IN THE COURT OF APPEALS OF IOWA

No. 1-601 / 90-1778

IN RE THE MARRIAGE OF DALE E. PETERSON AND CAREN K. PETERSON

Upon the Petition of
DALE E. PETERSON,

740

Petitioner-Appellant/Cross-Appellee,

And Concerning
CAREN K. PETERSON,

Respondent-Appellee/Cross-Appellant.

FILED
APR 28 1992
CLERK SUPREME COURT

Appeal from the Iowa District Court for Marion County, Peter A. Keller, Judge.

Appellant seeks modification of the district court's order on the issues of summer visitation, child support, award of attorney fees to appellee, and award of the tax exemption to appellee. Appellee cross-appeals on the issue of visitation travel expenses. **AFFIRMED.**

Eric Borseth, Pleasant Hill, for appellant.

Bert A. Bandstra, Knoxville, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

FACTS

Dale and Caren Peterson were divorced on June 21, 1984. At that time, Dale was employed at Minnesota Mining and Manufacturing Company (3-M) in Knoxville, Iowa as an assembly line laborer. His net monthly income was $1,460. Caren earned a net income of $346 per month working at a local medicine shop. Their one child, Jeremy, was born on February 26, 1979.

The dissolution decree gave Dale and Caren joint legal custody of Jeremy and vested his primary physical care in Caren. On May 3, 1985, the district court entered a modification decree which incorporated an agreement by the parties. In that agreement, the parties stipulated that Dale's child support obligation would be reduced from $75 to $50 per week.

On April 11, 1986, the district court entered another modification decree granting Dale visitation rights every other weekend, alternating holidays, and four weeks in the summer. That modification decision was appealed and affirmed by operation of law by the Iowa Court of Appeals. See In re Marriage of Peterson, No.86-642, slip op. (Iowa App. March 31, 1987).

On November 4, 1985, Dale's employment at 3-M was terminated following a disagreement concerning his refusal to report for overtime work. The district court determined Dale's termination was due to his own voluntary act. In

1988, after being unable to obtain similar work in other manufacturing areas, he began working for his father at the Jerry Peterson Insurance Agency. His original job duties included secretarial and receptionist responsibilities. He has since become licensed to sell insurance but has not yet passed his insurance exam. By 1990, his net monthly income had reached $745.94.

Following the dissolution, Caren attended community college and obtained a medical assistant's degree. She moved from Knoxville, Iowa to Apple Valley, Minnesota. On the date of trial, she had a net monthly income of $1,042.72.

Since their dissolution, both parties have remarried. In 1989, Dale's wife had a gross annual income of $35,870.04 and Caren's husband had a gross annual income of $14,309. Caren and her husband have a new child born on June 19, 1990. Dale and his present wife have no children.

After Dale's termination from 3-M, he failed to remain current with his child support obligation. By the time of trial, he was approximately $3,000 in arrears. Since January 1989, he has been making payments of $25 per week on the arrearage.

On December 28, 1989, Dale filed an application to modify the decree entered on April 11, 1986. In his application, Dale requested the the court grant the following: 1) he be given visitation with Jeremy every third weekend; 2) he have Jeremy during the entire summer

vacation; 3) Caren be required to share the expenses of transporting Jeremy between Beacon, Iowa, where Dale now lives, and Minnesota; and 4) his child support be calculated on the basis of his present income, not his income at the time of dissolution. In her answer/cross petition, Caren requested the child support of $50 per week be increased.

On October 25, 1990, the district court modified the decree making Caren responsible for carrying the medical and hospitalization insurance on Jeremy through her employer. Although the court found Dale had a present real earning capacity of $1,460 per month for purposes of computing child support, the court believed that to apply the child support guidelines would be inappropriate and that substantial injustice would result.

The court held Dale's child support obligation would remain at $50 per week. Additionally, Dale would continue to pay $25 each week on his arrearage. Caren was entitled to claim Jeremy as a tax exemption. The court denied Dale's request of visitation during the entire summer vacation period, but did order Caren to transport Jeremy to a halfway point when Dale exercises his visitation. Finally, the court ordered Dale to pay Caren $500 for attorney fees.

Dale appeals; Caren cross-appeals.

ISSUES

There are five main issues in this appeal. First, whether the appellant's summer visitation should be increased. Second, whether the appellant's child support obligation should be reduced. Third, whether the tax exemption of the minor child should be awarded to the appellant. Fourth, whether attorney fees should be awarded to the appellee. Fifth, whether the appellee should be required to share one-half of the travel expenses when the appellant exercises his visitation.

SCOPE OF REVIEW

Our review in this case 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 witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

ANALYSIS

Modification of a dissolution decree is only allowed when there has been a material and substantial change in

circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973) (citations omitted). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been in the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

I. **Visitation**. Appellant argues his visitation during the summer should be increased from four weeks to ten weeks. We affirm the district court on this issue.

In establishing visitation rights, our governing concern is the best interest of the child. Petition of Deierling, 421 N.W.2d 168, 171 (Iowa App. 1988). In this

regard, generally, liberal visitation rights are in the children's best interest. In re Marriage of Kerber, 433 N.W.2d 53, 54 (Iowa App. 1988); In re Marriage of Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). Iowa Code section 598.41(1) states in pertinent part:

> The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent, and which will encourage parents to share the rights and responsibilities of raising the child.

Iowa Code §598.41(1) (1991).

Although appellee has moved to Minnesota, appellant has not been denied visitation with Jeremy. We are unable to conclude there has been a substantial and material change in circumstances. The visitation schedule provides Jeremy the opportunity for the maximum continuing physical and emotional contact with both parents. We believe, the visitation granted by the district court is appropriate. Therefore, we affirm the district court's decree granting appellant four weeks of summer visitation.

II. Child Support. Appellant argues his child support obligation should be reduced. We affirm the district court on this issue.

"Child support is generally not reduced because of self-inflicted or voluntary reductions in income." In re Marriage of Fidone, 462 N.W.2d 710, 712 (Iowa App. 1990). See In re Marriage of Vetternack, 334 N.W.2d 761, 762-63 (Iowa 1983); Ellis v. Ellis, 262 N.W.2d 265, 268 (Iowa 1978); Reed v. Reed, 260 Iowa 1166, 152 N.W.2d 190, 191 (1967); In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). "Any voluntariness in diminished earning capacity has become increasingly an impediment to modification." In re Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983).

At trial, Dale admitted he voluntarily refused to work overtime. His failure to work overtime resulted in his termination from 3-M. The district court determined Dale's termination and subsequent reduction in income were due to his own voluntary act and, therefore, refused to reduce his child support obligation. We agree with the district court. We also agree it would be inappropriate to apply the child support guidelines for to do so, under the circumstances here, would create a substantial injustice to the parties. Dale's child support obligation remains at $50 per week.

III. **Tax Exemption**. Appellant argues the tax exemption of the minor child should be awarded to him. We affirm the district court on this issue.

Generally, the custodial parent is allowed to claim the dependency exemption. I.R.C. §152(e)(1) (1988). The custodial parent is treated as having furnished over half of the child's support. Id.

> There are three exceptions to the rule that a custodial parent is entitled to the dependency exemption:
>
> (1) when there is a multiple support agreement that allows the child to be claimed as a dependent by a taxpayer other than the custodial parent;
>
> (2) when the custodial parent releases his or her right to the child's dependency exemption to the noncustodial parent by executing IRS Form 8332; and
>
> (3) when a pre-1985 divorce decree or separation agreement between the parents grants the exemption to the noncustodial parent and the noncustodial parent provides at least $600 of the support of the child for the year in question.

In re Marriage of Kerber, 433 N.W.2d 53, 55 (Iowa App. 1988)(citing I.R.C. §152(e)(2)-(4) (1988)).

None of the above exceptions are applicable to the case at bar. Therefore, we apply the general rule awarding the tax exemption to the custodial parent. We affirm the district court's order granting Caren the tax exemption.

IV. **Attorney Fees**. Appellant argues attorney fees should not be awarded to appellee. We affirm the district court on this issue.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award, the complaining party must show the trial court abused its

discretion. Id. In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982) (citation omitted). 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) (citations omitted).

The district court listed the following reasons for requiring Dale to pay Caren $500 for attorney fees: in the past, Dale has unsuccessfully petitioned the court for custody of Jeremy; he voluntarily terminated his employment at 3-M; he cast the obligation of maintaining hospital and medical insurance for Jeremy upon Caren; and he failed to pay child support. We are unable to conclude the district court abused its discretion in awarding attorney fees based on the above factors. We affirm the district court on this issue.

V. Visitation Travel Expenses. In her cross appeal, appellee argues she should not be required to share one-half of the travel expenses when appellant exercises his visitation. We affirm the district court on this issue.

In In re Marriage of Wahlert, 400 N.W.2d 557, 561 (Iowa 1987), the Iowa Supreme Court found it equitable to require the mother and father to share visitation travel expenses. In the case at bar, we find it is equitable for the parties to share the responsibility of transportation and the travel expenses when Jeremy visits his father in Iowa. We affirm the district court on the issue of visitation travel expenses.

CONCLUSION

After considering all issues presented, we affirm the district court in all respects.

Costs of this appeal are taxed to the appellant.

AFFIRMED.