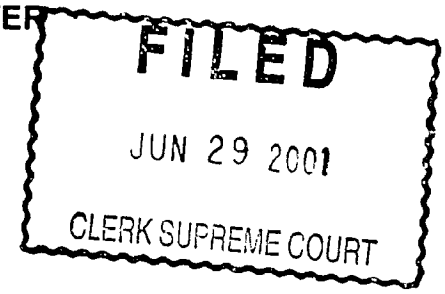
IN THE COURT OF APPEALS OF IOWA

No. 1-246 / 00-0245
Filed June 29, 2001

IN RE THE MARRIAGE OF SHAWN MICHAEL SHROYER AND JESSICA SHROYER



Upon the Petition of
SHAWN SHROYER,
Petitioner-Appellant,

And Concerning
JESSICA SHROYER,
Respondent-Appellee.

Appeal from the Iowa District Court for Monroe County, Annette J. Scieszinski, Judge.

The petitioner appeals a district court ruling on his petition to modify the visitation and child support provisions of the parties' dissolution decree and his application for rule to show cause. **AFFIRMED IN PART, REVERSED IN PART AND MODIFIED.**

Eric Borseth of Borseth, Genest & Suddreth Law Office, Altoona, for appellant.

Paul M. Goldsmith of Goldsmith Law Office, Chariton, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

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MAHAN, J.

The petitioner, Shawn Shroyer, appeals a district court ruling on his petition to modify the visitation and child support provisions of the parties' dissolution decree and his application for rule to show cause. Petitioner contends the district court erred in: (1) calculating his increased child support obligation; (2) eliminating the fifty-percent abatement of child support during his summer visitation; (3) ordering him to pay one-half of all uninsured medical expenses; (4) failing to grant him extended holiday visitation and require respondent to share in visitation transportation; (5) dismissing his contempt allegations; and (6) ordering him to pay $1000 toward respondent's attorney fees. Respondent, Jessica Shroyer, requests an award of appellate attorney fees. We affirm in part, reverse in part, and modify.

Background Facts and Proceedings. A stipulation of agreement for dissolution of marriage and a decree for dissolution of marriage were entered on November 24, 1998, dissolving the marriage of Shawn Shroyer and Jessica Shroyer. The stipulation and decree placed primary physical care and custody of the parties' two minor children, Stacy (born in 1995) and Jacob (born in 1997) with Jessica, and granted Shawn reasonable and liberal visitation privileges.[1]

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[1] Shawn's visitation schedule included: (1) weekend visitation every other weekend from 5:00 p.m. Friday to 7:00 p.m. Sunday, (2) Wednesdays from 5:00 p.m. to 8:00 p.m.; (3) alternate holidays from 8:00 a.m. to 6:00 p.m. or 10:00 p.m., depending on whether the holiday was followed by a school day or a vacation day; and (4) three, two-week visits during the summer. In odd-numbered years, Shawn's holiday visitation included Easter, July 4th, and Thanksgiving Day. In even-numbered years, it included New Year's Day, Memorial Day, and Labor Day. According to the terms of the stipulation, Shawn's Christmas visitation consisted of Christmas Eve Day from 9 a.m. to 9 p.m. every year. (Presumably, the children would spend the remainder of the Christmas holiday with Jessica.) The stipulation provided all summer, holiday and special event visitation "shall supersede weekend visitation" and "proceed regardless of where the visitation falls on the regular visitation schedule."

The stipulation and decree assigned Shawn the responsibility of picking up the children for visitation and returning them to Jessica's home.

The stipulation and decree set Shawn's child support obligation at $684 per month, allowing a reduction by fifty percent during Shawn's summer visitation with the children. It required Shawn to provide health insurance for the children. Jessica would pay for any uninsured prescriptions up to $100. Any prescription bill exceeding $100 per month would be divided equally between the parties.

The stipulation and decree awarded Jessica the parties' two vehicles, and ordered Jessica to hold Shawn harmless for any debt on the vehicles. Jessica was ordered to pay a Visa debt, and required to indemnify and hold Shawn harmless for the debt.

At the time of the decree, Shawn and Jessica were living in Albia. In April 1999, Jessica moved to Hudson, Iowa, approximately two and one-half hours from Albia, to live with her boyfriend. Jessica planned to attend the medical administrative assistant program at a local community college. She was unable to enroll, however, because her son, Dakota, was born in September 1999 with a heart condition requiring continued care.

Shawn filed an application for modification on May 6, 1999, requesting a change in primary physical care. Jessica filed an answer and requested an increase in child support. Shawn amended his application for modification by withdrawing his request to change primary physical care and requesting instead changes in visitation and transportation. On August 19, 1999, Shawn filed an application for rule to show cause, alleging Jessica was in contempt for denial of visitation and failure to follow the financial provisions of the decree. He later withdrew his application for contempt on the visitation issue.

After a hearing on the modification and contempt, the court issued a ruling on December 22, 1999. It modified the child support, medical support, and visitation provisions of the decree.[2] The court raised Shawn's child support obligation to $922.55 per month, and made Shawn and Jessica equally responsible for all uninsured medical expenses. It granted Shawn reasonable telephone contact with the children, and additional holiday visitation.[3] Summer visitation was changed to one six-week period, with Jessica entitled to weekend visitations twice during the six-week period and alternate visitation on July Fourth if Shawn's summer visitation spanned the July Fourth holiday. The modified decree left the responsibility for all Shawn's visitation transportation with him, but permitted him to delegate the responsibility to his parents, siblings, or any responsible adult. The court dismissed Shawn's contempt allegations. Shawn appeals.

Standard of Review. Our review is de novo. Iowa R. App. P. 4. 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). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997).

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[2] Other modifications to the decree are not at issue in this appeal.

[3] The court added holiday visitation from 9:00 a.m. December 26 to 6:00 p.m. December 31 each year, to continue through the New Year's holiday in those years when Shawn has New Year's Day visitation.

Child Support Calculation. Shawn concedes the "ten percent rule" applies, thus creating a substantial change in circumstances requiring a modification of child support. *See* Iowa Code § 598.21(9). He disagrees, however, with the district court's calculation of child support. His primary contentions are: (1) the court should not have included his employer's savings match in his gross income because he will no longer be able to participate in the savings program, and (2) additional deductions should be made to his gross income for medical insurance/expenses. Shawn agrees with the district court's decision to impute to Jessica gross income of $14,000 per year. He does not contest Jessica's $100 per week deduction for child care expenses. He claims child support should be $868.22 per month.

The child support guidelines create a rebuttable presumption the amount of child support resulting from the application of the guidelines is the correct amount of child support to be awarded. *In re Marriage of Gulsvig*, 498 N.W.2d 725, 727 (Iowa 1993). Shawn has failed to rebut the presumption. He testified he had participated in the savings bonus program every year while employed at Maytag, and anticipated continuing his participation. He presented no evidence to support a deduction of $300 for medical insurance/expenses. Shawn's calculations incorrectly deducted from Jessica's gross income only $1200 per year in child care expenses, rather than the $5200 per year ($100 per week) to which he had agreed. We conclude the district court correctly applied the guidelines to calculate child support.[4]

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[4] The additional arguments Shawn makes to support his calculation of child support are without merit, and we need not address them.

Elimination of Fifty-Percent Abatement. Shawn contends the court erred in eliminating the summer abatement of child support because neither party raised the issue in pleadings or at trial. *In re Marriage of Frederici*, 338 N.W.2d 156, 159 (Iowa 1983) (when a court considers changing a decree in a case before it in a respect that has not been litigated, it should provide the parties an opportunity to be heard on the possible change). Moreover, he argues, no change in circumstances existed to require a change in the decree's provision reducing child support during summer visitation.

We conclude the district court properly addressed the abatement issue as a part of the overall child support issue. It found "[t]he financial circumstances of the parties generally, and the interests of the Shroyer children specifically," supported the elimination of the abatement. *See In re Marriage of Oakes*, 462 N.W.2d 730, 733-34 (Iowa Ct. App. 1990) (child support for twelve-month year where custodial parent's expenses for child care "are only slightly reduced during the child's absence"). We agree, and affirm the district court on this issue.[5]

Uninsured Medical Expenses. Shawn contends the court erred in modifying the provisions of the decree addressing uninsured medical expenses because neither party raised the issue in pleadings or at trial. *See Frederici*, 338 N.W.2d at 159. Moreover, Shawn argues no substantial change in circumstances justified modification of the provision.

In certain cases, the issue of child support may require an examination of medical support. Our de novo review of the record in this case, however, reveals

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[5] While not in effect at the time of the modification hearing, the August 1, 2000 Child Support Guidelines support the elimination of the abatement. The guidelines give a credit to the guideline amount of child support only if the noncustodial parent's court-ordered visitation exceeds 127 days per year (eighteen weeks).

insufficient evidence upon which the court could base its decision to change the medical support provisions of the decree. We reverse the district court's modification of the decree's medical support provisions. Medical support will continue as provided in the original stipulation and decree.

Visitation and Transportation. To modify visitation privileges, the party seeking modification must show a change of circumstances has occurred since the entry of the initial decree. *In re Holub*, 584 N.W.2d 731, 733 (Iowa Ct. App. 1998). Generally, a much less extensive change of circumstances need be shown in visitation right cases. *Id.*

Shawn contends the court erred by failing to expand the holiday visitation to a full weekend and by failing to require Jessica to assist in the transportation for visitation. We agree.

Jessica's move to Hudson constitutes a change in circumstances requiring modification of Shawn's visitation schedule. We modify the visitation schedule as follows:

Shawn shall have visitation every July 4. If July 4 does not fall within his scheduled summer visitation, the length of the July 4 visitation will be from July 3 at 5 p.m. to July 5 at 6 p.m.[6] In exchange, Jessica shall have the children for Labor Day and the accompanying weekend every year. Shawn shall exercise holiday visitation odd-numbered years for Easter and Thanksgiving; and even-numbered years for New Year's Day and Memorial Day. Visitation times shall be as follows:

New Year's Day: December 31 at 5 p.m. to January 1 at 6 p.m.

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[6] We anticipate the July 4 holiday will often fall within Shawn's summer visitation, given his employer's summer shut down often includes the July 4 holiday.

Easter: Thursday before the holiday at 5 p.m. to Sunday at 6 p.m.

Memorial Day: Friday before the holiday at 5 p.m. to Monday at 6 p.m.

Thanksgiving: Wednesday at 5 p.m. to Friday at 6 p.m.

Christmas visitation will remain as modified by the court.[7] "Special event visitation" shall remain as provided in the stipulation and decree. Wednesday visitation shall remain as specified in the stipulation and decree, with the addition of "reasonable telephone contact" as specified in the modified decree. Summer visitation shall remain as specified in the modified decree, with the exception of the change to the July 4 holiday. Holiday visitation shall supercede and replace other routine weekend visitation.

Jessica should be responsible for meeting a portion of the additional transportation burden she created. Jessica shall meet Shawn or his designee at a mutually agreed upon location in Grinnell, Iowa, to drop-off and pick-up the children for visitation.

Contempt. Our review of a contempt ruling is at law, not de novo. *McKinley v. Iowa Dist. Ct. for Polk County*, 542 N.W.2d 822, 824 (Iowa 1996). We determine whether substantial evidence supports the district court's judgment. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Proof beyond a reasonable doubt must support a contempt finding. *McKinley*, 542 N.W.2d at 824. "Substantial evidence" to support such a finding is "such evidence as could convince a rational trier of fact that the alleged contemner is

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[7] Christmas Eve Day from 9 a.m. to 9 p.m., and December 26 at 9 a.m. to December 31 at 6 p.m., to continue through the New Year's Day holiday in those years when Shawn exercises New Year's Day visitation.

guilty of contempt beyond a reasonable doubt." *Ervin v. Iowa Dist. Court for Webster County*, 495 N.W.2d 742, 744-45 (Iowa 1993).

Contempt can be described as willful disobedience. *Ervin*, 495 N.W.2d at 744. "Willful disobedience" requires:

> evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Id. When a contempt allegedly involves a violation of a court's order, the violation must be found to be willful. *Rolek v. Iowa Dist. Court for Polk County*, 554 N.W.2d 544, 547 (Iowa 1996). Acting contrary to a known duty may constitute willfulness for this purpose. *Id.* The alleged contemner carries the burden of producing evidence on any defense tendered. *McKinley*, 542 N.W.2d at 824. The burden of persuasion on the willfulness issue, however, remains on the contemnee. *Id.*

Shawn argues Jessica's willful and intentional failure to find employment rendered her unable to pay her debts. Specifically, he contends she has willfully failed to pay the car loan for one of the vehicles she was granted in the decree and the VISA debt for which she was made responsible in the decree. The lender on the vehicle has filed suit against Shawn and Jessica, and Shawn has been contacted for collection on the VISA debt.

At the time of the decree, Shawn was approximately $3,259.65 in arrears for temporary child and spousal support obligations. At the time of the modification trial, he remained delinquent in the amount of $2,889.93. His failure to pay support in a timely manner affected Jessica's ability to repay the parties' debts as required by the decree. The vehicle debt was in arrears at the time of

the decree, due in part to Shawn's failure to pay temporary child and spousal support.

Jessica moved to Hudson, in part, to attend a medical administrative assistant program at the local community college. She sought employment after she moved, but was unable to obtain a job. Her financial situation and ability to work outside the home was compounded by her child's health condition.

Shawn failed to prove beyond a reasonable doubt Jessica committed a willful violation of the court's order. The district court did not err in dismissing Shawn's contempt application.

Attorney Fees. Ordinarily, an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Attorney fees in actions for modification of dissolution decrees are not a matter of right but may be awarded to the prevailing party in an amount deemed reasonable by the court. *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). An award of attorney fees depends upon the financial circumstances of the parties and their respective ability to pay. *Wessels*, 542 N.W.2d at 491. The district court ordered Shawn to pay $1000 of Jessica's attorney fees. We conclude the district court properly considered this issue and we find no abuse of discretion.

Similarly, an award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). A successful party does not have a vested right to appellate attorney fees. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Wood*, 567 N.W.2d at 684; *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We deny Jessica's request for appellate attorney fees.

Conclusion. We affirm the district court's child support calculation and its removal of the abatement of child support during summer visitation. We reverse the district court's modification of medical support provisions. We modify the holiday visitation schedule as provided herein, and require Jessica to provide transportation to Grinnell, Iowa, a halfway point, for Shawn's visitations. We affirm the dismissal of Shawn's contempt allegations. We affirm the district court's award of trial attorney fees, and deny Jessica's request for appellate attorney fees.

AFFIRMED IN PART, REVERSED IN PART, AND MODIFIED.