IN THE COURT OF APPEALS OF IOWA

No. 1999-207 (9-431) / 98-1960
Filed November 23, 1999

IN RE THE MARRIAGE OF KATHY BENSON AND ROBERT L. BENSON

FILED
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CLERK SUPREME COURT

Upon the Petition of
KATHY BENSON,
Petitioner-Appellee,

And Concerning
ROBERT L. BENSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Keokuk County, Daniel P. Wilson, Judge.

The respondent appeals a district court ruling denying his application to modify his child support obligation. Respondent contends the district court erred in: (1) failing to reduce his child support obligation due to an involuntary reduction in his income; and (2) deviating more than ten percent from the current child support guidelines. Respondent also argues that if a modification of his child support is warranted, that such modification order be applied retroactively to three months after petitioner was served with notice of the modification action. **REVERSED AND REMANDED.**

John C. Wagner and Jeffrey S. Ritchie of John C. Wagner Law Offices, P.C., Amana, of John C. Wagner Law Offices, P.C., Amana, for appellant.

Garold F. Heslinga of Heslinga, Heslinga & Dixon, Oskaloosa, for appellee.

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

HECHT, J.

Robert L. Benson appeals the district court's ruling denying his application to modify his child support obligation. He contends the district court erred by failing to reduce his child support obligation due to an involuntary reduction in his income and deviating by more than ten percent from the current child support guidelines. Robert also argues if a modification of his child support is warranted, such modification order be applied retroactively to three months after his ex-wife was served with notice of the modification action. We reverse and remand.

I. Factual Background and Proceedings. Robert and Kathy Benson were divorced on May 22, 1995. Kathy has physical custody of their two minor children; Robert has liberal visitation rights. At the time of the entry of the decree, Robert's gross income at Land O' Lakes was $32,000 per year and he was ordered to pay child support in the amount of $559 per month. Soon after the divorce, Robert was involuntarily laid off from Land O' Lakes when the company downsized. He searched unsuccessfully for employment in his area of expertise, the feed sales industry, until he went to farrier school (a person engaged in the business of shoeing horses). Since completing his training, he has been working as a professional farrier earning approximately $18,000 per year. He has continued to look for a higher paying job. He estimates he will make $20,000 a year in the next five years. Robert is now married to his second wife, Sara Benson, who makes approximately $35,000 per year. Robert and Sara do not have children together. Kathy has continued in the

employment she had at the time of the divorce and now makes approximately $37,251 per year.

On March 14, 1996, Robert filed an application to modify the decree (hereinafter, "first modification action") requesting a reduction in his child support obligation because he had recently lost his employment with Land O' Lakes. The district court denied his motion on March 17, 1997. Robert subsequently filed a motion pursuant to Iowa R. Civ. P. 179(b) which the court also denied. No appeal was taken from the district court's decision in the first modification action.

On December 8, 1997, Robert filed a second application to modify alleging a substantial change in circumstances arising from his inability to find employment paying as much as he had been making at Land O' Lakes. The district court denied his second application on October 6, 1998, holding the evidence did not establish a substantial and material change in circumstances since the entry of the prior ruling denying Robert's application to modify. Robert now appeals.

II. Standard of Review. Our scope of review of a child support modification action is de novo. Iowa R. App. P. 4; *In re Marriage of Bolick*, 539 N.W.2d 357, 359 (Iowa 1995). We give weight to the trial court's factual findings, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). We recognize the district court "has reasonable discretion in determining whether modification is warranted and the

discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983).

III. Substantial Change in Circumstances. Iowa Code section 598.21(8) allows the court to modify an order of child support when a substantial change in circumstances is shown. One of the factors the court is allowed to consider is whether there have been changes in the employment, earning capacity, income, or resources of a party. Iowa Code § 598.21(8)(a) (1999). The party seeking the modification must establish there has been a substantial change in circumstances by a preponderance of the evidence since the entry of the decree or its latest modification. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992). The first modification action was decided in March of 1997, and the issue now before us is whether there has been a substantial change in circumstances since that time.

The record indicates Robert's income has continued to be substantially less than the $32,000 which was determined to be his earning capacity in March of 1997. Robert has continued to search for a higher paying job in the months following the March 1997 ruling with no success. Although both this court and the district court could have benefitted from additional information regarding the specifics of his job search, we are persuaded Robert has delivered several applications for employment and has gone on several interviews since March of 1997. Notwithstanding these efforts, he has not received an offer of more lucrative employment. Sara's testimony

confirms Robert's efforts to obtain a higher paying job while steadfastly pursuing his work as a farrier since the district court ruled on the first modification action.

We note Robert's education is limited to a high school diploma and farrier training. The feed business has been his area of primary employment and experience. Suzie Drish, an employment counselor for the Job Training Partnership Act, testified, given Robert's limited education, it is not realistic to expect Robert to get a job making $32,000 per year. Ms. Drish observed opportunities in the feed industry have declined since March of 1997. She also testified employers within a fifty-mile radius of Robert's home are not hiring at compensation rates greater than his current earnings. While Kathy's counsel suggests various employment prospects for Robert at manufacturing plants located in the geographic area surrounding Robert's residence, Ms. Drish testified those plants are not hiring at starting wages exceeding what Robert currently earns as a farrier.

We conclude there has been a substantial change in circumstances since the ruling in the first modification action. Nearly three years have passed, and we are now convinced Robert has sustained a reduction in earning capacity which is permanent and continuous. We find the amount of Robert's earnings since March of 1997 are not the result of a voluntary or intentional effort to minimize or reduce his income. The record evidences changes in the livestock feed industry, which are totally outside Robert's control, have substantially diminished the value of his experience in, and knowledge of the feed business. Expert testimony in the record

tells us it is highly unrealistic to expect Robert to find a job in the feed business, or any other industry, with remuneration comparable to his $32,000 annual salary earned from Land O' Lakes. Therefore, we reverse the decision of the district court denying Robert's application for modification of child support.

Robert presents several different estimates of income from his farrier business. He estimated his 1998 income to be $18,000. He projected his future earning capacity to be $20,000 in the next five years. It is appropriate to consider earning capacity rather than actual earnings in applying the Uniform Child Support Guidelines. *In re Marriage of Flattery,* 537 N.W.2d 801, 803 (Iowa App.1995). We find the use of Robert's actual earnings ($18,000) would create a substantial injustice, or would require adjustments to provide for the needs of the children and to do justice between the parties. *See In re Marriage of Raue,* 552 N.W.2d 904, 906 (Iowa App. 1996). We find Robert's earning capacity to be $20,000 per year, and we will use that figure to determine his child support obligation. We also find Kathy's gross income has increased to $37,251 during the applicable time period. We conclude Robert's earning capacity should be considered in determining child support to adequately provide for the needs of his children and do justice between the parties. Using the child support guidelines, we therefore determine Robert's child support payment should be $410.87 per month.

IV. Retroactive Modification. Robert requests this court to retroactively modify his child support obligation to March 20, 1998. Though a support order may

be retroactively increased, it may not be retroactively decreased. *In re Marriage of Barker*, 600 N.W.2d 321, 324 (Iowa 1999); *Lee*, 486 N.W.2d at 306. Accordingly, the reduction of Robert's child support obligation shall commence in the month following the filing of this opinion. The case is remanded to the district court for entry of a modified support order that conforms with this opinion.

REVERSED AND REMANDED.