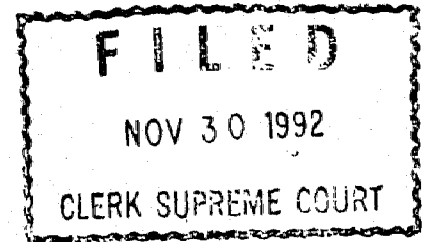


IN THE COURT OF APPEALS OF IOWA

No. 2-387 / 91-1075



IN RE THE MARRIAGE OF TRUDY ANN WHITE AND
DAVID ALLEN WHITE

Upon the Petition of
TRUDY ANN WHITE, n/k/a TRUDY ANN GROSS,

Appellee/Cross-Appellant,

And Concerning
DAVID ALLEN WHITE,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County,
Richard D. Morr and J. W. Jordan, Judges.

The husband appeals a district court decision modifying the parties' dissolution decree and a subsequent order. The wife cross-appeals, contending the district court erred in failing to award her trial attorney fees. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth & Holmes, Pleasant Hill, for appellant.

Leslie Babich of Babich & Nickerson, Des Moines, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett,

JJ.

HAYDEN, J.

On October 22, 1981, the trial court entered a decree dissolving the marriage of Trudy and David White. Trudy received physical custody of the parties' two children: Bradley, born July 1, 1976, and Amy, born on June 17, 1979. Pursuant to the decree, David was required to pay thirty dollars per week per child as child support. In addition, the trial court ordered David to maintain life insurance with the children as beneficiaries and ordered Trudy to maintain health insurance.

David and Trudy entered into a voluntary agreement to increase his child support obligation to eighty dollars per week for the parties' two children commencing on March 18, 1986. On May 24, 1988, the parties agreed to increase child support to eighty-five dollars per week for the two children. On February 28, 1989, the parties agreed to a voluntary reduction of child support to seventy-five dollars per week for the two children. Finally, in June of 1990, David reduced the child support payments to sixty dollars per week for the two children.

On June 12, 1990, Trudy filed an application to modify the parties' dissolution decree. On May 17, 1991, the trial court entered an order modifying the parties' dissolution decree. The trial court found there had been a substantial change in circumstances to the extent David's net worth increased and the general cost of living and expenses related to child care had substantially increased.

The trial court found Trudy's gross income had increased from the time of the original decree to approximately \$24,000 to \$25,000 per year. In 1988 David was employed at Smokey's Body Shop, and his annual income was \$34,668. Trudy's father owned the body shop at that time. In the fall of 1989 David and his brother purchased Smokey's Body Shop. After purchasing the business, David claimed his annual income for 1989 was approximately \$25,003. In a personal financial statement prepared for a creditor in 1990, however, David claimed his income for 1989 was \$34,000. The trial court noted David admitted at trial he earned additional unreported income but was unwilling to disclose the extent of such earnings. David and Trudy had remarried and their spouses' incomes in 1990 were \$10,597 and \$31,310 respectively.

The trial court determined David's child support obligation based upon his gross income of \$34,040, which equaled a net income of \$2152.76 per month. The court ordered David to pay \$645.83 per month for two children retroactive to July 1, 1990. The trial court ordered each party to pay his or her own attorney fees.

On May 28, 1991, David filed a rule 179(b) motion. Trudy filed a resistance and also filed a rule 179(b) motion on May 30, 1991. The trial court entered an order on June 18, 1991, denying both motions. The trial court found David's earning capacity was more accurately reflected by his 1988 income.

On September 13, 1991, Trudy filed an application to determine child support arrearages. David filed a resistance. On October 18, 1991, the trial court entered an order concluding David was not entitled to a credit or setoff for the amount of child support he paid in excess of his legal obligation from October 22, 1981, through June 30, 1991.

David has appealed, and Trudy has cross-appealed. On November 15, 1991, the Iowa Supreme Court entered an order consolidating the two appeals.

Our review of this case is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). However, we are not bound by these determinations. Id.

I. Child Support. A modification of the support provisions of a dissolution decree is allowed only if there has been a showing of substantial change in circumstances since the entry of the original decree. In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977); Iowa Code § 598.21(8) (1991).

The parties' dissolution decree was entered in October of 1981. At that time David's annual net income was \$18,556.20. His net income in 1988 was \$34,040. There has also been a substantial change in circumstances to the extent David's net worth has increased from \$3,100 in 1981 to \$65,841. Since 1981 inflation has stripped the support

dollar of about one-third of its purchasing power. Such increases in income and inflation may be considered a substantial change in circumstances which justifies modification of a child support obligation. In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981) (citations omitted). We may also weigh increased school expenses and the needs of growing children. Id. (citation omitted). Trudy has shown by a preponderance of evidence that a substantial change of circumstances has occurred. We find the increase in the parties' incomes, inflation, and the cost of raising older children constitute a substantial change of circumstances justifying a modification of the child support award.

We affirm the trial court on this issue.

II. Retroactive Increase of Child Support. The trial court ordered David's child support obligation retroactive to July 1, 1990, nineteen days after the application to modify was filed. David argues the increase should not be applied retroactively. In the alternative, David argues the support should be retroactive only to the date of service of the petition.

In In re Marriage of Chesterman this court affirmed the trial court order requiring payment of child support retroactive to the date on which the petition for modification was filed. In re Marriage of Chesterman, 462 N.W.2d 696, 697 (Iowa App. 1990). The Iowa Supreme Court has stated:

Our prior decisions have granted the court authority to make an increase in child support payments retroactive to the date of filing the petition to modify.

In re Marriage of Sheperd, 429 N.W.2d 145, 147 (Iowa 1988) (emphasis added). Although Trudy had filed the application to modify on June 12, 1990, she only requested the support be retroactive to July 1, 1990. We affirm the trial court on this issue.

III. Income Tax Exemptions. On appeal David contends the court should allocate to him both dependent tax exemptions for the children. He asks the court to order Trudy to sign any documents necessary to satisfy the Internal Revenue Service requirements. The trial court did not address this issue, and the original dissolution decree is silent on this issue. We agree this issue should be addressed as part of this modification proceeding because it relates directly to the child support obligation. See In re Marriage of Feustel, 467 N.W.2d 261, 264 (Iowa 1991).

Under the current modification order, David is obligated to pay \$7,749.96 per year in child support. He is also responsible for maintaining life insurance policies on the children and paying the first \$500 of all medical expenses of the children not covered by insurance. The amount of his support obligation is substantial enough to require awarding him both of the tax exemptions. See id. at 263. Although the calculation of net monthly income factors in the exemptions, allocating the exemptions to David does not affect the amount of his support

allocation. The applicable percentage remains thirty. Due to the existing financial circumstances surrounding the parties, we instruct the trial court to allocate both of the tax exemptions on David's state and federal income tax returns to him as long as he is current in his child support payments at the end of his taxable year. See In re Marriage of Snead, 448 N.W.2d 705, 708 (Iowa App. 1989). The trial court shall order Trudy to execute IRS Form 8332 in favor of both children.

IV. Credit. The trial court held David was not entitled to a credit for child support paid through the clerk's office over and above the amount due under the terms of the decree.

"Divorced parents may contract between themselves concerning the support of their minor children if the children's best interests are not harmed thereby. It is only necessary to prove such an agreement with reasonable certainty, and the agreement may be shown by conduct and circumstances." In re Marriage of Wimmer, 349 N.W.2d 505, 507 (Iowa App. 1984) (quoting Anthony v. Anthony, 204 N.W.2d 829, 831 (Iowa 1973)) (emphasis added).

We conclude David failed to prove with reasonable certainty an agreement was reached whereby any amount he paid above and beyond the amount required under the dissolution decree would entitle him to a credit upon future payments. We affirm the trial court on this issue.

V. Attorney Fees. Trudy contends the trial court erred in failing to award attorney fees to her. She also claims she is entitled to attorney fees on appeal.

An award of attorney fees is not a matter of right but rests in the sound discretion of the trial court. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980); In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). An award of attorney fees may be granted depending on the parties' respective abilities to pay. In re Marriage of Richards, 439 N.W.2d 876, 883 (Iowa 1989) (citation omitted). The decision of the trial will not be disturbed on appeal absent an abuse of discretion. Schissel, 292 N.W.2d at 428. We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We affirm the trial court's denial of attorney fees at that level. We also decline to award attorney fees to Trudy on appeal; each party shall be responsible for his or her own attorney fees. Costs of this appeal are assessed one-half to David and one-half to Trudy.

AFFIRMED AS MODIFIED.