IN THE COURT OF APPEALS OF IOWA

No. 1-333 / 00-0399
Filed July 31, 2001

IN RE THE MARRIAGE OF LINDA MARIE URIAS AND MICHAEL EDWARD URIAS

FILED
JUL 31 2001
CLERK SUPREME COURT

Upon the Petition of
LINDA MARIE URIAS,
Appellee,

And Concerning
MICHAEL EDWARD URIAS,
Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom, Judge.

The respondent appeals a district court ruling on his application to modify the support provisions of the parties' dissolution decree. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Douglas R. Smalley of Riemenschneider, Rydell & Smalley, Des Moines, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

VOGEL, P.J.

Michael Edward Urias appeals the district court ruling on his application for modification of the support divisions of the decree dissolving his marriage to Linda Marie Urias. While we affirm the district court's decision to limit retroactive modification of support obligations, we reverse its determination that Linda was not obligated to contribute to the support of the parties' child. We therefore remand this matter to the district court for the setting of the appropriate support amount.

Background Facts and Proceedings. The marriage of Michael and Linda was dissolved following a stipulation and agreement in 1992. The stipulation placed the parties' minor child, Amber, in the physical care of Linda and required Michael to pay $406 per month in child support. Support was required until Amber turned eighteen, graduated from high school, married, died or otherwise became self-supporting.

In June 1998, when Amber was seventeen, the parties agreed that Amber should move into Michael's home for the summer months and that Linda would hold Michael harmless for the June, July and August 1998 child support payments. It appears this decision to alter Amber's physical care arrangement was rooted in difficulties between Amber and Linda. At the end of summer, Amber did not return to Linda's home.

Because Amber wanted to resume high school in her former school district, Michael entered into an agreement with Linda's sister, Donna Brumbaugh, to house Amber during the school year. This arrangement was

made without the foreknowledge or consent of Linda. In exchange for Brumbaugh's care of Amber, beginning in September 1998 Michael paid to either Brumbaugh or Amber $200 per month. Michael then initiated attempts to formalize the change in physical care, but Linda failed to actively respond to his requests. Finally, in January 1999, Michael filed a modification petition, seeking a change in primary physical care as well as past and future child support obligations. Although Amber had reached the age of eighteen prior to the modification hearing, future support was still at issue as Amber was not scheduled to graduate from high school until June 2000.

In its December 7, 1999, ruling the district court declined to alter the physical care arrangement of a child who was now a legal adult under Iowa law, but did rule on the pending child support issues. The court terminated Michael's support obligation to Linda as of May 1, 1999, and required Linda to file a satisfaction for the June, July and August 1998 child support payments. Citing statutory constraints, it further ruled that, despite the absence of Amber from Linda's home, Linda was entitled to support from September 1998 through April 1999.

In regard to future support, the court determined that from May 1999 forward, Michael alone was required to pay child support to Brumbaugh, with payments to be made until such time as Amber no longer qualified for support under the decree. In its ruling the district court did allow Michael a future opportunity to present evidence of any support payments made after September 1998 to Amber and Brumbaugh, for possible consideration as credit against his

support arrearage to Linda. After the court denied Michael's post-hearing motion to enlarge its findings and conclusions and modify its judgment, he appealed the modification ruling.[1]

Scope of Review. The court's standard of review in dissolution of marriage proceedings is de novo. *In re Marriage of Wagner,* 604 N.W.2d 605, 608 (Iowa 2000). The court is obliged to examine the entire record and adjudicate rights anew on the issues properly presented. *Id.*

Support Modification. Under the dissolution decree Amber was entitled to support until her scheduled high school graduation date, and that support was payable to Linda. Michael, however, made no support payments to Linda once their summer agreement ended, and although he began paying support to Brumbaugh in September 1998, the monthly payments were less than half of what was owed under the decree. Nor did Linda take an active role in providing for her daughter once Amber began residing with Michael. After June 1998, Linda's support of Amber consisted of a few dinners, some gifts, and one month in 1999, which appears to have been limited to Amber acting as a house sitter for Linda.

Michael does not question his obligation to support Amber up to and through her graduation date. Rather, he argues that paying past-due support directly to Linda, for eight months when Amber did not live with Linda, does nothing to provide for Amber's needs, and serves only as a windfall to Linda. He thus urges the support owed to Linda for September 1998 to April 1999 should

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[1] Although Michael appealed this ruling on February 29, 2000, the appeal was not transferred to this court until May 15, 2001.

be placed into a trust fund for Amber, or that a support obligation should be set for Linda in an amount that would effectively reduce her past-due support "windfall" to zero. Michael also renews his contention that Linda should share in any and all support to be paid to Brumbaugh from May 1999 onward.

While the issue of an alternative fund was raised in Michael's trial brief, it was not addressed in the district court's ruling. As this absence was not brought to the court's attention in Michael's post-ruling motion, the issue was not properly preserved for appeal. *See Ritz v. Wapello County Bd. of Sup'rs*, 595 N.W.2d 786, 789 (Iowa 1999). Nor can we order Linda to pay support prior to the time of the modification, to either Michael or Brumbaugh, as child support "may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party." Iowa Code § 598.21(8) (1999). The district court was therefore correct in finding that in this case, such a requirement limits retroactive modification for either party to a date no sooner than April 20, 1999.[2]

It was also appropriate for the district court to order Michael to make child support payments to Brumbaugh, as she is the person with "the care and support of the child." *See In re Marriage of Keller*, 478 N.W.2d 424, 425 (Iowa Ct. App. 1991). However, we do not think Michael should bear this burden alone, as both parents have an obligation to support Amber. *See Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa Ct. App. 1996). We therefore find that Linda has an obligation to

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[2] Since the record contains no proof of service, we assume, as did the district court, that the modification petition was served on the same date it was filed – January 20, 1999.

pay some amount of support to Brumbaugh from May 1, 1999, and until Amber is or was no longer eligible for support under the parties' initial dissolution decree.

The district court recognized Linda had such an obligation, but declined to set any amount of support because Linda's employment with Pioneer Hi-Bred International, Inc. was terminated just after the modification hearing. In its ruling on the modification petition the court noted that Linda's termination was due to a company restructuring and relieved Linda of any support obligation based solely upon her loss of employment. When Michael requested that the court consider Linda's earning capacity in his post-hearing motion, the district court disregarded Linda's earning capacity because her discharge was for a good reason.

Although a court typically looks to a party's actual earnings when setting a child support obligation, earning capacity can be substituted for actual earnings upon "a finding that, if actual earnings were used, substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties." *In re Marriage of Bonnette*, 492 N.W.2d 717, 722 (Iowa Ct. App.1992). In making such a finding, a court must examine a party's employment history, current earnings, and any reason why that party is not working. *See Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable*, 474 N.W.2d 581, 583 (Iowa Ct. App.1991). Even where a parent's employment was involuntarily terminated, other factors may require that parent to make child support payments based upon an imputed income that is above and beyond his or her present income level. *See In re Marriage of Flattery*, 537 N.W.2d 801, 803-804 (Iowa Ct. App. 1995).

While the district court did note Linda's termination was involuntary, there is no indication the court considered Linda's working history or her ability to find substitute employment. This is fairly significant, particularly in light of the fact that Linda's administrative assistant position was not being eliminated until January 7, 2000, and there was apparently a possibility she could obtain employment elsewhere in her company.[3] The court also seemed to be motivated by the fact there were only five months of support due between the time its ruling was filed and Amber's anticipated graduation date. However, Linda's obligation to share in the support paid to Brumbaugh began in May 1999, which requires Linda to share in Amber's support for thirteen months. It appears from the record that she was earning a net income of $1,867.28 for eight of those months.

Regardless of the legal obligations of the parties, Linda did not incur the daily responsibility of Amber's care for the eighteen months prior to the modification ruling, and presumably for the remaining five to six months between the ruling and Amber's high school graduation. Statutory law dictates her right to acquiesce to Michael's assumption of that responsibility, either directly or though his arrangement with Brumbaugh, yet continue to receive remuneration for eight of those months. To allow her to avoid her responsibility to pay any amount for

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[3] The district court's conclusion that Linda's employment had been terminated in November was based on an Application to Reopen Record filed by Linda on November 16, 1999. Attached to the application was a letter from a Pioneer employee to Linda's attorney:

> Due to the recent acquisition of Pioneer Hi-Bred International, Inc. by DuPont on October 1, 1999, and the subsequent restructuring within Pioneer, Linda Urias' administrative assistant position will be eliminated. Her final day unless she is able to find employment elsewhere in Pioneer will be January 7, 2000.

Amber's care during the remaining time, based solely on her loss of employment, would be unjust. Although we could attempt to arrive at an equitable amount to be paid by each party, we find the better course is a remand to the district court for a ruling as to the appropriate amount of support to be paid by each parent. At that time Michael may pursue seeking a credit against his accrued support obligation, based on payments made directly to Brumbaugh or Amber, for Amber's support.

Equitable Estoppel. Michael also argues the district court erred in finding any support owed to Linda from September 1998 to April 1999 was not equitably estoppel by Linda's acquiescence to the informal change in physical care. We find no error in the district court's determination, as a finding of estoppel in this case requires proof of three elements: "a clear and definite oral agreement" between Linda and Michael, that Michael acted to his own detriment in reliance upon the agreement, and that the equities entitle Michael to relief. *See In re Marriage of Harvey*, 523 N.W.2d 755, 757 (Iowa 1994). The record establishes that while Linda did not actively seek the return of Amber, she never affirmatively consented to Amber's living arrangements after August 1998, nor did she indicate she would waive her right to support while Michael or her sister retained care of Amber. Although Michael relied on Linda's acquiescence and did so to his detriment, and while we find the equities balance in Michael's favor, the record falls far short of demonstrating a clear and definite agreement concerning either Amber's physical care or Michael's support obligation.

Conclusion. We reverse the district court decision that the support payable to Brumbaugh, from May 1, 1999, until the end of Amber's support eligibility, was the responsibility of Michael only. We remand this issue with directions to set an appropriate child support obligation for both Michael and Linda, payable to Brumbaugh[4], giving due consideration to Linda's earning capacity if she remains unemployed. The remainder of the district court's ruling is affirmed. Also, should Michael pursue seeking a credit for past paid support, we direct the district court to consider any affidavits or other proof provided by Michael of payments after September 1998, made for the support of Amber.

We deny Linda's request for appellate attorneys fees and divide the costs on appeal, one half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.

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[4] This assumes Amber continued to reside with Brumbaugh.