IN THE COURT OF APPEALS OF IOWA

No. 6-369 / 95-0506

FILED
DEC 20 1996
CLERK SUPREME COURT

IN RE THE MARRIAGE OF WENDY SUE KUPER AND KEVIN JOHN KUPER

Upon the Petition of
WENDY SUE KUPER,

Petitioner-Appellant,

And Concerning
KEVIN JOHN KUPER,

Respondent-Appellee.

Appeal from the Iowa District Court for Dallas County, Richard D. Morr, Judge.

Wendy Kuper appeals from a denial of her petition to modify the parties' dissolution decree by increasing Kevin Kuper's child support obligation. **AFFIRMED AS MODIFIED.**

Joseph A. Quinn of Nyemaster, Goode, McLaughlin, Voigts, West, Hansell & O'Brien, P.C., Des Moines, for appellant.

Kevin Kuper, Hubbard, Ohio, pro se.

Considered by Sackett, C.J., and Cady, J., and Perkins, S.J.* Streit, J., takes no part.

* Senior judge from the Fifth Judicial District serving on this court by order of the Iowa Supreme Court.

PERKINS, S.J.

Wendy and Kevin Kuper's ten-year marriage was dissolved in May 1983. Among other things, Wendy was awarded primary care of the parties' children: Stephanie, born August 17, 1973; Kenneth, born August 31, 1976; Keoni, born December 7, 1978; and Gary, born May 16, 1981. Kevin was ordered to pay $150 per month in child support for each child.

On June 23, 1994, Kevin filed a modification petition requesting a retroactive and prospective decrease in his child support obligation. Wendy cross-petitioned for an increase in child support in accordance with Kevin's increase in income. Both parties requested that the court determine the full amount of child support arrearage owed by Kevin.

A trial was held on February 22, 1995, and judgment was entered denying modification on March 15, 1995. Wendy appealed. However, Kevin was granted a motion to reopen the record and present additional evidence. The district court then filed its amended judgment on April 12, 1995. Wendy also appealed from this. Her appeals are consolidated under the docket number in this case.

The district court did not modify the decree. The court found only two minor children were still living with Wendy. The court stated although Kevin's current income would increase his child support obligation to $390 per month for both children under the guidelines, application of the guidelines would be inequitable and unjust because of the unreasonably heavy obligation with which Kevin was

confronted in the original decree. The court thus maintained Kevin's obligation at $300 per month for the two children going down to $150 upon emancipation of the next child.

The court further found Kevin's total child support arrearage was $66,000 but refused to order Kevin to pay any amount above the current child support towards the arrearage. Wendy's request for attorney fees was denied.

On appeal, Wendy challenges the failure to modify and apply the guidelines, the refusal to order extra payment towards the child support arrearage and the refusal to award attorney fees. She seeks appellate attorney fees.

Kevin also requests appellate attorney fees. Although there has been no notice of cross-appeal, Kevin's pro se brief appears to challenge the district court's assessment of the arrearage amount. However, the district court judgment states the parties stipulated to the amount in the judgment.

I. Scope of Review

Because the district court sat in equity in this modification proceeding, this court's review of the district court's decision is de novo. Iowa R. App. P.4; *State ex. rel. Lara v. Lara*, 495 N.W.2d 719, 721 (Iowa 1993).

II. Issue of Modification

The evidence in the record establishes that at the time of the original decree of dissolution in 1983 Kevin Kuper was working for his father and claimed he was receiving no pay check. He was required to pay $150.00 for each of four children.

At the time of trial of the modification in 1995, the evidence established Kevin's income to be $1,300.00 per month. Wendy's income was $1,325.00 per month.

Two minor children of the parties remained in Wendy's custody.

The appellant, Wendy, claims the trial court erred in finding there had not been a substantial change of circumstances since the original decree was entered, which would permit a modification of the child support obligation. We conclude there has been a substantial change since the original decree so as to increase the child support obligation. The trial court decision is reversed on this issue.

Iowa Code section 598.21(9) provides, "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 support guidelines

III. Issue of Amount of Support

Wendy the appellant claims the trial court erred in first incorrectly determining that Kevin's income was only $1,300.00 per month when it was actually $2,115.30 per month. The record does not clearly establish the facts Wendy relies upon and we adopt the trial court's finding in this regard.

However, Wendy further claims the trial court did not have sufficient legal reasons for his decision not to follow the Child Support Guidelines. We conclude the guidelines should be applied and reverse the trial court on this issue. The perceived

excessiveness of the prior support obligation is insufficient to rebut the statutory presumption in this case.

Iowa Code Section 598.21(4)(a) provides:

> There shall be a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. A variation from the guidelines shall not be considered by a court without a record or written finding, based on stated reasons, that the guidelines would be unjust or inappropriate as determined under the criteria prescribed by the supreme court.

The child support is fixed at $390.00 for two minor children. When the child support is reduced to support for one child the amount paid shall remain at $390.00 and the amount above the child support shall be applied upon the child support arrearage.

The trial court found the amount of arrearage in unpaid child support to be $66,000.00 at the time of trial. The parties stipulated to this amount.

The trial court in its discretion refused to allow attorney fees and we do not find this was an abuse of discretion. We do fix an attorney fee of $500.00 for Wendy upon the appeal.

Costs are taxed to Kevin.

AFFIRMED AS MODIFIED.