FILED
DEC 13 1999
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1999-407 (9-660) / 99-0114
Filed December 13, 1999

IN RE THE MARRIAGE OF RICHARD DEAN ERBES AND LOUISE KAY ERBES

Upon the Petition of
RICHARD DEAN ERBES,
Petitioner-Appellant,

And Concerning
LOUISE KAY ERBES,
Respondent-Appellee.

Appeal from the Iowa District Court for Emmet County, Frank B. Nelson, Judge.

The petitioner appeals a district court ruling modifying the child support provisions of the parties' dissolution decree. **AFFIRMED.**

Deborah K. McKittrick of McKittrick Law Firm, P.C., Ankeny, and Jeanne K. Johnson, Des Moines, for appellant.

Michael R. Bovee of Montgomery, Barry & Bovee, Spencer, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

ZIMMER, J.

Richard D. Erbes appeals from a district court ruling on his application to modify the child support and related provisions of the decree which dissolved the parties' marriage. His former wife, Louise K. Erbes, requests appellate attorney fees. We affirm.

I. Background Facts and Proceedings. Richard and Louise married in May 1980. They have two children: Sarah, nineteen, and Carrie, seventeen.

In May 1996, the district court dissolved the marriage and entered a decree that incorporated the parties' stipulation. The stipulation awarded Louise primary physical care of the children and required Richard to pay child support of $1,100 per month until Carrie reached the age of twenty-two, unless both daughters became ineligible for support because of death, marriage, or other emancipation. By agreement, the amount of child support deviated upward from the child support guidelines. The stipulation specifically recognized this upward deviation was in lieu of Richard's obligation to contribute to any future college expenses of Sarah or Carrie. Richard was also required to provide medical insurance for the children, pay all unreimbursed medical expenses, and maintain a life insurance policy of not less than $100,000 for the benefit of the children.

In March 1998, Richard filed a petition to modify the child support and related provisions of the divorce decree. Claiming his income as a podiatrist had decreased since the decree was entered, he asked the court to: (1) reduce his child support obligations; (2) reduce the medical support and life insurance provisions of the

decree; (3) redetermine the parties' obligations to pay for post-secondary education expenses; and (4) award him attorney fees.

Following trial on the modification petition, the district court reduced Richard's monthly child support obligation to $971.50. The district court derived this figure using the child support guidelines, after calculating Richard's gross income to be $53,070 and Louise's to be $36,000 per year. The court declined to modify any other provisions of the decree. The court rejected both parties' requests for trial attorney fees.

Richard appeals. He contends the district court erred in: (1) calculating his income for purposes of child support; (2) failing to set aside the parties' stipulation which extended his child support to April 1, 2004; (3) refusing to eliminate the provision of the decree which requires him to maintain life insurance for the children's benefit; (4) declining to reduce his obligation to pay all unreimbursed medical expenses; and (5) failing to award him trial attorney fees. Both parties seek an award of appellate attorney fees.

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).

The party seeking 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,* 596 N.W.2d 561, 564 (Iowa 1999). Well-established principles 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 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.

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)). We accord the trial court considerable latitude in determining whether modification is warranted and will disturb the ruling on appeal only when there has been a failure to do equity. *Id.*

III. Calculation of Child Support. In calculating child support, the trial court utilized a gross income figure of $53,070 for Richard and $36,000 for Louise. To arrive at Richard's figure, the court first determined his cash wage to be $49,560. The court added to that figure its calculation of the value of Richard's personal use of a company car ($3,150 per year) and his personal use of a company cellular phone ($360 per year). The trial court then calculated the parties' net monthly incomes by making appropriate deductions to gross income. Pursuant to the current child support guidelines, the court calculated child support to be $971.50 per month. The court reduced Richard's child support obligation from $1100 to $971.50 per month based

on a finding the prior order for support varied by ten percent or more from the new child support figure calculated by the court. *See* Iowa Code § 598.21(8) and (9).

Richard contends child support should be further reduced because the trial court over-valued his nonsalary employment benefits and erred in adding employment benefits to his gross income prior to applying the child support percentages. We note nonsalary benefits are properly factored into a child support award. *See In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa App. 1995). Although the definition of net monthly income does not encompass adding employee benefits to other income prior to applying the guideline percentages, the value of such benefits is a factor justifying a discretionary call by the trial court to order more child support than provided for by the guidelines. *Id.* We agree with Richard's contention that the *Huisman* case suggests a different approach from the one employed by the trial court in addressing the issue of employee benefits. Nevertheless, we decline his invitation to reduce the amount of child support ordered by the district court. We conclude the benefits Richard receives from his closely held professional corporation provide ample basis for an upward deviation in child support.

The district court's estimate of 10,000 miles of personal use of the company car per year is supported by Richard's history of personal use during the five years preceding trial. Richard's five-year average mileage for the years 1993 through 1997 was 20,170 miles. Richard and his accountant testified Richard drove the corporate car approximately 10,000 miles per year in those years for business purposes. The difference between business use and actual mileage is approximately 10,000 miles,

the number of miles used by the district court to place a value on the use of the corporate car.

We agree with Louise that further support for the trial court's calculation of child support is provided by averaging Richard's income for the 1995 to 1997 tax years. *See In re Marriage of Robbins*, 510 N.W.2d 844, 846 (Iowa 1994) (approving application of income averaging to self-employment, fluctuating income situations). His average gross income for that period is $55,367.33. This amount exceeds the gross income figure utilized by the district court. We decline to reduce the amount of child support ordered by the district court in its modification decree.

IV. Duration of Child Support. The parties' original stipulation provides that in the event both Sarah and Carrie die, marry, or otherwise become ineligible to receive child support before April 1, 2004, then Richard's obligation to pay child support shall terminate. However, child support does not decrease if only one of the children becomes ineligible befor · April 1, 2004. The parties acknowledged in the stipulation that the duration of child support was a specifically negotiated term. Richard contends the trial court erred by failing to change the duration of his child support obligation. He maintains that the decline in his income, used by the district court to reduce the amount of his child support, also justified a change in the duration of his child support obligation.

We disagree. The record shows the parties' agreement regarding the duration of the child support was based on at least two considerations. The first was the realization that Sarah would require parental involvement past the age of eighteen

because of her autistic tendencies and depression. The second was to create a less burdensome educational payment plan for Richard. The increased child support over several years was easier than paying two daughters' college expenses at the same time. The stipulation states Richard's obligation to pay child support until April 1, 2004, was in lieu of his obligation to pay college expenses for Sarah and Carrie. We find no basis in the record for modifying the parties' agreement regarding the duration of child support.

V. College Expenses. Richard also maintains that the parental allocation of the daughters' college expenses should be redetermined in accordance with Iowa Code section 598.21(5A) (1999), which provides for a "postsecondary education subsidy." We disagree. Before the effective date of the statute, the parties negotiated a stipulation which specifically established a longer period for child support payments in lieu of Richard's obligation to pay college expenses for the girls. Due to the explicit language of the stipulation, we decline to apply section 598.21(5A). *See In re Marriage of Williams*, 595 N.W.2d 126, 130 (Iowa 1999) (holding section 598.21(5A) does not apply retroactively).

VI. Maintenance of Life Insurance. The dissolution decree obligated Richard to maintain a life insurance policy for the benefit of his children. Richard contends he should be obligated to maintain this life insurance policy only until Carrie is age eighteen, not until April 1, 2004. Our de novo review of the record fails to reveal a material change in circumstances justifying any change in the duration of this obligation. We affirm on this issue.

VII. Unreimbursed Medical Expenses. Richard maintains the district court should have modified the requirement that he pay all unreimbursed medical expenses for the children. He contends Louise should pay one-half of those expenses.

Richard bases this request on changes in the parties' incomes and Sarah's incurrence of increased therapy and prescription expenses since the decree was entered. The parties negotiated a specific agreement regarding medical insurance and medical expenses which was incorporated into their dissolution decree. Sarah was diagnosed with autistic tendencies when she was five years old. Both parties were aware of her condition and the likely need for additional treatment when their marriage was dissolved. We find no substantial change of circumstances on this issue since entry of the dissolution decree.

VIII. Computation of Louise's Income. Richard asserts the trial court improperly computed Louise's income in applying the child support guidelines. The court used a figure of $36,000 for Louise's gross income in calculating the child support. This figure accounted for 200 hours of overtime work. Richard claims the court should have included an additional 100 hours of overtime compensation in determining her income.

Overtime pay may be excluded from the computation of monthly income when determining a child support obligation if overtime is speculative or uncertain. *In re Marriage of Geil*, 509 N.W.2d 738, 742 (Iowa 1993). The record reveals Louise is not guaranteed payment for overtime in excess of 200 hours per year. Her employer testified any additional overtime is compensated by additional time off ("comp time")

or paid in cash, at the sole discretion of her employer. We conclude the trial court properly computed Louise's income for purposes of applying the child support guidelines. We affirm on this issue.

IX. Trial and Appellate Attorney Fees. The district court refused to award either party attorney fees. Richard contends the district court should have awarded him attorney fees. In addition, both parties request appellate attorney fees.

Iowa Code section 598.36 governs the award of attorney fees in modification proceedings: "the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court." Under this code section, the district court has considerable discretion in determining the propriety of an attorney fee award. *Maher*, 596 N.W.2d at 568. We have discretion to award appellate attorney fees under section 598.36. *Id.* We consider the needs of the party making the request, the abiiity of the other party to pay attorney fees, and whether the requesting party was obligated to defend the district court's decision on appeal. *Id.* In this case, both parties prevailed in some measure in the modification proceeding in district court. We conclude the district court did not abuse its discretion in refusing to award Richard trial attorney fees. We decline to award appellate attorney fees.

X. Disposition. We affirm the district court's decision on the modification petition in its entirety. Costs on appeal are taxed to Richard.

AFFIRMED.