IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1-170 / 00-0640
Filed November 16, 2001

IN RE THE MARRIAGE OF CINDY MARIE HECK AND JERRY WAYNE HECK

Upon the Petition of
CINDY MARIE HECK,
a/k/a CINDY MARIE WINELAND,
Petitioner-Appellee,

And Concerning
JERRY WAYNE HECK,
Respondent-Appellant.

Appeal from the Iowa District Court for Jasper County, Arthur E. Gamble, Judge.

Jerry Heck appeals a district court order granting Cindy Wineland's application for modification of the parties' dissolution decree. **AFFIRMED.**

Robert Warren Conrad of Conrad Law Firm, Knoxville, for appellant.

Robert L. Stuyvesant of Stuyvesant & Benton, Carlisle, for appellee.

Considered by Huitink, P.J., and Vogel and Mahan, JJ.

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HUITINK, P.J.

Respondent-appellant, Jerry Heck, appeals from the district court's modification of his child support obligation. He claims the court erred in finding a substantial change in circumstances and in including his voluntary overtime in the calculation. We affirm.

Background facts and proceedings

Cindy and Jerry Heck divorced in 1990. Jerry paid child support to Cindy for their three daughters. Cindy sought and obtained a modification of child support in 1995. In 1999 Cindy filed the current modification action. By that time, only the youngest daughter was the subject of child support. Jerry has worked about seven to eight hours of voluntary overtime every week for the past several years. Cindy included Jerry's overtime in her calculation of child support; Jerry excluded it in his.

The district court found a material and substantial change in circumstances in that two of the children were emancipated, Jerry's income had increased, and his child support obligation calculated under the current guidelines deviates by more than ten percent from his previous obligation. The district court found Jerry was eligible for and accepted voluntary overtime over the previous ten years and such overtime would be available for the foreseeable future. The court modified Jerry's support obligation, setting it at $615.57 monthly. Jerry appeals.

Claims on appeal

Jerry claims the court erred in finding a material and substantial change in circumstances because the changes warranting a modification must not have been within the contemplation of the court at the time of the decree. He contends the

support awarded for one child is excessive and inequitable. Jerry also claims the court erred in including his voluntary overtime in calculating his child support obligation.

Discussion

Our review is de novo. Iowa R. App. P. 4.

Material and substantial change in circumstances. The district court based its finding there was a material and substantial change in circumstances on three facts: 1) two of the three children now were adults and not subjects of child support, 2) Jerry's income had increased, and 3) calculating his support based on current income and child support guidelines would result in a deviation of more than ten percent from his existing support obligation. Jerry argues his children growing up and his income increasing were within the contemplation of the court at the time of the decree. *See In re Marriage of Schettler*, 455 N.W.2d 686, 689 (Iowa Ct. App. 1990) (finding an increase in income from $130,000 to $1,750,000 over six years was envisioned by the court at the time of the decree). He also argues he was working overtime regularly at the time of the decree and at the time of the modification, yet the court did not include his overtime in the child support obligation, so his voluntary overtime also was within the contemplation of the court and was not a change in circumstances warranting modification. Even assuming for the sake of argument the original court in this case contemplated that Jerry's income would increase, that he was working overtime regularly, and that the children would grow up, the evidence shows the increase in his base income would pass the ten-percent deviation test. That alone is sufficient to support the court's finding of a material and

substantial change in circumstances. We find there has been a material and substantial change in circumstances, as set forth in Iowa Code section 598.21(9) (1999).

Including voluntary overtime in the child support calculation. Jerry argues the overtime he works is not mandatory, not guaranteed, and is less than that worked by fathers in other cases in which the court did not include the overtime in the child support calculation, so the court should not have included it in his case. He also contends it is unjust that a "similarly situated" obligor who did not choose to work the voluntary overtime would have a lower child-support obligation.

The supreme court has ruled,

> In *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992), this court held that overtime wages come within the definition of gross income used to calculate the proper award. Only when such overtime is speculative or uncertain, or where a parent is forced to work overtime to meet a burdensome child support obligation, may overtime pay be excluded from the guideline calculation. *Id.*

In re Marriage of Geil, 509 N.W.2d 738, 742 (Iowa 1993). Jerry's overtime is not speculative or uncertain. The evidence shows Jerry can pay the support ordered without being forced to work overtime. The district court properly included Jerry's overtime in calculating his child support obligation.

AFFIRMED.