IN THE COURT OF APPEALS OF IOWA

No. 3-618 / 93-0468

FILED
OCT 25 1994
CLERK SUPREME COURT

IN RE THE MARRIAGE OF HOWARD LEE GIBSON AND SUSAN KAY GIBSON

Upon the Petition of
HOWARD LEE GIBSON,
Petitioner-Appellant,

And Concerning
SUSAN KAY GIBSON,
Respondent-Appellee.

Appeal from the Iowa District Court for Buchanan County, William G. Klotzbach, Judge.

Petitioner appeals from the denial of his petition to modify and to enforce the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

W. Wayne Saur, Oelwein, for appellant.

R.L. Van Veldhuizen, Oelwein, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

SACKETT, J.

Petitioner-appellant Howard Lee Gibson appeals from the trial court's refusal to modify his dissolution decree and order respondent-appellee Susan Kay Gibson to pay child support and a deceased child's funeral bill. We affirm in part and reverse in part.

The twenty-year marriage of Howard and Susan was dissolved in June 1990. The parties were awarded joint custody of Chad, born December 15, 1973, and Ryan, born July 1, 1980. There were two older children, one was a student. Howard and Susan stipulated that, based on the children's preferences, the physical care of Chad and Ryan would be with Howard. The decree approved and incorporated the following language of the parties' stipulation:

> Based upon the current circumstances of the parties and the property division provided for in this Stipulation, it is agreed that the respondent [Susan] shall not be required to pay any child support to the Petitioner [Howard] for the support of Chad Michael Gibson, nor Ryan Dean Gibson, throughout their minority, or as may be extended pursuant to the laws of the State of Iowa.

The decree, also, provided Howard had responsibility to provide health insurance and pay all medical, dental, and eye care expenses.

In the property division, Susan received life insurance policies that had been purchased on the children and she agreed to pay the premium on the policies until the children reached their majority.

On November 5, 1991, Chad committed suicide. On the day of his death, Howard and Susan signed a written contract with a funeral home where Howard and Susan agreed to each pay one-half of the funeral expenses. Susan received $10,558.17 from the proceeds of Chad's insurance policy and out of the policy paid $2800 toward the funeral bill and $3800 for a headstone. There is a remaining balance of the funeral bill of $2756.99.

On April 7, 1992, Howard filed a petition for modification claiming there had been a change of circumstances. Howard asked that Susan be required to pay child support for Ryan and, also, pay Chad's funeral expenses in its entirety.

The trial court found Howard had not shown the necessary change of circumstances. The trial court denied Howard's request in both instances.

At the time of the dissolution, Howard was employed at John Deere as a welder and had an annual income of $51,532. Susan was employed at Amoco Foam in Oelwein and had an annual income of about $16,600. The parties at the time of the dissolution had a net worth, without valuing the pension rights of either, of between $20,000 and $35,000. Susan received about one-third of the net assets and her own pension rights. Howard received the balance and whatever pension rights he may have had with John Deere. No alimony was awarded either party.

There are three issues raised by Howard which are intertwined: (1) did he show the necessary change of circumstances, (2) should Iowa Code section 598.21(9) apply, and (3) what effect should the agreement approved by the dissolution court that Susan not pay child support be given.

The first question we address is whether the provision in the decree forecloses further awards of child support. Prior to the adoption of child support guidelines, the Iowa courts said parents cannot lightly contract away or otherwise modify child support obligations; the court will give effect to such agreements only if they do not adversely affect the best interest of affected minor children. In re Marriage of Zeliadt, 390 N.W.2d 117, 119 (Iowa 1986); see also Anthony v. Anthony, 204 N.W.2d 829, 833-34 (Iowa 1973); In re Marriage of Van Zee, 488 N.W.2d 721, 724; In re Marriage of Sundholm, 448 N.W.2d 688, 690 (Iowa App. 1989).

The text of the current guidelines as to stipulations provides:

> A stipulation of the parties establishing child support and medical support shall be reviewed by the court to determine if the amount stipulated and the medical support provisions are in substantial compliance with the guidelines, and if a variance is proposed, whether it is justified and appropriate. A proposed order to incorporate the stipulation shall be reviewed by the court to determine its compliance with these guidelines.

The question here is not whether the agreement should have been approved by the dissolution court. The stipulation was approved by the dissolution court and

neither party appealed from that decision. The question is whether the provision in the dissolution decree Susan not be required to pay child support forecloses Howard from seeking a modification to order Susan pay support. An agreement contracting as to future support of a child will only be honored if the child's interests are adequately protected. See In re Marriage of Bonnette, 492 N.W.2d 717, 721 (Iowa App. 1992); Webb v. Iowa Dist. Court, 416 N.W.2d 95, 98 (Iowa App. 1987). The agreement does not preclude modification.

The next issue is whether Howard has shown the required change of circumstances. Howard claims he has. Howard advances the following facts support a modification. A month after the dissolution, his oldest son defaulted on his student loan. He had a burglary and $25,000 of machinery and tools were stolen and his insurance coverage was less than $10,000. His profit sharing with John Deere had decreased. He purchased a home in the country and was unable to sell his other home. He has responsibility on the funeral bill. After Chad's death, Ryan needed psychological help. Ryan needs orthodontic work, and Howard's overtime has decreased.

Susan lives with a gentleman and, after being laid off and receiving severance pay, she has made no effort to seek other employment.

We find the decrease in salary, the decrease in overtime, the increased expenses necessitated by the need

for counseling, and the receipt by Susan of the life insurance and the responsibility Howard has for Chad's funeral expenses changes in circumstances not envisioned by the trial court. We find Susan has an earning capacity that should result in a net income of $1208 monthly. Howard's net monthly income is $3223. We modify to order Susan pay $272 a month in child support commencing with the date of the filing of the petition for modification.

Howard, also, contends the modification is supported by Iowa Code section 598.21(9) which was amended effective July 1, 1992, to provide:

> Notwithstanding subsection 8, 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 guidelines established pursuant to subsection 4 . . . This basis for modification is applicable to petitions filed on or after July 1, 1992, . . . (emphasis supplied).

The petition here was filed April 7, 1992. The decree was filed January 28, 1993. Also see Schuler v. Rodberg, 516 N.W.2d 902, 903 (Iowa 1994), where the court determined section 598.21(9) is a remedial and procedural statute. Because we have found the modification supported by other grounds, we need not address the application of the statute.

Howard next contends because Susan received all Chad's life insurance, she should have total responsibility for his funeral expenses. Howard contracted with the funeral home and any agreement or responsibility between the

parties does no change his contracted obligation. We find no basis under Iowa law to address responsibility for a minor child's funeral expenses in a modification proceeding. We have considered the insurance money Susan received in assessing the issue of change of circumstances for child support and we have considered the obligation Howard assumed in assessing the change of circumstances. We affirm the trial court on this issue.

Susan seeks attorney fees on appeal. We deny her request. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.