IN THE COURT OF APPEALS OF IOWA

4-322 / 94-0201

IN RE THE MARRIAGE OF KEVIN ANDERSON and RHONDA SMART, f/k/a RHONDA ANDERSON

Upon the Petition of
KEVIN ANDERSON,

Appellant.

And Concerning
RHONDA SMART, f/k/a RHONDA ANDERSON,

Appellee.

FILED
OCT 25 1994
CLERK SUPREME COURT

Appeal from the Iowa District Court for Buena Vista County, James L. McDonald, Judge.

Kevin Anderson appeals the child support provisions of the district court's order modifying the parties' dissolution of marriage decree. **REVERSED IN PART AND REMANDED.**

Douglas R. Hansen, Alta, for appellant.

Dan Connell, Storm Lake, for appellee.

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

CADY, J.

Kevin Anderson appeals the child support provisions of the district court's order modifying the parties' dissolution of marriage decree. The district court transferred custody of Kevin Anderson and Rhonda Smart's son, Keith, from Rhonda to Kevin, but it did not require Rhonda to pay child support. We reverse the portion of the court's order relating to child support.

Kevin and Rhonda were divorced in 1981. Pursuant to the decree, Rhonda was granted physical custody of their minor child, Keith, born July 15, 1978. Kevin was ordered to pay $120 per month in child support. In June 1993, Keith went to live with his father for the summer and later told his mother he wished to continue living with his father. During discussions between Kevin and Rhonda, Kevin told her that he would not ask for child support if she agreed to relinquish custody.

On June 15, 1993, Kevin filed a petition for modification of the decree, requesting that he be granted physical custody of Keith. Kevin did not specifically request child support but asked for other relief as deemed equitable by the district court. Rhonda later agreed that it would be in Keith's best interest for him to temporarily reside with his father for the 1993-94 school year.

The parties stipulated Keith would have temporary custody of Kevin, Keith's child support obligation should terminate August, 30, 1993, and Rhonda would not have to

pay child support during pendency of the modification due to her strained financial circumstances. Financial affidavits were waived. On September 27, 1993, the district court entered a temporary custody and support order approving the parties' stipulation but requiring Rhonda to pay nominal child support of one dollar per month until further order of the court.

Trial was held on the modification proceeding on January 12, 1994. The parties stipulated to the transfer of custody. The sole issue before the court was the amount of child support to be paid by Rhonda for the support of Keith. According to Kevin's financial affidavit, he had remarried and had two children from this marriage. Kevin worked at a food processing plant earning $8.75 per hour. His net monthly income was $1,188. Rhonda's financial affidavit stated she worked at a furniture manufacturer and earned approximately $682 net per month. Rhonda is living with a man and has a child by that relationship.

The district court held Rhonda was not required to pay Kevin child support. It noted that the September 1993 order for temporary child support imposed only nominal support and found Rhonda's financial position was unchanged or worse than in September. Therefore, it reasoned there was no compelling reason for the court to now provide support.

Kevin's subsequent rule 179(b) motion was denied. He has appealed.

On appeal, Kevin argues the district court should have ordered Rhonda to pay child support in accordance with the child support guidelines despite the parties' agreement as to temporary child support during the pendency of the modification action. Kevin requests child support of $207 per month retroactive to the date the temporary support order was entered.

I. Scope of Review

Our review of this equity action is de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Child Support

It is a fundamental axiom that parents have a legal duty to support their children in accordance with their ability to pay. In re Marriage of Reedholm 497 N.W.2d 477, 479 (Iowa App. 1993). The ability to pay is defined by applying the uniform child support guidelines. In re Marriage of Van Zee, 488 N.W.2d 721, 723 (Iowa 1992). There is a rebuttable presumption that the amount of child support resulting from application of the guidelines is correct. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). Our supreme court has directed

> court[s] 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 under the following criteria:
>
> (1) Substantial injustice would result to the payor, payee, or child;

> (2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case; and
> (3) Circumstances contemplated in Iowa Code section 234.39 [(regarding foster care)]

Iowa Code § 598.21(4)(b) (1993).

The district court did not make a finding that application of the guidelines would be inappropriate under the criteria listed in the guidelines. Nor did it determine the parties' incomes. It simply stated,

> The only evidence in the record is that the Respondent's [Rhonda's] financial position is, if anything, worse than it was in September because of increased utility bills. . . .[I]f the Court [ordering temporary custody] in September of 1993 found that support should not be provided in connection with the transfer of physical custody of Keith to the Petitioner [Kevin], there is no compelling reason for the Court to provide for support at this time."

This conclusion does not establish the special circumstances necessary to deviate from the guidelines. See State DSS ex rel. Welter v. Kitner, 512 N.W.2d 309, 912 (Iowa App. 1993). The guidelines balance the needs of the children against the legitimate needs and expenses of the payor parent. State v. Burt, 469 N.W.2d 669, 670 (Iowa 1991). Thus, the guidelines take into account the reasonable living expenses of the payor parent, the subject which prompted the district court to deviate from the guidelines. Reasonable living expenses of the noncustodial parent do not normally provide grounds for departing from the guidelines. Id. In the present case, there is no showing that requiring Rhonda to pay child support will impose a substantial injustice on her.

After careful review of the record, we find application of the child support guidelines is appropriate. Rhonda's child support obligation should be set at the figure determined under the guidelines as computed below.

According to the financial affidavits submitted by the parties, Kevin earns net monthly income of $1,188. Rhonda earns net monthly income of $682. Kevin, however, contends Rhonda under-reported her net monthly income. He asks this court to determine Rhonda's income based on a copy of her pay stub he submitted with his amended financial affidavit. Following the trial, the district court specifically requested Kevin to submit an updated financial affidavit. The court did not request additional financial information from Rhonda. Therefore, we will not consider information regarding Rhonda's financial status submitted by Kevin after the record was closed on the issue.

Accordingly, under the income figures submitted by the parties, the guidelines call for child support of 20.1% of Rhonda's income or $137.19 per month.

III. Retroactive Support

On appeal, Kevin requests retroactive support from the date of the temporary custody order, September 27, 1993. We hold Kevin did not preserve error on this issue.

The central premise of error preservation is that the trial court must be alerted to the alleged error before it will be considered by the appellate court. Robert G. Albee & Kasey W. Kincaid, Error Preservation in Civil Litigation:

A Primer for the the Iowa Practitioner, 35 Drake L. Rev. 1, 4 (1985). Thus, we have consistently held issues not presented in the trial court may not ordinarily be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). The first time Kevin addressed retroactive support was on appeal. He did not request it in his petition, at trial, or in his rule 179(b) motion. In fact, his 179(b) motion specifically asks the district court to order child support payments to commence on February 1, 1994.

In sum, we reverse the district court's failure to award Kevin child support and decline to address the issue of retroactive support. We remand the case to the district court for imposition of the monthly prospective support obligation. Costs of this appeal are assessed to Rhonda.

REVERSED IN PART AND REMANDED.