporer of Sporer & Flanagan, P.C., Des Moines, for appellant.

Michael Oliver of Oliver Law Office, Windsor Heights, for appellee.

Heard by Vogel, P.J., Eisenhauer, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ZIMMER, S.J.

Shawn Echelberry appeals from the district court's decision denying his application to modify the physical care provisions of the parties' paternity decree. He also contends the court erred in: determining his modified child support obligation, failing to grant his motion in limine, refusing to modify the transportation provisions of the original decree, and awarding Virginia trial attorney fees. We affirm the district court's decision with one exception. We remand to the district court for recalculation of Shawn's child support obligation.

I. Background Facts & Proceedings

Shawn Echelberry and Virginia McKim are the parents of Kristin, who was born in 1996. The parties entered into a stipulated paternity decree on July 31, 1998, which provided the parents would have joint legal custody of Kristin, with Virginia having physical care. The decree established a visitation schedule for Shawn.[1] He was also ordered to pay child support of $280 per month. On June 10, 2002, the paternity decree was modified to increase Shawn's child support obligation to $355 per month. On November 9, 2006, the decree was again modified to increase the amount of support to $471.34 per month.

On February 15, 2008, Virginia filed a petition to increase Shawn's child support obligation. Shawn responded with a counterclaim seeking to modify the physical care provision to provide him with physical care of Kristin. Virginia

---

[1] Shawn was granted visitation from 6:30 p.m. on Friday until 6:30 p.m. on Sunday each weekend. He was also granted visitation on certain holidays. After Kristin completed kindergarten he had visitation for one week each summer, and after she completed fifth grade, he had visitation for two weeks each summer.

subsequently amended her petition to seek a retroactive increase in child support back to November 2006.

In 2005, Shawn started a company called AIM Lending, Inc. Initially, Shawn was the sole shareholder of the company. He operated the business as a subchapter S corporation for the first year and then changed the form of the business to a subchapter C corporation. In 2007, a second person joined the corporation. In 2008, the corporation began to wind down due to a downturn in the mortgage lending industry. Shawn is currently in the process of dissolving the business and distributing its assets and debts.

Since October of 2008, Shawn has been employed as a mortgage lender with Hedrick Savings Bank. He earns about $4500 per month, and his income is based solely on commission. Shawn married Audrey in 2006. Audrey has one child from a previous relationship, and this child lives with her. The family moved to Hedrick in 2008.

Virginia is employed as a licensed practical nurse with Methodist Plaza Internal Medicine in Des Moines, where she earns $15.09 per hour. Until recently, she also held a part-time job at Fleur Heights Care Center, where she earned $19.50 per hour. Virginia and Kristin moved a number of times while Virginia was going to school to obtain her nursing decree and as she established herself in her career. Virginia has the physical care of an older child, Michael, from a previous relationship. In the fall of 2006, Virginia, Michael, and Kristin moved in with Virginia's parents in a three-bedroom trailer home in Waukee. Virginia and Kristin shared a bedroom. About one week before the modification

trial, Virginia and Kristin moved to an apartment in West Des Moines.[2] Kristin continued to attend middle school in Waukee.

The modification hearing came on for trial to the court on April 15, 2009. After considering the evidence presented, the district court determined there had been a substantial change of circumstances since the time of the paternity decree, but found Shawn had not established that it was in Kristin's best interest that he have physical care of the child. The court determined Shawn had not established he could provide superior care. As a result, the court dismissed Shawn's counterclaim for physical care of Kristin. The court found the three-year average for Shawn's income was $60,205, and that Virginia's annual income was $31,387. Using these amounts, the court increased Shawn's child support obligation to $693.91 per month. Pursuant to Iowa Code section 598.21C(4) (2007), the court made this amount retroactive to three months after the service date of February 20, 2008. The court denied Virginia's request for retroactive child support to a previous date. Shawn was ordered to pay $7500 for Virginia's trial attorney fees.

Shawn filed a post-trial motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asking the court to modify and enlarge the modification order. His motion included a request to modify the transportation provisions of the original decree. The court denied the motion. Shawn appeals.

---

[2] Michael was then eighteen years old and expecting to complete high school within a few months. He remained living with his grandparents in Waukee.

II. Standard of Review

In paternity actions, issues ancillary to the determination of paternity are tried in equity. *Markey v. Carney*, 705 N.W.2d 13, 20 (Iowa 2005). In equity cases our review is de novo. Iowa R. App. P. 6.907 (2009). We examine the entire record and adjudicate the parties' rights anew on the issues properly presented on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 564 (Iowa 1999). In equity cases, we give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(*g*).

III. Timeliness of Appeal

Virginia has asked to have Shawn's appeal dismissed because he failed to comply with the expedited time guidelines in rules 6.902(1) and 6.902(2). Virginia raised the same issue in a motion filed before the Iowa Supreme Court, and that court denied the motion to dismiss. Because this issue has already been decided, we will not address it further.

IV. Motion in Limine

On April 7, 2009, Shawn filed a motion in limine seeking to exclude Virginia from presenting witnesses or exhibits he claimed had not been timely identified. Virginia identified some family members as witnesses, including Kristin, and listed as an exhibit the records of the child's therapist. Shawn claimed he had not received this information until April 6, less than ten days prior to the trial date—April 15, 2009. The court determined it would hear the evidence, subject to Shawn's objections. The court stated that if Kristin testified

she would do so in chambers, without the parties present. The court reserved ruling on the counseling records until they were presented. During the modification hearing the court overruled Shawn's objection to the counseling records.[3]

On appeal, Shawn claims the district court abused its discretion by permitting Virginia to present any witnesses other than herself, and by allowing her to offer exhibits that she had not timely identified. A "Uniform Scheduling Order" required the parties to exchange witness and exhibit lists ten days prior to trial.[4] The certificate of service on the list Virginia mailed Shawn was dated April 2, 2009, while the postmark on the envelope was April 3, 2009. Shawn's counsel argued the documents were not received until April 6, 2009.

Under the circumstance presented here, we conclude the district court did not abuse its considerable discretion in denying Shawn's motion to exclude the witnesses identified from testifying. In addition, we find no reason to believe that Shawn was prejudiced by the trial court's decision. We find nothing in the record which suggests that the trial court relied on the testimony of any of the witnesses Shawn objected to in reaching its ultimate decision. In addition, nothing in the record suggests that the court relied on the child's therapy records in deciding this case.[5] Accordingly, we reject this assignment of error.

---

[3] Shawn claimed the therapy records lacked evidentiary foundation and contained hearsay.

[4] Shawn also claims the witnesses should have been identified in supplementary answers to his interrogatories.

[5] The child's therapist did not testify at trial.

V. Physical Care

Shawn contends the district court should have modified the paternity decree to place Kristin in his physical care. He asserts Virginia has exposed Kristin to inadequate and unstable housing. He points out that Virginia has moved frequently, and that Virginia and Kristin shared a bedroom while they lived with Virginia's parents. Shawn offered evidence that Virginia and her father were involved in a physical altercation at some time in the past. Shawn notes that Virginia has held several different jobs. Shawn also points out that Kristin has had some issues at school recently, including not turning in homework on time. He objects to the fact that Virginia took Kristin to a counselor without first informing him. Finally, Shawn's main argument is that Virginia has shown intense hostility to him. He contends this hostility prevents Kristin from enjoying a stable relationship with him.

In issues concerning custody and physical care, we employ the same criteria regardless of whether the parties were married or unwed. *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994). A party seeking to modify physical care must first show a substantial change in circumstances since the entry of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party must show that because of the change in circumstances, continued enforcement of the decree would result in positive wrong or injustice. *Maher*, 596 N.W.2d at 565. The change must be more or less permanent and relate to the welfare of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

A parent seeking to modify the physical care provision of a decree has a heavy burden. *In the Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). "A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being." *Frederici*, 338 N.W.2d at 158. This heavy burden is imposed based on the principle that once physical care of a child has been fixed it should be disturbed only for the most cogent reasons. *Id.*

The district court found there had been substantial and material changes in circumstances that were more or less permanent and were not within the contemplation of the parties or the court at the time of the paternity decree. The court went on to find, however, that Shawn had not shown it was in Kristin's best interests to be placed in his physical care. The court stated:

> Although the child apparently loves both parents, she is doing well where she is. She apparently wishes to remain in her mother's physical care and to remain in the Waukee School system. Her standard of living is just fine even though her mother has struggled financially.

The court also found, "While [Shawn] may be able financially to provide more material things, he has not established that he can provide superior care." The court declined Shawn's request to modify physical care.

Upon our de novo review of the record, we agree with the district court's conclusion. The evidence clearly shows Virginia does not like Shawn; however, the evidence does not support a finding that Virginia's poor relationship with Shawn has been detrimental to Kristin's relationship with her father. The record reveals no evidence Shawn had ever been denied visitation with Kristin, or that

Kristin shares Virginia's negative view of Shawn. Overall, Kristen is doing well where she is. She is involved in a number of activities at school including volleyball and track, show choir, and the drama club. In addition, she plays an active role in the Waukee Teen Advisory Board. When Kristin has had an academic problem, her mother has addressed the issue to help her overcome it. Although Virginia has struggled financially at times, she has always been able to meet her daughter's needs. While Virginia has moved quite a few times, her changes in residence have been made to allow her to attend nursing school, find a job, and support her children.

Shawn's argument that he should be awarded physical care is not aided by his approach to visitation with his daughter. Shawn failed to exercise a single summer visitation period with Kristin until the current matter was pending before the district court. In addition, he has shown little interest in attending his daughter's activities at school. Finally, it is worth mentioning that many of Shawn's complaints about Virginia concern matters that occurred many years ago. For example, he places considerable emphasis on an altercation between Virginia and her father which took place more than eight years prior to trial. Like the district court, we conclude Shawn has failed to show that he can offer superior care. Therefore, we affirm the district court's decision that physical care should not be modified.

VI. Transportation

Shawn asks that the paternity decree be modified to make Virginia responsible for one-half of the transportation for all visitations. Under the

provisions of the paternity decree, Shawn is to pick Kristin up for visitation and return her. The modification order did not specifically address this issue, although the court stated, "All other provisions of the original decree as amended not otherwise in conflict shall remain in force including the visitation provisions." In his rule 1.904(2) motion, Shawn proposed that each parent be responsible for one-half of the transportation. The district court denied the motion.

The parties stipulated to the terms regarding transportation in their original paternity decree. It appears their present system has worked well for them. In addition, Shawn has considerably more financial resources than Virginia. The trial court has reasonable discretion in determining whether modification of a term of the decree is warranted. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983). Upon our review of the record, we cannot say that the court failed to do equity in determining that the transportation provision of the parties' paternity decree should not be modified. Accordingly, we reject this assignment of error.

VII. Child Support

Shawn contends the district court improperly calculated his child support obligation. The district court averaged Shawn's income over a three-year period, finding he had income of $44,083 in 2006, $87,266 in 2007, and $53,694 in 2008, which gives him an average of $60,205 per year. Shawn agrees to the use of a three-year average, but states the court used the wrong figures. He asserts he had net income of $31,585 in 2006, $83,266 in 2007, and $40,967 in 2008,

giving him an average annual income of $51,939. Shawn asks to have the case remanded for recalculation of his child support obligation using this amount.

A court determines child support based on the parents' net monthly incomes using the most reliable evidence presented. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). "[W]hen a parent's income is subject to substantial fluctuations, it may be necessary for the court to average the parent's income over a reasonable period when determining the current monthly income." *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 52 (Iowa 1999).

Net monthly income means gross monthly income less certain specified deductions. Iowa Ct. R. 9.5. Generally, completed federal and/or state income tax returns are considered the best evidence of a parent's income. *In re Marriage of Will*, 602 N.W.2d 202, 204 (Iowa Ct. App. 1999). For a parent's gross monthly income we look to the "total taxable income" in the federal income tax forms and to "net income" on the state income tax forms. *In re Marriage of Cossel*, 487 N.W.2d 679, 683 (Iowa Ct. App. 1992).

For 2006, Shawn's gross income on his Iowa income tax form was $44,083. To arrive at the amount of $38,964 for his "net income," the amount of $4000 for voluntary pension payments and $1119 for health insurance was deducted. Rule 9.5(11) provides that contributions to voluntary pension plans should not be deducted from gross income. However, under rule 9.5(6), Shawn should be able to deduct his health insurance premiums because he provides

medical insurance for Kristin.[6] Therefore, for purposes of the child support guidelines, in 2006 his net income would be $42,964.

We only have Shawn's 2007 federal income tax return to show his income for that year, and it lists his total income as $83,266. We find no evidence to support the amount of $87,266 used by the district court, and determine Shawn's net income for 2007 should be $83,266.

For 2008, Shawn's federal income tax return shows gross income of $53,584, the amount used by the district court. His Iowa income tax return, however, shows Shawn had gross income of $40,475, while his wife had gross income of $12,275. Virginia disputes that Audrey earned as much as $12,275, and asserts this income should be attributed to Shawn. We note the record demonstrates Audrey had a part-time job as a notary, and there was no evidence to show she had not earned the income imputed to her. We determine Shawn's net income for 2008 should be $40,967, the amount shown as his net income on his Iowa income tax form.

The three-year average for Shawn's income for the period of 2006 to 2008 is therefore $55,732. We determine his child support obligation should be recalculated using this amount, instead of the amount of $60,205 used by the district court. We remand to the district court for recalculation of Shawn's child support obligation under the new child support guidelines, which became effective July 1, 2009.

---

[6] The modification order of June 10, 2002, provides that Shawn will continue to provide medical insurance for the minor child.

VIII. Trial Attorney Fees

Shawn claims the district court abused its discretion by awarding Virginia trial attorney fees. In paternity actions, an award of attorney fees may be made only to the prevailing party. Iowa Code § 600B.25. Additionally, any award of attorney fees rests within the sound discretion of the district court. *Bryant v. Schuster*, 447 N.W.2d 566, 568 (Iowa Ct. App. 1989). Virginia prevailed in her request to increase Shawn's child support obligation, and the district court awarded her a portion of her requested attorney fees of $17,185. We find no abuse of discretion in the district court's award of trial attorney fees.

IX. Appellate Attorney Fees

Virginia seeks attorney fees for this appeal. "An award of appellate attorney fees is within the discretion of the appellate court." *Markey*, 705 N.W.2d at 26. We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court in this modification action, except that we remand the issue of Shawn's child support obligation for a recalculation of the amount of that obligation. Costs of this appeal are assessed to Shawn.

AFFIRMED AS MODIFIED AND REMANDED.