IN THE COURT OF APPEALS OF IOWA

No. 7-521 / 96-412

IN RE THE MARRIAGE OF SANDRA LYNN LANE AND STEVEN K. LANE

Upon the Petition of
SANDRA LYNN LANE,

Appellant,

And Concerning
STEVEN K. LANE,

Appellee.

FILED
APR 24 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Jefferson County, Dan F. Morrison, Judge.

Sandra Lynn Lane appeals the district court's modification of the parties' dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

Joseph G. Bertogli, Des Moines, for appellant.

Steven Gardener of Kiple, Kiple, Denfe, Beaver & Gardener, Ottumwa, for appellee.

Considered by Cady, C.J., and Huitink, J., and Peterson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

PETERSON, S.J.

The decree dissolving the marriage between Sandra and Steven Lane was modified on February 5, 1996. Sandra appeals contending the trial court erred in making the modification of child support retroactive to a date pre-dating service on her and the trial court erred in modifying the child support when no change in circumstances was proved. Steven cross-appeals contending the trial court erred in assigning him income of $400 per month from his farm and in calculating his child support, and he requests appellate attorney fees.

I. Background and Facts.

Sandra and Steven Lane were married in September 1982. They had a son, Parker, in 1984. Their marriage was dissolved on April 6, 1994.

Sandra is a high school graduate with some secretarial skills. She has worked as a receptionist, secretary, sales clerk, and administrative assistant. She had not worked outside the home for several years during her marriage to Steven and remained at home to provide child care, and at the time of the divorce she was unemployed.

Steven has a Bachelor of Arts degree in business administration and at the time of the dissolution was employed by State Central Bank and farmed. The trial court found his income for child support purposes to be $28,000 per year. This included his income from the bank and farm income.

The trial court awarded the parties joint custody of Parker and placed him in Sandra's physical care. Sandra was awarded certain personal property and a cash settlement of $69,642 and assumed responsibility for approximately $10,000 of debt. The balance of the property was awarded to Steven. He was ordered to pay $706 per month in child support and $10,000 toward Sandra's attorney fees and the cost of the action. The trial court also provided specific rights of visitation. The decree was appealed to the Iowa Court of Appeals and we modified the decree by changing only the visitation rights. *In re Marriage of Lane,* No. 94-0831 (Iowa App. May 30, 1995).

On August 8, 1995, Steven filed an application requesting that the child support provisions of the decree be modified. Notice of the application to modify the decree was served on Sandra on October 14, 1995, outside of the State of Iowa. On February 5, 1996, the decree was modified by reducing the child support from $706 per month to $390 per month, effective August 15, 1995. In modifying the decree, the trial court found that Steven had a net monthly income for child support purposes of $1659. This consisted of $400 per month from his farming operation and $1259 from his employment. The trial court also found Sandra was capable of earning a minimum net monthly income of $718.

Shortly after the decree dissolving the marriage was entered, Steven was laid off from his position at the bank. This was because he had not been able to fulfill his duties because of the amount of time he had been in court for the dissolution. Some of the board members of the bank petitioned the president to rehire him, which was done. However, after a three-month probationary period, Steven was permanently terminated. This was not a voluntary act on his part.

Following the loss of this employment Steven looked for work, and in April 1995, he became employed by Hassenfritz Equipment Company in Mount Pleasant, Iowa. He is a salesman earning $8 per hour and does not receive a commission. His gross yearly income is $18,720, and he receives a Christmas bonus which is approximately $50. This is a net monthly income for child support purposes of $1259.33. He also has the use of a vehicle belonging to his employer.

At the time of the dissolution, Steven owned eighty acres of land. Subsequent to the dissolution, forty acres of the land was sold at a sheriff's sale as a result of Sandra's execution on the money judgment in the decree. Steven's mother bought that parcel of property at the sheriff's sale for $35,000. She also loaned Steven an additional $22,000 to pay the balance of the property equalization judgment which was not covered by the sale of the forty acres of farm land. Steven is required to pay ten percent interest per year on that loan. Steven also has an additional loan which has been incurred since the divorce in the sum of $50,000, which was for operating funds. This is drawing interest at the rate of six percent per year. This forty-acre parcel purchased by Steven's mother is now rented by him for $2850 per year.

Shortly after entry of the divorce decree, Sandra moved with the parties' child to Juniper, Florida. She remarried and had a baby, and although currently unemployed, assists her present husband in the operation of his business. The extent of this assistance and if she is compensated was not shown by any credible evidence.

II. Standard of Review.

The standard of review accorded application to modify support orders is de novo. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983). In our review, we are not bound by the findings of the trial court, but give those findings some weight, especially as to the credibility of witnesses. Iowa R. App. P. 14(f)(7).

III. Retroactive Modification Child Support.

Sandra contends the trial court erred in modifying the decree prior to the date the application for modification was served on her on October 14, 1995. She contends this is contrary to Iowa Code section 598.21 (1995), which provides:

> Judgments of child support for child support awards entered pursuant to this chapter which are subject to a modification proceeding may be retroactively modified only from the date the notice of the pending petition for modification is served upon the opposing party.

Steven contends the trial court does have the authority to modify the support retroactively to the date of the petition and cites his support of that contention in *In re Marriage of Phares*, 500 N.W.2d 76, 78-79 (Iowa App. 1993), and in *State ex rel. Welter v. Kitner*, 512 N.W.2d 309, 312 (Iowa App. 1993).

In *Phares*, the issue was whether child support provisions in a dissolution decree could be decreased retroactively and the court had the authority to divest a party of accrued support. *Phares*, 500 N.W.2d at 78. The court held the amendment to Iowa Code section 598.21 authorized a retroactive modification of child support.

Id. at 78. The effective date of that modification was not an issue. *Id.* In *Kitner*, it was contended the trial court erred in not making a modification of the child support order retroactive to the date of the petition for modification. *Kitner,* 512 N.W.2d at 312. The court agreed and found the record revealed the appellee was served with a copy of the petition and original notice of the modification on May 30, 1991, and accordingly modified the trial court by changing the effective date of the child support obligation to May 30, 1991. *Id.* at 313. This was in accordance with the specific wording of the statute which provides that modification may be "retroactively modified only from the date the notice of the pending petition for modification is served upon the opposing party." *Id.*

We find the trial court erred in making the modification retroactive to the filing of the petition and the modification is effective only from the date of the service of the modification upon Sandra, which was October 14, 1995.

IV. Modification of Child Support.

Iowa Code section 598.21(8) provides that a per se substantial change in circumstances will occur when the child support ordered varies by ten percent or more from the amount which would be due by applying the current child support guidelines to the current circumstances of the parties. This will apply where the reduction in net income is the result of involuntary acts on the part of the applicant. *In re Marriage of Colby,* 569 N.W.2d 157, 158 (Iowa App. 1997). In this case we find there is a variation by more than ten percent from the amount which we calculate by applying the guidelines to the current income of the applicant and there is a basis to modify the decree.

V. Amount of Child Support.

Sandra contends the trial court should not have imputed $718 per month to her. In determining her income, it is appropriate to consider her earning capacity. *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa App. 1991). Before earning capacity can be used rather than actual earnings, a court must make a finding that if actual earnings were used, substantial injustice would result or adjustments would be necessary to provide for the needs of the children and to do justice between the parties. *Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable*, 474 N.W.2d 581, 582-83 (Iowa App. 1991). We do not make that finding here.

In this situation, Sandra was not employed at the time of the divorce from Steven and had remained in the home to care for their child. Since that time, she has remarried, has had an additional child, and has remained at home to care for the children. It is true there was testimony she assists her husband in his present occupation. However, the extent of that assistance and if she was compensated was not shown. We conclude in this situation it was error to impute income to Sandra in determining the amount of child support.

Sandra next contends Steven's loss of his job at the bank and reduction in income was known at the time of his previous appeal of the dissolution decree. We approved of the amount of the child support set by the trial court. She, therefore, contends the modification court could not relitigate this finding. Steven lost his job subsequent to the entry of the divorce decree. Issues must be presented to and passed on by the trial court before they can be raised and adjudicated on appeal. *Benavides v. J. C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). This issue was not presented to the trial court prior to appeal.

Sandra next contends Steven's change in his career from banking to sales appears to be voluntary on his part. It is true a voluntary reduction in income does not justify a modification of child support. *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa App. 1995). We believe, however, this was not a voluntary reduction in income. Steven was laid off shortly after the entry of the decree and was able to be rehired. However, he was unable to satisfactorily complete his probationary period and was unable to find employment until the following April.

Sandra next contends the trial court should have allocated an additional $300 per month to Steven's income because he has the use of his employer's vehicle and does not assume any expenses in connection with the vehicle. The benefits in the salary package can support a discretionary call by the trial court to depart from the guidelines amount. The definition of net monthly income does not include adding employment benefits to the income before applying the percentages. *In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa App. 1995). We do not believe the circumstances justify departure from the guidelines because of the use of this vehicle. The extent of the use of the vehicle was not shown nor was there any monetary amount attached to its use.

Sandra next contends the child support payments should not be abated during the six-week summer visitation period. The only matter that was reviewed by the modification court was that of child support. Issues must be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal. *Benavides*, 539 N.W.2d at 356. Although the modification court's opinion indicates all other portions of the decree as modified by the court of appeals remain unaffected by this ruling, we do not believe that indicates the modification court considered the visitation issue and the findings of fact entered by the modification court make no reference to that issue.

Steven, in his cross-appeal, contends the trial court erred in finding income from his farming operations. Divorce cases have consistently used the concept of average farm income to determine child support. *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa App. 1992). In determining the farm income, the use of the federal and state income tax returns are considered the best evidence of this income. *Huisman*, 532 N.W.2d at 160. Steven's tax returns for the years 1990 through 1994 show a combined loss of $15,919. However, in 1992, they showed a $37,572 profit, whereas in 1994 they showed a $36,247 loss. The matter was tried to the modification court on February 1, 1996, and at that time Steven had not prepared his 1995 tax return. He testified to some additional expenses because of loans he had with his mother; however, there is no indication in the record of his income for that year nor his other expenses. The modification court noted Steven had been given a very limited view of the farming operation. We believe there was insufficient evidence presented to the trial court in order to determine what amount, if any, from the farming operation should be considered in determining Steven's net income for child support purposes. Consequently, we find the farming operation should not be considered in determining his child support and it should be based on his average monthly income of $1259.33.

Steven next contends he should be awarded appellate attorneys fees. The award of attorneys fees are not a matter of right but rests in the sound discretion of the parties and their financial situation. *In re Marriage of Moore*, 526 N.W.2d 335, 338 (Iowa App. 1994). We believe in this matter each party should pay their own appellate attorneys fees.

In conclusion, we find there has been a material change in circumstances justifying a modification of the child support to be paid by Steven to Sandra. An imputed income to Sandra and the farm income attributed to Steven should not be considered in determining the child support. We find Steven's net monthly income for child support purposes to be $1259.33, and the appropriate percentage from the Child Support Guidelines is 25.8 percent. Accordingly, Steven's child support obligation is $325 per month effective as of the date of the service of the notice on Sandra, October 14, 1995.

AFFIRMED AS MODIFIED.