IN THE COURT OF APPEALS OF IOWA

No. 9-104 / 98-0577
Filed July 23, 1999

IN RE THE MARRIAGE OF CHARLES SIMMERING AND JANET SIMMERING

Upon the Petition of CHARLES SIMMERING,

Petitioner-Appellee/Cross-Appellant,

And Concerning JANET SIMMERING,

Respondent-Appellant/Cross-Appellee.

FILED
CLERK SUPREME COURT

Appeal from the Iowa District Court for Muscatine County, Mark J. Smith, Judge.

Respondent appeals, and petitioner cross-appeals from the district court's order on petitioner's application for modification of the dissolution decree. **AFFIRMED.**

David L. Scieszinski, Wilton, for appellant.

John E. Wunder, Muscatine, for appellee.

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

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MAHAN, J.

Janet Simmering appeals and Charles Simmering cross-appeals from the district court's order on Charles' application for modification of the dissolution decree. Janet contests the modification of her child support obligation and requests trial and appellate attorney fees. Charles maintains he should have been awarded trial attorney fees and requests appellate attorney fees. We affirm.

Charles and Janet were divorced on February 14, 1995. Charles was awarded primary physical care of their daughter, Emily. Charles did not request child support from Janet. However, the district court ordered child support in the amount of $10 per week.

On July 22, 1996, Charles filed an application seeking modification of Janet's child support obligation. He alleged Janet's income had changed and she was a beneficiary of her mother's estate and would be receiving a large inheritance. The parties reached a settlement and the district court entered an order on May 1, 1997, increasing Janet's child support obligation to $120 per month.

On December 30, 1997, Charles filed the instant application because Janet had become employed full time. The child support issue was submitted to the court by stipulated facts. Janet's child support guidelines worksheet was based on her actual earnings for 1997. She calculated her net monthly income as $668.90 and her child support obligation as $100.33 per month. Charles' child support guidelines worksheet was based on Janet's monthly income from her new full-time employment; at the time

of the hearing Janet was earning six dollars per hour. He calculated her net monthly income as $834.90 and her child support obligation as $155.29 per month. The trial court ultimately used Charles' calculation and ordered Janet to pay $155.29 child support per month. The court did not award Charles trial attorney fees.

Janet appeals and Charles cross-appeals.

I. STANDARD OF REVIEW. Our review is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings, but we do give them deference considering its opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa App. 1995).

II. CHILD SUPPORT AWARD. Janet contests the modification of her child support obligation. She argues the trial court erred in using her "earning capacity" (Charles' figure) instead of her "actual income" (her figure) in calculating her child support obligation. However, both figures represent Janet's actual income calculated differently. Thus, the real question is whether the court erred in using the six dollar per hour figure rather than Janet's affidavit showing her actual income for 1997 in calculating her child support obligation.[1]

In applying the child support guidelines, the court must determine the parents' current monthly income from the most reliable evidence presented. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996). Janet does not dispute she was

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[1] In her brief, Janet states "both parties agree that the ten percent deviation under section 598.21(9) is applicable in this case." Thus, we need not discuss the parties' "substantial change in circumstance" arguments.

employed full-time and earning six dollars per hour at the time of the hearing. Thus, the trial court could use the $834.90 net monthly income figure to calculate her child support obligations. *See In re Marriage of Ober*, 538 N.W.2d 310, 312 (Iowa App. 1995) (it is not inequitable to use party's income at the time of trial). Pursuant to the guidelines, Janet was ordered to pay Charles $155.29 per month. There is nothing in the record to suggest the application of the guidelines in this case would be unjust or inequitable.

We do not agree with Janet's contention the district court used her earning capacity instead of her actual earnings.[2] The trial court's calculation of child support is affirmed.

III. ATTORNEY FEES. Charles and Janet each argue they should be awarded trial and appellate attorney fees.

Ordinarily, an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). An award of attorney fees depends upon the ability of the respective parties to pay, depending upon the financial circumstances and earnings of each. *Id.* We conclude the district court properly considered this issue and we find no abuse of discretion.

Similarly, an award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997).

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[2] We once again note appellant's brief, on page 7, admits the ten percent deviation under section 598.21(9) applies in this case.

In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. *Id.* We decline to award appellate attorney fees to either party.

We have carefully reviewed the issues on appeal and affirm the decision of the trial court.

AFFIRMED.

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