IN THE COURT OF APPEALS OF IOWA

No. 0-519 / 90-275

FILED
AUG 27 1991
CLERK SUPREME COURT

IN RE THE MARRIAGE OF KELLY S. BISHOP AND JEFFREY R. BISHOP

Upon the Petition of

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KELLY S. BISHOP,

Appellee,

And Concerning

JEFFREY R. BISHOP,

Appellant.

Appeal from the Iowa District Court for Scott County, Max Werling, Judge.

The district court modified the parties' 1985 dissolution decree to increase the husband's child support obligation. The husband appealed. **VACATED IN PART AND REMANDED WITH DIRECTIONS.**

John Wunder, Muscatine, for appellant.

Arthur L. Buzzell, Davenport, for appellee.

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

PER CURIAM

Kelly Bishop and Jeffrey Bishop were married to each other. They have one child, Jeffrey Bishop, Jr. (Jeff), who was born in May 1982. The marriage has been dissolved. The decree of dissolution was filed in January 1985. At that time Kelly was employed by Village Inn and had gross wages of $678 per month. She also received $35 per month in food stamps. Jeffrey was employed by Ring King Visibles and had gross wages of $750 per month.

The district court awarded joint custody to the parties and placed primary physical care of Jeff with Kelly. Jeffrey was ordered to pay $35 per week in child support.

Kelly filed the present petition for modification in May 1989. She alleged there has been a substantial and material change in the financial earnings of the parties. Jeffrey has remarried and has a child with his present wife. He now works for Louis Rich Company and has gross wages of $1335 per month. Kelly now works for Iowa Machine Shed and has gross wages of $778 per month.

The parties agreed to submit the modification to the court on the pleadings and argument of counsel. The appendix does not reveal that arguments were recorded. The pleadings are of little help in our de novo review. We assume the parties are in agreement that the various materials appearing in the appendix were made a part of the record before the trial court.

This cause was submitted to the court on September 29, 1989. The trial judge orally ruled that a substantial change in circumstances had occurred and that the child support award should be modified. The trial judge increased Jeffrey's child support obligation from $35 per week to $65 per week. He ordered Jeffrey's attorney to prepare the formal judgment.

At the time the petition for modification was pending, the temporary child support guidelines, which had been adopted on September 29, 1987, were in effect. On the date this cause was submitted to the trial court, that is September 29, 1989, the supreme court issued its order adopting the former temporary child support guidelines of September 29, 1987, as permanent child support guidelines. This rule was made effective October 12, 1989.

On May 15, 1989, the Iowa Legislature amended Iowa Code section 598.21, subsection 4 (1989) by striking the subsection and substituting the following pertinent language in a new subsection:

> 4. The supreme court is authorized to prescribe uniform child support guidelines and criteria to be effective October 12, 1989, and to review the guidelines at least once every four years, pursuant to the federal Family Support Act of 1988, Pub.L. No. 100-485.
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> a. Upon every judgment of annulment, dissolution, or separate maintenance, the court may order either parent or both parents to pay an amount reasonable and necessary for supporting a child. In establishing the amount of support, consideration shall be given to the responsibility of both parents to support and provide for the welfare of the minor child and of a child's need,

> whenever practicable, for a close relationship with both parents. There shall be a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. A variation from the guidelines shall not be considered by a court without a record or written finding, based on stated reasons, that the guidelines would be unjust or inappropriate as determined under the criteria prescribed by the supreme court.

1989 Iowa Acts ch. 166, § 6 (codified at Iowa Code § 598.21(4) (1991)).

Before the written ruling was filed, Jeffrey, on November 8, 1989, filed a motion for expanded findings of fact, asking the court to either follow the permanent guidelines or make appropriate written findings to justify the variance from the guidelines. The court, on November 27, 1989, ruled that the amount of child support it had previously ordered was equitable, fair, and accurate and that it would not reconsider its earlier ruling.

The written order of modification was filed on February 2, 1990. In its order, the court stated that it was not following the guidelines, but was ordering Jeffrey to pay child support of $65 per week, effective September 29, 1989. Jeffrey appealed. He claims the court erred by not following the permanent child support guidelines, and when it varied from the guidelines, it failed to follow the order of the supreme court by not making written findings in accordance with the established criteria. Jeffrey does not challenge that part of the trial court's ruling that a substantial change in circumstances has occurred to require

modification of child support. He agrees there should be an increase in his child support obligation.

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).

At the time the district court heard the modification petition, only the temporary child support guidelines were in effect. Those guidelines specifically provided that they were not to be used to set permanent child support. However, this prohibition was suspended by the order of September 29, 1989. Under Iowa Code section 598.21(4), the effective date for the new rule concerning the guidelines was fixed for October 12, 1989. Thus, on November 8, 1989, when Jeffrey filed his motion for expanded findings of fact, the new rule was in effect. In addition, the permanent guidelines had become effective before the written modification ruling was filed in February 1990.[1]

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1. The oral ruling of the court on September 29, 1989, was not a final decree of the court. Where a court informally expresses the nature of its decision and directs that counsel for the successful party prepare a formal judgment, the informal expression is not considered a final judgment. See Egy v. Winterset Motor Co., 231 Iowa 680, 687, 2 N.W.2d 93, 96-97 (1942). The decree should not be considered final until February 2, 1990, when the written decree was filed. See Knauss v. City of Des Moines, 357

The recent case of In re Marriage of Bergfeld, 465 N.W.2d 865 (Iowa 1991), is somewhat instructive. There it is provided:

> Fourth, as to post October 12, 1989, support orders, the district court has some discretion to vary the amount of child support from the guidelines in certain circumstances. These circumstances include a determination by the district court that the guidelines would be unjust or inappropriate. In making this equitable determination the court must make written findings using the following criteria:
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> (1) Substantial injustice would result to the payor, payee, or child;
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> (2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case; and
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> (3) Circumstances contemplated in Iowa Code section 234.39 [cost of services provided by the Iowa department of human services].
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> Last, the court must enter an order for medical support as required by law. See generally Iowa Code ch. 252E.

Id at 870.

We are compelled to remand this cause for further proceedings. The modification decree was entered on February 2, 1990. At the time of the decree, the permanent child support guidelines, adopted October 12, 1989, were in effect. Courts are not to vary from these guidelines without written findings that they would be unjust or inappropriate. No such findings were made. In addition,

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N W 2d 573, 576 (Iowa 1984).

we are not given the net monthly earnings used by the trial court when it determined that under the "new" child support guidelines Jeffrey would pay $82.50 per week and under the "old" he would pay $45 per week.

Like in Bergfeld, we believe fairness and justice dictate that the parties should be allowed to present evidence relative to the criteria set forth above. Accordingly, we vacate the order fixing child support at $65 per week. We remand this cause for further proceedings consistent with this opinion and recent decisions of the supreme court. If the trial court determines the child support guidelines should apply, it will utilize the most recent guidelines in calculating the support obligation. See In re Marriage of Ladely, 469 N.W.2d 663, 665-66 (Iowa 1991); In re Marriage of Bergfeld, 465 N.W.2d at 871. We do not retain jurisdiction. Pending the hearing on remand, child support shall be paid as ordered by the original decree.

We direct to the attention of the litigants the case of In re Marriage of Bergfeld. We form no opinion as to whether there should be a variance from the child support guidelines. We merely hold there is not sufficient record before us to make that determination on our de novo review.

Each party shall pay his or her attorney fees on appeal. Costs are assessed one-half to each party.

VACATED IN PART AND REMANDED WITH DIRECTIONS.