IN THE COURT OF APPEALS OF IOWA

No. 4-611 / 94-1062

FILED
MAY 30 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF LISA DAWN CALIGIURI and LOUIS ANTHONY CALIGIURI

Upon the Petition of
LISA DAWN CALIGIURI,

Petitioner-Appellee,

And Concerning
LOUIS ANTHONY CALIGIURI

Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, James W. Brown, Judge.

Louis challenges the order modifying the child support provisions of the parties' dissolution decree. **AFFIRMED.**

Louis A. Caligiuri, Des Moines, pro se.

Greg Noble of Murray, Davoren & Jankin, Des Moines, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Lisa and Louis Caligiuri were divorced on May 29, 1986. Under the terms of the dissolution decree, Lisa was awarded primary physical care of the parties' one minor child, Nicole. The court ordered Louis to pay $75 per week in child support, which amounts to $325 per month.

On October 21, 1993, Lisa filed an application to modify the dissolution decree. She sought to have Louis's child support obligation increased. She also sought to modify the decree to provide that she would be responsible for Nicole's health insurance instead of Louis.

At the time of the dissolution decree, Lisa was unemployed. She testified Louis's child support obligation was set, however, with the expectation she would soon obtain employment. She is now employed by Allied Construction. In 1993 she earned $21,000 and had net monthly income of $1,457. She testified she planned to work only part-time in 1994 and anticipated earning $15,000. Lisa has remarried and is now known as Lisa York.

At the time of the dissolution decree, Louis was employed by Associated Grocers. He was still employed by the same company at the time of the modification hearing. In 1993 he earned $26,839, and had net monthly income of $1,843. Louis has also remarried.

On May 4, 1994, the district court issued a ruling modifying the dissolution decree. The court found there had been a substantial change of circumstances under Iowa Code section 598.21(9) (1993) because Louis's current child support obligation deviated by more than ten percent from the amount required by the child support guidelines. The court applied the guidelines to the parties' 1993 incomes. The court modified the dissolution decree to require Louis to pay child support of $414 per month. The court determined this increase should be made retroactive to January 1, 1994. The court also modified the decree to provide that Lisa should maintain the primary health insurance for Nicole.

Louis has appealed, pro se, the modification of the parties' dissolution decree. He first claims Nicole failed to show there was a substantial change in circumstances.

I.

We agree with the district court there has been a substantial change in circumstances under section 598.21(9). This section provides:

> Notwithstanding subsection 8, 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 established pursuant to subsection 4 . . .

Under the dissolution decree, Louis was required to pay child support of $325 per month. Under the most current guidelines, and using the 1993 incomes for both parties, we find Louis is required to pay $414 per month. The amount he was required to pay under the dissolution decree differs by more than ten percent from the latter

amount. Thus, under section 598.21(9) there has been a substantial change of circumstances. We may modify a dissolution decree when there has been a substantial change in circumstances. Iowa Code § 598.21(8).

II.

In the alternative, Louis claims that if there has been a substantial change in circumstances, application of the child support guidelines under the facts of this case would be inequitable. He states he is supporting three other children in addition to Nicole. He argues his increased child support obligation for Nicole has left him unable to adequately support the children of his current marriage. He believes his obligation to support his current family should have been given more consideration.

Louis has two children with his current wife. Apparently his wife's child from a previous relationship also lives in his household and this is the third child he claims he is supporting. Louis testified at the modification hearing that his wife sometimes receives child support for this child.

There is 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. *In re Marriage of Bergfeld*, 465 N.W.2d 865, 869 (Iowa 1991). The guideline amount may be adjusted upward or downward if the court finds an adjustment necessary to provide for the needs of the child and do justice between the parties under the special circumstances of the case.

State ex rel. Department of Human Services v. Cottrell, 513 N.W.2d 765, 768 (Iowa 1994).

Other familial obligations do not automatically justify a departure from the guidelines. *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 105 (Iowa 1994). However, the consideration of expenses related to support of children from a current marriage is germane in determining a parent's financial ability to pay and whether a strict application of the guidelines will result in substantial injustice. *Id.*

In order to justify deviation from the guidelines, a party should submit a financial affidavit showing personal living expenses in order to document the party's inability to meet those expenses if ordered to pay the amount required by the guidelines. *Cottrell*, 513 N.W.2d at 768 (*citing State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 695 (Iowa 1993)). We note that in *Reaves* the noncustodial parent submitted an affidavit of financial affairs and testified in detail to his monthly expenses. *Reaves*, 514 N.W.2d at 105.

We determine Louis has failed to show strict application of the child support guidelines here would result in substantial injustice. Louis did not present any financial information which would allow us to conclude that he in unable to pay the amount of support required by the guidelines or that payment of the guidelines amount will prevent him from meeting his personal expenses and those of his other children.

We also note that while Louis claims he supports four children, apparently his wife receives child support for one of the children.

III.

Louis raises a further argument that the court improperly considered his overtime pay in calculating his child suport obligation. He states his overtime is not guaranteed so it should not be considered.

Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). In circumstances where overtime pay appears to be an anomoly or is uncertain or speculative, a deviation from the child support guidelines may be appropriate. *Id.*

Our review of the record shows Louis's overtime hours have been relatively consistent since 1990. Because Louis's overtime pay is not uncertain or speculative, we agree with the district court's decision to include it within his gross income for purposes of calculating child support.

IV.

We conclude there has been a substantial change in circumstances under section 598.21(9). Louis has not shown sufficient reason to deviate from the child support guidelines. We affirm the decision of the district court finding Louis should pay the amount of child support required by the child support guidelines, which based on the

parties' incomes here is $414 per month. Costs of this appeal are assessed to Louis Caligiuri.

AFFIRMED.