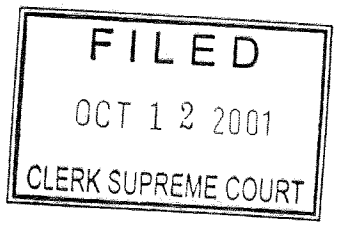
IN THE COURT OF APPEALS OF IOWA

No. 1-376 / 00-1590
Filed October 12, 2001

IN RE MARRIAGE OF THOMAS M. CISTOLA AND ALYSON CISTOLA



Upon the Petition of
THOMAS M. CISTOLA,
Petitioner-Appellant,

And Concerning
ALYSON CISTOLA,
Respondent-Appellee.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

The petitioner appeals a district court ruling denying his request for modification of his child support obligation. **REVERSED.**

Mary M. Schumacher, Dubuque, for appellant.

Robert L. Sudmeier and Norman J. Wangberg of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Heard by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Thomas Cistola appeals a district court ruling denying his request for modification of his child support obligation. We reverse.

I. *Background Facts and Proceedings*

The marriage of Thomas and Alyson Cistola was dissolved by stipulated decree during March of 1996 in the State of Georgia. The parties' decree incorporated a written separation agreement which awarded Alyson primary physical care of their daughter, Heather, born in August 1995. Thomas was ordered to pay monthly child support of $800. The parties agreed the laws of Georgia would govern the terms of their decree and separation agreement.

Alyson and Heather moved to Dubuque, Iowa in the spring of 1996. They continue to reside in Dubuque. In July 1996, Thomas quit his job in Georgia and moved to Chicago, Illinois. He found a job in the Chicago area in late 1996. He earned $113,420 in 1997. Thomas was fired in 1998. After an extended period of unemployment, he accepted employment in Indiana. He currently earns $45,760 per year as a project manager with a construction firm.

Thomas filed his dissolution decree as a foreign judgment with the Clerk of Court of Dubuque County, Iowa on November 4, 1999. At the same time, he filed a petition to modify the decree seeking a reduction in his child support obligation. Alyson resisted asserting the parties had orally agreed that Thomas's monthly child support obligation would be permanently set at $800 regardless of whether his income increased or decreased.

Trial was held on May 4, 2000. The parties agreed the trial court should apply Georgia law in determining the legal effect of their Georgia dissolution

decree; however, neither Thomas nor Alyson offered any proof of Georgia law at trial. At the close of evidence, the court discussed the application of Georgia law with counsel for both parties and proposed it would research Georgia law as best it could. The court invited the parties to submit post-trial briefs regarding applicable Georgia law if they desired. The parties accepted this procedure without objection.

The district court entered its judgment on May 23, 2000. At the time judgment was entered, neither party had submitted a brief on Georgia law. The trial court denied Thomas's application for modification of child support. The court found the parties had orally agreed that Thomas would always pay $800 per month in support, no matter if his income increased or decreased. The court concluded the agreement was enforceable under Georgia law even though it was unwritten and not specifically set forth in their written separation agreement. Thomas filed a Rule 179(b) motion contending the court's interpretation of Georgia law was incorrect. The court denied the motion and Thomas appealed.

On appeal, Thomas contends the trial court misinterpreted and misapplied Georgia law in construing the legal effect of the parties' Georgia Separation Agreement and Georgia Decree. He claims Georgia law does not prevent him from seeking to modify his child support obligation. Alyson contends Thomas failed to preserve this issue for review. If error was preserved, she argues the parties have a verbal agreement not to modify the amount of child support that is enforceable under Georgia law.

II. *Scope of Review*

Because this modification of a dissolution decree is an equity action, our review is de novo. *See* Iowa R. App. P. 4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We examine the entire record and adjudicate anew the parties' rights on the issues presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). Although we give weight to the district court's factual findings, we are not bound by them. Iowa R. App. P. 14(f)(7); *Walters*, 575 N.W.2d at 741 (citation omitted).

III. *Preservation of Error*

Alyson contends Thomas failed to preserve error on his claim that the trial court's interpretation of Georgia law is incorrect. She argues his failure to offer evidence of Georgia law as part of the record before the trial court should prevent him from pursuing this appeal. We reject her argument for several reasons. When Thomas brought his modification action in Iowa district court, Alyson agreed Georgia law should be applied by the trial court. Alyson did not object at the trial court level when Thomas failed to plead or prove the applicable Georgia law.[1] In addition, she accepted the trial court's proposal for discerning Georgia law after trial was held.

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[1] The parties acknowledge they did not follow the correct procedural path in district court. The petitioner, seeking modification, was technically required to plead and prove Georgia law before the trial court. Similarly, the respondent's position that the oral agreement to waive modification was enforceable under Georgia law, should have been supported by Georgia law. Instead, all parties consented to the application of Georgia law, and then left it to the court to determine what that law was and how it should be applied. Neither party presented the court with Georgia legal authority until a battle of 179(b) motions ensued after the judgment was issued. The trial court summarily overruled Thomas's 179(b) motion, standing by its original interpretation of Georgia law.

We recognize trial courts ordinarily do not consider foreign law in the absence of pleading and proof. *See Eddards v. Suhr,* 193 N.W.2d 113, 115 (Iowa 1971). However, exceptions have been made where the district court has proceeded to apply such foreign law without objection from either party. *National Equipment Rental v. Estherville Ford*, 313 N.W.2d 538, 548 (Iowa 1981); *In re Estate of Millers,* 159 N.W.2d 441, 446 (Iowa 1968). Under the circumstances presented here, we conclude Thomas's claim that the trial court misapplied Georgia law should be considered on its merits.

IV. *Applicable Law*

The issue to be determined by Georgia law was the effect, if any, of the parties' alleged oral agreement that neither would seek modification of the amount of child support fixed in their written separation agreement.

In its judgment, the trial court stated: "The Court's ability to research Georgia law is limited and no authority is provided by counsel." The court then found Thomas and Alyson had, in fact, made an oral agreement that they would not modify child support.[2] The court found the agreement was enforceable under the court's understanding of Georgia law. The court denied Thomas's petition for modification.

We reach a different conclusion. While it is true that Georgia courts have recognized a willingness to enforce such agreements, specific language in the divorce decree or preceding separation agreement is required. In *Nelson v.*

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[2] Prior to signing their written separation agreement, the parties discussed the issue of child support. The terms of the oral agreement were disputed at trial. Alyson contends they reached an oral understanding that neither would return to court to modify support upward of downward. According to Thomas, he and Alyson verbally agreed that she would not return to court to increase his level of child support.

Mixon, 457 S.E.2d 669 (Ga. 1995), the Georgia Supreme Court held that a husband had not waived his right to seek downward modification of child support by signing an agreement, incorporated into the divorce decree, that "the parties expressly waived their right to petition for any modification of any of the terms of this agreement." The court found that because the language did not specifically address child support the husband's right to seek modification survived. *Nelson,* 457 S.E.2d at 671.

Alyson contends that because the oral agreement at issue pertains exclusively to child support, it should satisfy this specificity requirement. However, in another case involving the incorporation of a collateral agreement into a divorce decree, the Georgia court was careful to acknowledge that "[n]egotiations and oral agreements between husband and wife, preceding divorce, as to alimony and child support, are, by presumption of law, merged in the final judgment in the divorce suit [and that] [u]nderstandings between the husband and wife which are not incorporated into the divorce decree are not binding." *Arnold v. Arnold,* 489 S.E.2d 65, 67 (Ga. App. 1997) (quoting *Cabaniss v. Cabaniss,* 304 S.E.2d 65 (Ga. 1983)).

In *Ashworth v. Busby*, 526 S.E.2d 570 (Ga. 2000), the Georgia Supreme Court upheld an agreement waiving a party's right to seek modification of alimony payments where a written agreement incorporated into the divorce decree contained clear waiver language specifically referring to the right of modification. *Ashworth*, like *Nelson*, addressed the enforceability of an express written agreement incorporated in a divorce decree. *Ashworth,* 526 S.E.2d at 571. Because the parties' "verbal agreement" was not incorporated into their

divorce decree we conclude it is unenforceable under Georgia law. The parties divorce decree does not prevent either party from filing an application to modify child support.

V. *Modification of Support*

We now consider the merits of Thomas's application to modify child support. In doing so we apply Iowa law. "Modification of a registered child support order is subject to the same requirements, procedures and defenses that apply to the modification of an order issued by a tribunal of this State and the order may be enforced and satisfied in the same manner." Iowa Code § 252K.611(2). The party seeking a modification of child support provisions of a dissolution decree must establish a substantial change in circumstances by a preponderance of the evidence. *In re Marriage of Maher*, 569 N.W.2d 561, 564 (Iowa 1999). Well-established principals guide our consideration of modifications:

> (1) there must be a substantial and material change in the circumstances occurring after the entry of the dissolution 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 a 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; (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

In re Marriage of Rietz, 585 N.W.2d 226, 229 (Iowa 1998) (quoting *In re Marriage of Vetternack,* 334 N.W.2d 761, 762 (Iowa 1983)). When faced with a request for modification, one recognized factor for a court to consider is a change in "employment, earning capacity, income or resources of a party." Iowa Code § 598.21(8)(a). In addition, Iowa Code section 598.21(9) provides that a

substantial change in circumstance exists when a court order for child support deviates by 10 percent or more from the amount due according to the most current child support guidelines.

The Cistola's separation agreement, signed in 1996, required Thomas to pay $800 a month in child support. This amount was based on Thomas's 1995 income of approximately $70,000 and the confidence that his earnings would increase in future years. Thomas's income in 1996 was $56,500. In 1997 he earned $113,420 working for a new company in Chicago. In 1998, Thomas's earnings decreased dramatically after losing that job. He remained unemployed for seventeen months. Currently, Thomas is earning a salary of $45,760. Thomas's income is approximately $25,000 less than when the parties divorced in 1996.

Upon de novo review of the record, we find that this reduction in earnings constitutes a "substantial change in circumstance" as required by Iowa Code section 598.21(8)(a). *See In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). According to the child support guidelines worksheet introduced at trial, Thomas's payment should be $562.64 per month. The $800 per month Thomas is currently obliged to pay is more than a 10 percent deviation from the guidelines.

Therefore, we reverse the district court's denial of Thomas's application to modify child support. We modify the decree to fix the level of child support at $562.64 per month.

VI. *Attorney Fees*

We conclude the district court did not abuse its discretion in ordering each party to pay their respective attorney fees. We award no attorney fees on appeal. Costs are taxed to Alyson.

REVERSED.