IN THE COURT OF APPEALS OF IOWA

No. 1-295 / 00-1428
Filed August 29, 2001

FILED
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CLERK SUPREME COURT

Upon the Petition of
DARYL L. MUHLBAUER,
Petitioner-Appellant,

And Concerning
KAREN J. BURSON-HELMS,
Respondent-Appellee.

Appeal from the Iowa District Court for Cass County, Charles L. Smith, III, Judge.

The petitioner appeals a district court ruling denying his petition to modify his child visitation schedule and child support obligation. **AFFIRMED AS MODIFIED.**

J.C. Salvo and Richard C. Schenck of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellant.

Christopher J. Tinley of Root, Tinley & Sondag, Council Bluffs, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HECHT, J.

Daryl Muhlbauer appeals from the dismissal of his petition for modification of a dissolution decree. He contends the district court erred when it refused to decrease his child support obligation and increase the amount of time he is permitted for visitation with his minor son. We affirm the decree as modified.

I. Factual and Procedural Background. Daryl Mulhbauer and Karen Burson-Helms are the parents of Darek, born on November 21, 1994. Following the end of Daryl's and Karen's relationship, the unmarried parents litigated the issues of physical care, visitation, and child support. A temporary order entered on January 9, 1998, provided the parties would have joint physical care of Darek during the pendency of the action. Under that arrangement, Darek's care alternated between the parents every four days.

On May 25, 1999, the district court's decree (1) granted the parties joint custody of Darek; (2) placed physical care with Karen; (3) allowed Daryl weekend, holiday, and summer visitation; and (4) ordered Daryl to pay $677 per month for child support. To determine Daryl's net income for child support calculations, the court added back depreciation deductions claimed by Daryl on his income tax returns for 1997 and 1998 and averaged the resulting net incomes for those two years. After making the depreciation adjustment, the district court found Daryl's net income to be $3403 per month. The court attributed income to Karen by assuming she worked forty hours per week and set her net income for child support purposes at $1079 per month. No appeal was taken.

On April 14, 2000, Daryl filed a modification action alleging a substantial change in his financial status. He claimed his child support obligation should be decreased based on his 1999 farm income, which was significantly less than his income for the previous two years. Daryl's pleading also requested an increase in visitation with Darek. Karen denied Daryl's allegation of a substantial change of circumstances, and in her counterclaim sought an increase of child support and a reduction of Daryl's visitation.

On August 7, 2000, the district court filed an order denying the modifications sought by both parties. Daryl appeals, contending (1) his 1999 income justifies a reduction in child support; and (2) the visitation schedule established by the decree should be modified because it has resulted in negative consequences for Darek. Karen does not appeal from the dismissal of her claim for modification.

II. Scope of Review. Our review in this equity case is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, except to provide a framework for analysis, and our decision must be based on the particular facts and circumstances before us. *Id.* The burden rests on the party seeking the

modification to establish such a change by a preponderance of the evidence. *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991).

III. The Child Support Issue. Because of the fluctuations of income inherent in the farming business, we have found it equitable to average a farmer's income during a period of twenty-four to thirty-six months. *In re Marriage of Crotty*, 584 N.W.2d 714, 718 (Iowa Ct. App. 1998) (affirming district court's computation of earnings based on average of two years farm income); *In re Marriage of Cossel*, 487 N.W.2d 679, 683 (Iowa Ct. App. 1992) (averaging three years of farm income). Daryl's income tax returns reported income of $29,382 in 1997, $19,611 in 1998, and $22,328 in 1999. When the applicable child support guidelines are applied to the average of the reported income for these three years, a support obligation of $329.49 per month results.

Daryl notes his tax returns for these three years utilized an accelerated depreciation model. We have previously observed the straight-line method of depreciation produces a more realistic picture of a farmer's net income than accelerated depreciation methods. Our supreme court has noted the child support guidelines do not mention depreciation deductions. *See In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991). However, we have applied the straight-line depreciation model to arrive at a farmer's income for purposes of calculating child support. *Cossel*, 487 N.W.2d at 683. If the applicable guidelines are applied to the average of Daryl's reported income for the years 1997 through 1999, adjusted to apply straight-line depreciation, a child support obligation of $234.98 per month results. Thus, Daryl contends under either

depreciation model his child support obligation deviates by more than ten percent from the support obligation established in the 1999 decree and justifies a modification. *See* Iowa Code § 598.21(9) (2000).

"Generally, completed federal and/or state income tax returns are the best evidence of income" for child support determinations. *In re Marriage of Will*, 602 N.W.2d 202, 204 (Iowa Ct. App. 1999). Daryl contends, however, it is inequitable to use his net income of $22,206 from the 1999 income tax return to assess whether a substantial change of financial circumstances occurred in this case. He points out his 1999 adjusted gross income was skewed or artificially increased because it included $25,231 due to the conversion of his traditional IRA to a Roth IRA[1]. This conversion of the IRA created taxable, but Daryl contends illusory, 1999 income that masked actual reported losses from the farming operation. Depressed commodity prices for the 1999 crop resulted in a net farm loss of $8775 for that year, as contrasted with net profits of $12,310 in 1997 and $5503 in 1998. Daryl contends if the IRA income is subtracted from his reported 1999 net income, and the income for that year is averaged with that of 1997 and 1998, the child support obligation under the guidelines would be only $222.40 per month without adjustment for the method of depreciation. If his income is further adjusted to straight-line depreciation, the guidelines would call for child support of only $100.03 per month.

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[1] See Internal Revenue Code section 408A(c) and (d) requiring inclusion in gross income of all amounts converted to a Roth IRA in the tax year in which the conversion was made.

Karen contends Daryl's tax returns are not credible representations of his income. She notes the district judge who presided in Daryl's 1992 dissolution proceeding found Daryl's reports of income unreliable and tended "to doubt that [Daryl] has ever reported all of his income. . . ." Daryl's credibility was also questioned by the district judge who authored the 1999 decree. That court found Daryl deducted $8192 in "wages" he claimed to have paid to Karen in 1995. Karen returned most of the money to Daryl who used it to satisfy his child support for a daughter born from his first marriage. The court found "Daryl will resort to less than honorable conduct to zealously protect his material accumulations," and noted "it is difficult to determine [Daryl's] exact net income. . . . " The court specifically referred to the fact Daryl had claimed an earned income credit on his 1998 return even though Karen claimed Darek as a dependent. In addition, Daryl inaccurately claimed for tax purposes that Darek resided with him during the entire year. Consequently, the district court added back accelerated depreciation deductions to income claimed by Daryl in 1997 and 1998 before setting the child support obligation at $677 per month in the 1999 decree.

Daryl did not appeal the district court's depreciation adjustment and finding of fact that his net income for child support purposes in May of 1999 was $3403 per month. Accordingly, we reject his assertion we should effectively reverse that determination in this modification action by calculating his child support obligation on his reported income for 1997 and 1998. We accept as fact the district court's determination of Daryl's net income for those years and

average it with net income for the year 1999 to arrive at his ability to pay child support.

In the determination of Daryl's net income for the year 1999, we do not consider the $25,231 reported as income because of the conversion of the IRA. Although the conversion did constitute a taxable event, it did not produce disposable income that we deem available for inclusion in net monthly income for purposes of child support calculations. Daryl urges us to further adjust his reported income for the years 1997, 1998, and 1999 because his tax preparer utilized the accelerated method of depreciation in those years. Although we have on occasion applied the straight-line method to make equitable adjustments, we decline to do so in this case. In the 1999 decree, the district court made a credibility assessment adverse to Daryl and added back accelerated depreciation before averaging Daryl's 1997 and 1998 income. Equity does not require additional depreciation adjustments at this time. After adjusting Daryl's 1999 income, and averaging over the three-year period, we find his net income for child support purposes is $2,433.98 per month. Net income of $1079 is attributed to Karen.[2] We modify Daryl's child support obligation to $533 per month.

We acknowledge Karen's assertion Daryl has considerable net worth and has used it to favor his children with various gifts. She contends we should not modify the support obligation because Daryl's conduct evidences a greater ability to pay child support than is reflected in reported earnings. "Generally, child

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[2] The district court attributed the same amount to Karen. Neither party challenges this finding on appeal.

support is figured on income, not net worth." *Will*, 602 N.W.2d at 206. We find no support in the record for Karen's implied assertion Daryl's generosity toward his children was funded from current income rather than from assets not classified as income for purposes of child support calculation.

IV. Visitation Issue. Daryl claims a change of circumstances requires a modification of his visitation with Darek. The schedule set by the district court permits visitation by Daryl every other weekend from 6:00 o'clock p.m. on Fridays until 7:00 o'clock p.m. on Sundays, customary alternating holiday visitation, and four weeks of summary visitation. The burden to change a visitation provision in a decree is substantially less than to modify custody. *In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa Ct. App. 1998). Our focus is on the child's best interests. Iowa Code § 598.41(1)(a) (1999); *Nicolou v. Clements*, 516 N.W.2d 905, 906 (Iowa Ct. App. 1994). There is evidence in the record tending to prove Darek is sad when visitation ends and on occasion requests permission to speak to his father by telephone. We find such emotion is not unusual when parents and children are separated due to the dissolution of their parents' relationship. Although it evidences a close bond between father and son, we are not persuaded Darek's sadness and Daryl's desire to spend more time with his son constitute a change of circumstances. After careful review of the record, we find Daryl has not met his burden of proof and we affirm on this issue.

AFFIRMED AS MODIFIED.