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FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-175 / 92-854

IN RE THE MARRIAGE OF LINDA SUE BURKHOLDER AND LARRY GEORGE BURKHOLDER

Upon the Petition of
LINDA SUE BURKHOLDER,

Appellee/Cross-Appellant,

And Concerning
LARRY GEORGE BURKHOLDER,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Grundy County County, James L. Beeghly, Judge.

The husband appeals and the wife cross-appeals the modification of the dissolution decree which increased his child support obligation. **AFFIRMED.**

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

Douglas V. Coonrad of Douglas V. Coonrad, P.C., Hudson, for appellee.

Considered by Oxberger, C.J., Schlegel, J., and Peterson, S.J.* Donielson, J., takes no part.

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

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PETERSON, S.J.

Linda and Larry Burkholder were married in 1969. They had three children: Laura, born on July 8, 1975; Lisa, born on February 15, 1978; and Leslie, born on October 11, 1979.

A dissolution decree was entered for the parties on January 10, 1983. At the time the decree was entered Larry was employed as a CPA in Grundy Center, and his income was $36,000. Linda earned about $13,000 to $14,000 from her employment as a piano teacher and church organist. Linda was awarded the care and custody of the children. Larry was ordered to pay $625 per month in child support for the three children.

Larry filed an application for modification on December 9, 1986, asking for a reduction of his child support. He stated that he had lost his job and had only a temporary job during tax season. At that time Linda's income was about $16,375. Larry was earning $2,800 per month. The court modified the decree to award the parties joint legal custody of the children, with primary physical care remaining with Linda. The court found there had not been a substantial change in circumstances such as to warrant a reduction in child support.

Linda filed an application for modification on June 12, 1991, seeking an increase in Larry's child support obligation.

Since the previous modification, Larry has moved to California. He is the director of a professional CPA corporation and earns annual income of $60,000. Larry has remarried, and his present wife earns about $37,000 per year as a respiratory therapist.

Linda is still employed as a piano teacher and church organist. Her income is currently about $18,000, and she has net monthly income of about $1,050.

The district court entered its order on May 5, 1992. The court found Larry's net monthly income was $3,509. The court did not adopt Larry's proposed deductions for business expenses. The court applied the child support guidelines, and Larry's child support obligation was increased to $1,228.15 per month and was made retroactive to June 12, 1991, the date Linda filed the application for modification. Larry was also ordered to pay $1,200 for Linda's attorney fees. Larry appealed, and Linda cross-appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

Pursuant to Iowa Code section 598.21(8), a court of competent jurisdiction may subsequently modify a decree of dissolution where there has been a substantial change in

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circumstances. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991). To justify a modification, some material change must be shown in the circumstances of the parties, financially or otherwise, making it equitable that other or different terms be imposed. Id. The circumstances which have changed must be those which were not them within the contemplation of the court when the decree or any subsequent modification was entered. Id.

II. Larry contends the district court improperly calculated his net monthly income for purposes of applying the child support guidelines. Larry sought to deduct his expenses for entertaining clients from his income because he claimed these expenses were unreimbursed. He also claimed he contributed $1,250 per month back into the accounting firm to keep it in business, and he sought to deduct this expense from his income.

We first note Larry is not disagreeing that his child support obligation ought to be increased by some amount or that the child support guidelines should be applied. We also note that under Iowa Code section 598.21(9) (1993), a substantial change in circumstances exists when the court order for support deviates by ten percent or more from the amount which would be due pursuant to the most current child support guidelines. In order to apply the guidelines, a court must determine the parents' current monthly income from the most reliable evidence presented. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991).

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This often requires the court to carefully consider all of the circumstances relating to the parents' income. Id.

We agree with the district court that Larry failed to produce reliable evidence to prove these business expenses. At one point Larry testified that he was trying to get the accounting firm to reimburse his business expenses. He stated, "If they can't reimburse it, I do not expend it on the most part." He also stated, "I think that I probably will incur some business expenses of some nature, and I am estimating those for '92 may be $6,000 . . . ." We conclude this evidence is not sufficient to allow a deduction from Larry's income. It is not clear whether or not he will have any unreimbursed business expenses, and, if he does have such expenses, the amount, if any.

Larry's payment of $1,250 per month into the firm, is actually for capital acquisition and not a business expense. Larry stated he had a capital balance in the firm that was reflective of his share of any of the current obligations of the partnership. We find Larry is making a capital contribution indirectly to the partnership, and these payments should be not deducted from his income for child support calculations.

III. Larry contends the district court abused its discretion in making the increased child support award retroactive to the date Linda filed the application for modification.

A trial court has authority to make an increase in child support payments retroactive to the date of filing the petition to modify. In re Marriage of Lee, 486 N.W.2d 302, 306 (Iowa 1992); In re Marriage of Shepherd, 429 N.W.2d 145, 147 (Iowa 1988). This is because the right to modification commences on the date the application is filed if the grounds for modification exist at the time the application is filed. In re Marriage of Keopke, 483 N.W.2d 612, 614 (Iowa App. 1992). The trial court has the discretion to decide if the increased payments will begin from the filing date or from the date of the modification order. In re Marriage of Stanley, 411 N.W.2d 698, 702 (Iowa App. 1987).

We determine Larry has not shown an abuse of discretion here. The grounds for modification existed at the time the application was filed. Also, the increase in support was substantial, and the case was not decided until almost a year after it was filed. Some of this delay was because Larry challenged the court's jurisdiction and his reluctance to participate in discovery. We agree with the district court's decision that Larry's increased obligation for child support should be made retroactive to the date the application was filed.

IV. Larry also argues that if the child support award is made retroactive this portion of his obligation should be placed in a trust fund to be used for the children's higher education.

We first question whether this question has been preserved for review because we find no mention of it before the trial court. However, even if this issue has been preserved for appeal, we do not find a reason sufficient to require the retroactive support to be placed in a trust fund.

Iowa Code section 598.21(5) only gives the court discretion to set a fund aside to protect the children or to promote their best interests when the circumstances warrant such a disposition. In re Marriage of Richards, 439 N.W.2d 876, 879 (Iowa App. 1989). A trust fund is justified when the record reflects an unwillingness or inability of either party to meet the legal obligation of support. In re Marriage of Fountain, 492 N.W.2d 707, 711 (Iowa App. 1992); In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). Without such a justification, no reason exists to create a trust or conservatorship. Fountain, 492 N.W.2d at 711.

We find Larry has not shown a sufficient reason for us to order the retroactive child support obligation to be placed in the trust fund he has created for the children. This does not prevent the parties from agreeing between themselves to place the retroactive support in a trust fund.

V. In her cross-appeal Linda seeks a greater award of trial attorney fees. The district court ordered Larry to pay $1,200 towards Linda's trial attorney fees. Linda

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states her trial attorney fees were $3,360 and asks that Larry be ordered to pay this amount.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award the complaining party must show that the trial court abused its discretion. Id. We find no abuse of discretion here.

VI. Finally, Linda seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. Id. 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 obligation to defend the district court's decision on appeal. Id. at 104.

We determine Larry should pay $500 towards Linda's attorney fees for this appeal.

We affirm the district court on all issues. Costs of this appeal are assessed to Larry.

AFFIRMED.