IN THE COURT OF APPEALS OF IOWA

No. 8-161 / 97-0897
Filed May 29, 1998

IN RE THE MARRIAGE OF MARTIN PAUL MINECK AND DENISE MARIE MINECK

Upon the Petition of
MARTIN PAUL MINECK,
Appellee,

And Concerning
DENISE MARIE MINECK,
Appellant.

Appeal from the Iowa District Court for Linn County, William L. Thomas, Judge.

Denise Mineck appeals from the district court's modification of Martin Mineck's child support obligation. **REVERSED.**

Stephen B. Jackson, Jr., of Jackson Law Office, Cedar Rapids, for appellant.

Carter Stevens of Beecher, Rathert, Roberts, Field, Walker & Morris P.C., Waterloo, for appellee.

Heard by Cady, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

Denise Mineck appeals from the district court's modification of Martin Mineck's child support obligation. We reverse.

I. Background Facts and Proceedings.

Martin and Denise Mineck were divorced in 1991. Denise was awarded physical care of their two children. Martin was ordered to pay $700 per month child support. Martin's child support was increased to $800 per month in 1995.

Martin initiated this modification action after his employment as an environmental engineer at Brain Engineering in Cedar Rapids was terminated. He alleged the resulting loss of income justified a reduction of his $800 monthly child support obligation.

The district court found Martin's net monthly income declined from $2633 to $1947 following his termination. The court also determined Denise's net monthly income as a corporate attorney was $1967. Because the amount of Martin's support determined by applicable child support guidelines deviated by more than ten percent from the existing support order, the district court reduced Martin's child support obligation from $800 to $590 per month.

On appeal, Denise contends the district court erred by reducing the amount of Martin's child support. She argues Martin's diminished earnings are self-inflicted and only temporary. Denise also argues Martin has understated his earnings by using a closely-held corporation to deflect income to his spouse and pay personal expenses.

II. Standard of Review.

We review modification proceedings de novo. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). 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 district court's findings of fact, but we are not bound by them. Iowa R. App. P. 14(f)(7). The district court's modification of a child support obligation will not be disturbed on appeal in the absence of a failure to do equity. *In re Marriage of Smith*, 501 N.W.2d 558, 560 (Iowa App. 1990).

III. Modification of Child Support.

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)).

The principles enumerated in *Vetternack* and applied in *Kern* are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the 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 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; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

In the case of *In re Marriage of Wahlert*, 400 N.W.2d 557 (Iowa 1987), our supreme court stated:

> [C]urrent inability has become less a consideration and long-range capacity to earn money has become more of a consideration; and . . . any voluntariness in diminished earning capacity has become increasingly an impediment to modification.

Id. at 560. A substantial change of circumstances includes a recalculated level of support according to the child support guidelines that deviates by more than ten percent from the current amount set by an existing child support order. *See In re Marriage of Salmon*, 519 N.W.2d 94, 96 (Iowa App. 1994).

The record indicates Martin was earning $45,000 annually when he was terminated at Brain Engineering. After an unsuccessful job search, Martin and his wife, Rachelle, founded Mineck Engineering and Environmental Services.

Mineck Engineering is a closely-held corporation. Martin owns forty-nine percent of the stock, Rachelle owns the remaining fifty-one percent. Both serve as officers of the corporation. Mineck Engineering's place of business is located in their Cedar Rapids home.

Mineck Engineering reports its income on a cash accounting method. It is taxed as a true corporation. In 1996, Mineck Engineering reported gross receipts of $57,940, and a net taxable income of $2036. Its retained earnings were $1928, after deducting a $2160 carry-over net operating loss sustained in its first year of business.

Mineck Engineering's 1996 income tax return included a $30,000 deduction for compensation paid to its officers. Martin received $20,000 of this amount. Rachelle received $10,000. Each received a corresponding W-2 form from the corporation. Other deductions included $2416 rent, paid to Rachelle and Martin for the corporation's use of their home and an additional $1630 for utilities. The return also includes deductions for Martin's corporate vehicle and employee benefit plans. Additionally, the corporation elected to expense $2129 of equipment rather than deducting a lesser amount for depreciation.

At trial, Martin was asked about his expected future earnings. The record includes the following questions and answers:

> Q. Obviously you're aware of one of the concerns your ex-wife has is whether or not you're potentially underemploying yourself. How do you feel about that?
>
> A. Definitely. I wish I were earning a lot more money. I hate criticism to the comments that I am trying to avoid child support and avoid my obligation in that regard. I have always consistently paid my child support and again this company was started to be a success and to be a long-term substantial company for me and I hope my family in the future.
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> Q. Do you anticipate earning $45,000 again in the near future?
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> A. I would like to say that's in the future. I can't see it will be this year, 1997, but I would like to believe, yes, my income will get back up there in a couple of years.

Q. Do you feel that this business move was in your and your family's long-term best interests?

A. Oh, definitely. I have been able to remain in the area and stay close to my two children that are under primary care of their mother and in this past year we've done well in maintaining what clients we've had and in servicing those clients so we have a good base to build on.

Q. Do you feel that you could continue to meet your currently family expenses and continue to pay child support at the current guideline level?

A. Not at the current situation, no.

The district court determined Martin's current income by allocating *all* of Mineck Engineering's officer compensation to Martin. While we are not in complete agreement with this allocation, the record clearly demonstrates Martin's use of Mineck Engineering to substantially understate his income. The extent to which he has done so is, however, not a determination essential to the resolution of the merits of this appeal.

Martin's own testimony belies the notion any reduction in his income is permanent. Martin is confident his earnings will return to their former level within a relatively short time period. In the interim, Martin's discretionary access to Mineck Engineering's demonstrated earnings and cash flow provide him more than adequate income to cover the $210 difference between his current support obligation and the modified amount he seeks to uphold on appeal. Martin can and should bear the temporary financial burdens attending his employment transition. Under these circumstances, we believe it is inequitable to impose on Denise and the children the negative financial consequences attending Martin's discretionary allocation of

corporate income and expenses. We conclude Martin has not met his heavy burden of proof and decline to modify his $800 per month child support obligation. The judgment of the district court is accordingly reversed.

IV. Attorney Fees.

Denise requests an award of trial and appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 obligated to defend the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). We award Denise $1000 for trial attorney fees and $1000 appellate attorney fees. Costs are assessed to Martin.

REVERSED.