FILED
AUG 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-261 / 93-1388

IN RE THE MARRIAGE OF CYNTHIA ANN SWAN AND BRENT NOEL SWAN

Upon the Petition of
CYNTHIA ANN SWAN,

Appellant,

And Concerning
BRENT NOEL SWAN,

Appellee.

Appeal from the Iowa District Court for Des Moines County, Harlan W. Bainter, Judge.

Cynthia appeals the modification of the dissolution decree. **AFFIRMED AS MODIFIED.**

J. Bryan Schulte of Bauer, Schulte, Hahn & Swanson, Burlington, for appellant.

James W. Miller of Cray, Goddard & Miller, Burlington, for appellee.

Considered by Donielson, C.J., and Sackett and Huitink, JJ.

HUITINK, J.

Cynthia appeals the district court's modification of the parties' dissolution decree. We affirm.

Cynthia and Brent Swan's marriage was dissolved in 1986. They have two children: Audrey, born in 1980, and Heidi, born in 1982. Cynthia has physical custody of the children.

In a modification order entered in September 1991, Brent's child support was increased to $177.50 per week for both children. The court determined his net monthly income as a package driver for United Parcel Service (UPS) was $482.32; however, due to a settlement between the parties, the court did not follow the child support guidelines.

In May 1991 Brent sustained a work-related injury to his lower back. He underwent lumbar disc surgery in February 1992. In July 1992 a treating physician released Brent to return to work with restrictions but concluded a return to work would aggravate his back problem.

In his worker's compensation claim, Brent reached a lump sum settlement with UPS. In order to receive the best settlement, UPS required Brent to sign a resignation statement. After paying attorney fees, Brent received $42,304.25 in February 1993.

Brent filed for modification of the decree in October 1991. Cynthia filed a counterclaim and a rule to show cause.

After a consolidated hearing, the district court reduced Brent's child support to $100 per week for both children and relieved him of his insurance obligations. Cynthia sought the imposition of a trust on Brent's cash resources, but this was denied. The court found Brent had generally purged his contempt by bringing his child support obligation current with the exception of accrued interest.

Our review of a district court's modification decree is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of the witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Cynthia contends Brent's reduction in income is voluntary and should not have been considered by the trial court in setting child support. We disagree.

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the entry of the decree or its latest modification of the provisions involved. In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991). The party seeking the modification has the burden of showing such change has occurred. In re Marriage of Phillips, 493 N.W.2d 872, 874 (Iowa App. 1992).

This is not a situation where a parent is trying to gain an advantage by reducing his or her earning capacity and ability to pay support through improper intent or reckless conduct. See In re Marriage of Foley, 501 N.W.2d

497, 500 (Iowa 1993). Here, Brent suffered a back injury which clearly prevented him from returning to the same position at UPS without restrictions. The medical reports of Dr. Subbiah and Dr. Paul both indicated reservations about the likelihood that Brent could perform the same job after the surgery. We, like the trial court, are persuaded Brent's resignation from UPS was involuntary, given the seniority, salary, and benefits he gave up.

Brent was left with few opportunities to earn a similar salary given his back injury and limited education. He has chosen to pursue a career as a radiology technician, in part because of the low amount of physical activity required in the position. He expects to graduate in September 1995 and to earn approximately $21,000 per year.

We are satisfied, after a de novo review of the record, that Brent has met his burden of showing a substantial change in circumstances which warrants modification of child support. Given the circumstances, substantial injustice would result to Brent if he were required to continue making support payments based on his previous salary. Therefore, the district court is affirmed as to the reduction in child support.

However, we do not believe Brent should be relieved of his responsibility to provide health insurance for Audrey and Heidi. He received a net lump sum award of $42,000. He also received a substantial concession on his child support responsibilities. If we excuse him from providing

health insurance as well, then the children will suffer substantial injustice. By requiring Brent to provide insurance for Audrey and Heidi, they are guaranteed access to quality health care. We therefore modify the decision of the district court to require Brent to provide health insurance for his children.

Next, Cynthia contends the trial court erred in failing to find Brent in contempt for his failure to pay child support and medical support in a timely manner. We disagree.

An action for contempt of court is treated in the nature of a criminal proceeding. Amro v. Iowa Dist. Court, 429 N.W.2d 135, 140 (Iowa 1988). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Id. Our review of a finding of "not in contempt" is not de novo nor is the decision of the trial court lightly reversed. In re Marriage of Wegner, 461 N.W.2d 351, 353-54 (Iowa App. 1990) (citation omitted). We find substantial evidence to support the court's finding that Brent was not in contempt. We affirm on this issue.

Finally, Cynthia argues that a trust should be imposed on Brent's cash reserves to guarantee the future payments of child support and medical support. We disagree.

While the record reflects Brent voluntarily reduced his weekly child support payments in January 1993 and at times was sporadic in paying, the circumstances of this case do

not justify the creation of a support trust. In June 1993 Brent corrected his arrearage, except for interest, after he sold his home, and he has maintained the position that $100 per week support payments are manageable.

The court entered a judgment for Cynthia against Brent in the amount of $2,211.10 which represents unpaid medical and dental bills owed by Brent under the terms of the decree. We affirm. Our modification requiring Brent to provide health insurance for his children obviates the need for a trust for medical support.

Both parties request attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). The parties' requests are denied, and each shall pay his or her own attorney fees.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Each party shall be responsible for his or her own costs of this appeal.

AFFIRMED AS MODIFIED.