IN THE COURT OF APPEALS OF IOWA

No. 3-160 / 91-1422

FILED
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JEANNINE McINTIRE n/k/a **JEANNINE KOHLMEYER,**

Appellee,

vs.

TERRY LANG LEONARD,

Appellant.

Appeal from the Iowa District Court for Linn County, Lynne E. Brady, Judge.

Father appeals from a modification order which increased his child support obligation. **AFFIRMED.**

Jon M. Kinnamon of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, and William G. Faches of Faches, Gloe, Quint & Martin, Cedar Rapids, for appellant.

Bonnie J. Campbell, Attorney General; John Parmeter, and Kay Delafield, Assistant Attorneys General; and Corenne Liabo, Friend of Court, for appellee.

Considered by Donielson, P.J., and Schlegel and Habhab, JJ.

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HABHAB, J.

Jeannine McIntire and Terry Lang Leonard are the natural parents of Eric McIntire, (also known as Terry Lang McIntire, hereafter "Eric") born October 5, 1978. The parties never married or lived together and Jeannine has custody of the child. In 1980 the district court ordered Terry to pay $162.50 per month child support.

In May 1989, Jeannine filed a petition to modify the support order. Terry filed an affidavit of financial status but did not respond to all requested discovery. Jeannine then filed for sanctions. The hearing had to be twice reset by the court. Jeannine requested a continuance because the expert she had retained had a conflict of interest. Before the hearing Jeannine had amended her request to increase child support to $800 per month or in such amount as required by the guidelines.

Jeannine had been earning $11.56 per hour from the State of Illinois but had been laid off in May 1991. At the time of trial her only income was $728 per month from unemployment. The court found that it did not appear she would be reemployed in the near future.

Terry operates a trucking business he formed in 1986. He is the sole shareholder in the corporation Rolling Oats, Ltd., which has eleven trucks and nine drivers. He receives both a salary and rental income from the corporation. The court found that his net income was

$4520.33 per month and that he was paying $125 per week for support of two other children.

The district court ordered Terry (1) to obtain a life insurance policy in the amount of $96,000 with only the child as beneficiary, (2) to provide medical and dental insurance for the child and pay any medical and dental expenses not covered, and (3) to pay $184.62 per week (the equivalent of $800 per month) support. The court made the increased support award retroactive to the date of filing and ordered Terry to pay court costs and $1485 in fees to Jeannine's CPA. Terry appeals. We affirm.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Substantial Change in Circumstances.

Terry argues there was no substantial change in circumstances which justified raising his child support obligation.

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). "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)).

We find that Terry's income has increased significantly since the original decree. Terry's trucking operation has grown from five trucks to eleven trucks. (See also division II). In contrast, Jeannine's income has increased by a relatively small amount. (See division III). In addition, Eric's needs have increased. Eric is in need of orthodontic services to avoid possible permanent tooth loss from "severe crowding and malocclusion." Eric would also like to attend College for Kids, an educational activity designed for children that scholastically have excelled in school. We agree with the district court that there has been a substantial change in circumstances.

II. Terry's Net Income.

Terry is the sole shareholder of a closely-held corporation called Rolling Oats Ltd. The majority of evidence presented at trial surrounded the determination of the actual net income of Terry. A number of documents were presented, as well as expert testimony from Peggy Kuda, a

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CPA who reviewed the financial documents, and from Terry's accountant, Rodney Kubichek.

Ms. Kuda testified that based on the records for the month of July 1990 through March 1991, Terry had $54,243.96 as cash available for payment of child support, or $4,520.33 per month. The district court deducted from this figure the amount Terry pays in child support to his two other children and determined Terry's net monthly income as $3,978.66.

We agree with the district court that the most reliable evidence of Terry's personal net income came from Ms. Kuda's cash flow analysis.

Terry now argues the district court erred by not deducting taxes from the cash available figure. Terry's recent tax returns show no taxes due and owing at the time of filing of his 1987, 1988, 1989 and 1990 tax returns. Terry states that these returns do not reflect his actual tax liability. Terry claims that he is currently under IRS audit for those years and that he expects to have to pay income tax. In addition Terry expects to owe penalties and interest. Terry now asks us to deduct from his child support obligation what he claims is his true tax liability.

The child support guidelines allow Terry to deduct from his net income federal and state income taxes properly calculated withholding or estimated payments. We agree with the district court in its reliance on Terry's tax

returns for the last four years which showed Terry did not owe income taxes.

III. Jeannine's Net Income.

Terry next claims the district court erred in calculating Jeannine's net income. Jeannine's income has been sporadic. At the time the original support order was entered into she was receiving Aid to Dependent Children (ADC). In 1989 she was earning $658.00 per month. In 1990 Jeannine earned $11.56 per hour as a State of Illinois employee, but was laid off in May of 1991. During the summer of 1990 she also held a second job with University of Illinois. For 1990 her net income averaged $975.00 per month. Since being laid-off Jeannine collects unemployment of $728 per month. The district court found it unlikely Jeannine would be re-employed in the near future.

Given Jeannine's past employment history, the unlikelihood of her returning to the employment of the State of Illinois and her current income, we find the district court appropriately calculated her current income as the measure of her earning capacity. We therefore find Jeannine's net income to be $728 per month.

IV. Terry's Child Support Obligation to Other Children.

Terry next contends the district court should have awarded a child support award for Eric which was proportionate to the awards of the two other children Terry

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had an obligation to support. Terry argues it is inequitable to award child support for Eric at $800.00 per month when the total amount of child support for these two other children is only $541.67 per month.

The district court, in accordance with the child support guidelines, deducted the prior child support obligations actually paid pursuant to a court order. The district court then applied the table for one child. Terry's child support obligation under the guidelines would be in the sound discretion of the court but not less than 23.5% of his income or $935.00 per month. The district court then deviated from the guidelines to take into account that Terry would have to pay medical and dental insurance and to pay any uninsured expenses for the child. The district court ordered Terry to pay $800.00 per month in child support.

We find that the district court appropriately considered Terry's child support obligations to his two other children.

V. Retroactivity of Child Support Payment.

Terry claims the district court abused its discretion by making the child support payment increase retroactive. Terry claims the district court did not have authority to do so because Jeannine did not specifically ask for the increase in payment to be made retroactive in her application for modification.

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Our prior decisions have granted the court authority to make an increase in child support payments retroactive to the date of filing the petition to modify. In re Marriage of Shepherd, 429 N.W.2d 145, 147 (Iowa 1988). Payments may be required from the time of the filing of the modification decree since the right to modification dates from the application for modification. In re Marriage of Stanley, 411 N.W.2d 698, 702 (Iowa App. 1987).

The trial court determined the payments should be retroactive. We agree. We find no merit in Terry's argument that the district court did not have authority to make the payment retroactive. We affirm the district court on this issue.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit.

Costs of this appeal are assessed to the appellant.

AFFIRMED.