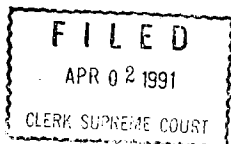


IN THE COURT OF APPEALS OF IOWA

No. 0-493 / 89-1713



IN RE THE MARRIAGE OF PAMELA R. JEDDELOH AND LARRY L. JEDDELOH

Upon the Petition of
PAMELA R. JEDDELOH,

186

Appellee/Cross-Appellant,

And Concerning
LARRY L. JEDDELOH,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Jasper County,
William Joy, Judge.

Both parties appeal an order modifying the amount set
as child support. Wife cross-appeals an increase in
visitation. **AFFIRMED IN PART AND REMANDED IN PART.**

Charles F. Fairall and Marie Condon of Fairall,
Fairall, Kaplan, Hoglan, Condon & Klaessy, Marshalltown,
for appellant.

Sharon Soorholtz Greer of Cartwright, Druker & Ryden,
Marshalltown, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

SCHLEGEL, J.

Respondent Larry Jeddeloh appeals a district court order modifying his dissolution of marriage decree. He argues that the court erred in increasing his child support obligation. Petitioner Pamela Jeddeloh, now known as Pamela Siemonsma, cross-appeals the same order. She argues that the court erred in failing to increase Larry's child support obligation adequately, failing to extend Larry's child support obligation past the age of majority, and increasing Larry's visitation. Pamela also requests an award of appellate attorney fees. We affirm and remand.

I.

The parties' marriage was dissolved in 1986. The parents have joint custody over their three children, who are girls born in July 1978, December 1980, and July 1983. The petitioner, Pamela, has primary physical care of the children. Under the 1986 decree Larry is required to pay \$345 per month in child support. In 1987 he raised his payments to \$395 per month and in 1988 to \$445 per month. He alleges that Pamela demanded these increases in "payment" for additional visitation rights.

When the decree was entered, Pamela was living in east central Iowa and Larry was living in northwest Iowa. The decree provided visitation only every other weekend and every other holiday. Both parties have since remarried, and they now live about eighteen miles apart in northwest Iowa.

In 1989 Larry applied for a modification of his visitation rights. His evidence showed that Pamela required him to purchase additional time with his children and that she interferes with his visits by frequent telephone calls and by changing visitation times to suit herself. He complains also that he is never informed of school conferences or activities. He alleges that he must pay Pamela to sign a dependency exemption form despite being so entitled under the original decree.

Pamela also applied for a modification of Larry's child support obligation. The district court found that Larry presently is a successful businessperson who has turned a car dealership whose viability was "questionable" in 1986 into a going concern. Larry is the sole shareholder in the dealership corporation, a subchapter "S" corporation, and privately owns the building in which it is housed. Thus, he sets his salary at \$16,680 per year and pays himself rent. The corporation also provides his health insurance, a car (which also is available to his wife), and gasoline. Larry admits that the corporation pays for other personal items, such as attorney fees and his wife's engagement ring.

While Larry's personal net worth has gone from \$4,000 in 1986 to approximately \$87,000 in 1989, the corporation's equity and gross income have doubled. The corporation has switched from negative retained earnings in 1986 of \$24,768 to positive retained earnings in 1988 of \$18,827. In 1988

the balance sheet showed \$254,252 assets, \$155,425 liabilities, and \$98,827 equity.

Our review of dissolution modification orders 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.

II.

The court has the authority to modify orders pertaining to custody and visitation. Iowa Code §§ 598.21(6), 598.21(8) (1991). The legislature has mandated in Iowa Code section 598.41(1) that:

[t]he 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 . . . and which will encourage parents to share the rights and responsibilities of raising the child.

The supreme court has held that the change in circumstance justifying a modification of visitation rights need not be as extensive as required for a modification of support obligations. See Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973).

The record shows that Pamela has changed her residence since the original decree was entered. See Iowa Code § 598.21(8)(f) (1991). This change brought her across the state to within a few miles of Larry. Because the decree

appears to have been crafted with a greater distance and fewer possible visits in mind, we believe a change in circumstances warranting a modification in visitation rights has occurred. Further, the children all are now in school, and the older girls are approaching an age at which they may be more active in school and extra-curricular functions. De facto modifications by the parties support this finding of a change in circumstances. In accordance with legislative encouragement of "parents to share the rights and responsibilities of raising the child[ren]," it thus is appropriate to require Pamela to keep Larry informed of the children's activities and to arrange visitation accordingly.

We have examined the order establishing detailed visitation rights for Larry. The schedule is a common arrangement in which the non-custodial parent has visitation on alternating weekends and holidays, a brief mid-week visit, and four weeks during the summer. The order places appropriate restrictions on Pamela's interference with Larry's visits and conditions preventing the visits from being disruptive of the children's lives and activities. We therefore affirm the order setting the visitation schedule.

We remind both parties that liberal visitation rights are in the best interests of the children. Iowa Code § 598.41(1) (1991); In re Muell, 408 N.W.2d 774, 777 (Iowa App. 1987). Both parents, as joint custodians, are charged

with maintaining those interests. We caution Pamela against withholding rights lawfully due Larry. See Iowa Code § 598.21(8)(j) (1991). We are bound to consider as "significant" in custody arrangements any "denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause" Iowa Code § 598.41(1) (1991).

III.

The district court has reasonable discretion in determining whether modification of support obligations is warranted, and we generally will not disturb its decision unless there is a failure to do equity. In re Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983)).

The district court properly determined that Larry's support obligation should be modified. We have reviewed the record de novo and agree with the district court's determination that Larry's net worth and earning capacity have increased substantially since the decree was entered. It is clear, too, that the children are older and have more expensive needs. We are fully satisfied that the change in circumstances are in accord with the principles expressed in Kern, 408 N.W.2d at 389, and Vetterneck, 334 N.W.2d at 762. Given that the children are still fairly young and that the district court expressly retained jurisdiction over the issue of post-majority support, we find that the

district court did not err in refusing to further modify Larry's support obligation.

Unfortunately, the district court entered its order modifying the child support provision without reference to the child support guidelines. Because the decree does not apply the child support guidelines, we are compelled to remand with directions to apply the rules as set forth in the supreme court order of October 16, 1990. See In re Bergfeld, No. 27/89-1316, slip op. at 11 (filed February 20, 1991). Under that order, "the court shall not vary from the amount of child support which would result from the application of the guidelines without a written finding that the guidelines would be unjust or inappropriate" (Emphasis supplied.) The district court apparently did vary from the guidelines and did so without a finding that they were unjust or inappropriate. We therefore remand this case to the district court to enter an appropriate order following the procedure mandated by the supreme court order. See Bergfeld, slip op. at 11 (upon finding change in circumstances, court must apply guidelines). Pending said hearing on remand, we order child support to be paid as fixed by the modification order. We do not retain jurisdiction. See In re Oakes, 462 N.W.2d 730, 733-34 (Iowa App. 1990); In re Craig, 462 N.W.2d 692, 693 (Iowa 1990).

As we have noted above, there is much contention over whether and to what degree the corporation's income should

enter into the calculus of Larry's personal income. We address this issue briefly in the event it arises on remand. Provided all criteria specified in the supreme court order are met, it may be "unjust and inappropriate" to apply the child support guidelines if the record reflects evidence that the payor voluntarily has failed to realize personal income. A voluntary diminution of earning may occur through sole control of a business, and a court may be justifiably skeptical of an owner-employee's alleged inability to pay himself more. This is not a new concept in our law. See Reed v. Reed, 260 Iowa 1166, 1168, 152 N.W.2d 190, 191 (1967). The court may look to long range capacity and voluntary diminution of capacity to establish the payor's obligation. Vetternack, 334 N.W.2d at 763; accord In re Wahlert, 400 N.W.2d 557, 560-61 (Iowa 1987). As the supreme court has pointed out, this is not intended to deter an individual from making good faith decisions affecting individual income; however, the payor is not free to plan his economic future without regard to support obligations owed. See Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978); accord Reed, 260 Iowa at 1168, 152 N.W.2d at 191.

IV.

We are not persuaded that Pamela is entitled to payment for attorney fee expenses generated for this appeal. An award of attorney fees is not a matter of right, but rests

within the court's discretion. In re Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We are satisfied that Pamela has sufficient resources to pay for her attorney fees and that she has generated much of the cost associated with her application for modification and this appeal.

V.

We conclude that the judgment of the district court should be affirmed with respect to its order modifying visitation rights. We remand to the district for further proceedings pertaining to the question of child support. Having considered the record, we find that the parties' other assignments of error are without merit, and that the order of modification should be affirmed in all other respects. The costs of this appeal shall be taxed one-half to each party.

AFFIRMED IN PART AND REMANDED IN PART.