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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-731 / 90-869

PENNY EVEN f/k/a PEN BLACKLEDGE,

Appellant,

125

vs.

KOLIN JOE DAVIS,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Mother appeals district court's modification of child support. **REVERSED AND REMANDED.**

Scott Lemke of Pieters, Pieters & Lemke, Waterloo, for appellant.

L. Don Snow of Reed-Merner and Mershon, Snow & Knock, Cedar Falls, for appellee.

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

SCHLEGEL, P.J.

Penny Even and Kolin Davis are the parents of a daughter, Nikole, born in 1978. They have never been married to each other. Nikole has been in Penny's care and custody throughout her life.

A 1980 court order directed Kolin to pay Penny child support of $25 per week. In 1989 Penny filed the present petition to modify the 1980 support order. She sought an increase in the amount of child support.

After a hearing, the district court increased Kolin's child support obligation from $25 per week to $67.15 per week. In reaching this figure the court relied on the Iowa Supreme Court's child support guidelines of October 12, 1989. In particular, the court used the support chart for a payor with two children; the court noted Kolin is also obligated to pay support for another child by a different woman.

Penny has appealed from the district court's modification order. She contends the amount of her child support award should be increased further. Penny argues the district court erred in its determination of Kolin's net income. She also argues the district court misapplied the child support guidelines by using the chart for a payor with two children; she asserts the two-child chart should not apply because Kolin's other child has a different mother and is not a part of the same household as Nikole.

In addition, Penny contends the district court should have ordered the increase in child support to be retroactive to the date she filed her modification petition. Penny also argues the district court should have provided for the child support award to extend to Nikole's twenty-second birthday if Nikole attends college and otherwise meets the requirements for college support under Iowa Code section 598.1(2). Penny states the district court should have awarded her attorney fees. She also requests attorney fees on appeal.

Kolin argues, in his appellee's brief, that the district court erred by increasing his child support obligation at all; he asserts the evidence failed to establish a change of circumstances warranting an increase.

I.

Our review is de novo. Iowa R. App. P. 4; In re Marriage of Bergfeld, 465 N.W.2d 865, 868 (Iowa 1991). We give weight to the district court's findings of fact but are not bound by them. Iowa R. App. P. 14(f)(7).

Kolin is liable for child support under Iowa Code section 252A.3(9), the Uniform Support of Dependents Law. In 1980 Kolin admitted paternity of Nikole and was ordered to pay child support in the amount of $25 per week. In the 1990 hearing the trial court used Iowa Code section 598.21(4) to determine the amount of support. See Iowa Code § 252A.6(11) (1991) (court shall determine amount of support pursuant to 598.21(4)). Iowa Code section

598.21(4) allows the supreme court to set uniform child support guidelines.

These guidelines were not in use when Kolin was originally ordered to pay support. The supreme court made the original guidelines effective October 12, 1989, and the present guidelines effective December 31, 1990. We apply the support guidelines to pre-October 12, 1989, support orders only if a substantial change in circumstances has been established. Bergfeld, 465 N.W.2d at 870. The child support guidelines now in effect do not constitute a change in circumstances by themselves. Id. at 869. The party seeking modification has the burden

> to prove a substantial change in circumstances from the time the decree was entered making it equitable and just that different terms be fixed. A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of changed conditions.

Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). The factors the court must consider in determining whether there is such a substantial change are codified in Iowa Code section 598.21(8).

The trial court made no mention in its order of a change of circumstances. Penny's petition alleged there had been a substantial change in circumstances since the original order in 1980, but no proof was given. The evidence at the trial on April 2, 1990, indicated Penny was employed at Iowa Beef Processing and Kolin continued to be employed at John Deere. There seems to be no attempt by

Penny to request from the court any determination of the disparities in income between Penny at the time of the original order and at the time of the hearing. There further was no evidence entered reflecting a change in the income of Kolin and a comparison with the income of Kolin at the time of the most recent hearing and at the time of the original hearing. These matters were attempted to be raised only after the trial and after the ruling by the court on Penny's untimely rule 179(b) motion.

The court should have required a showing of a change of circumstances in order to raise the child support. "A substantial change of circumstances not within the contemplation of the trial court and the parties when the original decree was entered enables modification of a 252A decree." State ex rel. Evers v. Berridge, 447 N.W.2d 562, 563 (Iowa 1989) (citing Dep't of Social Services, ex rel. Brecht v. Brecht, 255 N.W.2d 342, 346 (Iowa 1977)). Because there are no findings by the trial court that a substantial change in circumstances required a modification, we reverse and remand the issue to the trial court. We think fairness and justice require the parties be allowed to present evidence on a change or lack of change of circumstances. See Bergfeld, 465 N.W.2d at 871.

II.

We do not address any issues other than the change of circumstances requirement in the modification. The trial court on remand may consider these contentions in light of

the evidence. We do note, however, on the issue of which support chart to utilize, a recent supreme court case which states the court must begin its calculations by selecting the chart that applies to the number of children "who live in the custodial parent's household and can legally claim both parties as parents." Gilley v. McCarthy, ___ N.W.2d ___ (Iowa 1991). The mere fact that an obligor has other children to support is not sufficient to establi the guideline amount is inequitable. In re Marriage o Ladely, ___ N.W.2d ___ (Iowa 1991). This proof may bear on whether strict application of the guidelines will result in substantial injustice, however. See id. at ___. Because Kolin's second child was born after the obligation for child support to Nikole was fixed, the support payable to the second child cannot be deducted to arrive at net income.

We reverse the modification of the support amount and remand. Each party is to pay his or her own attorney fees.

REVERSED AND REMANDED.

Sackett, J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I concur in the result.