IN THE COURT OF APPEALS OF IOWA 000351

No. 6-366 / 95-332

FILED
JAN 29 1997
CLERK SUPREME COURT

IN RE THE MARRIAGE OF KATHERINE LYNN WHITE n\k\a\ KATHERINE LYNN NOBLE AND RANDY LYN WHITE

Upon the Petition of
KATHERINE LYNN WHITE n\k\a\ KATHERINE LYNN NOBLE,
Appellant,

And Concerning
RANDY LYN WHITE,
Appellee.

Appeal from the Iowa District Court for Muscatine County, Bobbi M. Alpers, Judge.

Katherine White appeals from the district court's modification of the parties' dissolution decree reducing Randy White's child support obligation. **AFFIRMED AS MODIFIED.**

Gregory A. Johnston, Muscatine, for appellant.

Robert H. DeKock of DeKock Law Office, Muscatine, for appellee.

Considered by Sackett, P.J., Cady, and Huitink, JJ.

000352

CADY, J.

Katherine White appeals from the district court's modification of the parties' dissolution decree reducing Randy White's child support obligation. We affirm the decision of the district court with modification.

Katherine and Randy White dissolved their marriage in 1992. They had two children: Melissa, born October 27, 1980, and Andrew, born December 6, 1977. The dissolution decree granted Katherine primary care of Melissa and granted Randy primary care of Andrew. The decree further ordered Randy to pay child support of $105.00 each week for Melissa. At the time of the dissolution Randy earned approximately $600.00 per week and Katherine earned approximately $200.00 per week.

On May 12, 1994, Randy sustained an injury while working at North Star Steel. Pursuant to company procedure following job-related accidents, Randy was tested for drug use. He tested positive for THC, an active ingredient in marijuana. Randy also tested positive for THC in 1990. North Star policy provided for termination if an employee tested positive for THC. Randy was aware of this policy.

North Star terminated Randy's employment on June 6, 1994. Within three days Randy informed Katherine of his termination. Randy regularly used marijuana and was drug dependent.

On June 13, 1994, Randy filed an application for modification seeking a reduction of his child support obligation. He subsequently filed a financial affidavit

showing income of approximately $175.00 per week and several assets including a retirement account. On August 8, 1994, at Randy's request, the district court entered an order setting pretrial and settlement conferences for October 5, 1994, and hearing on the application to modify for October 26, 1994. Katherine did not receive immediate notice of the pretrial and trial dates from the clerk of court. Upon learning of the oversight, Randy's counsel transmitted a copy of the order to Katherine on September 19, 1994.

Katherine filed a motion to continue the modification hearing on October 12, 1994 based on the untimely notice. She also argued she learned during Randy's October 3, 1994 deposition the true cause of his termination of employment was his consumption of illegal drugs and not the injury as stated in his application. The trial court denied the motion to continue on October 19, 1994, and the case proceeded to hearing as scheduled.

Randy testified he sought outpatient treatment for his substance abuse problem following the termination. He attended a "thirty-day" program held four days a week for three to four hours. After treatment, Randy attended only two Alcoholic Anonymous meetings.

In late June 1994 Randy secured employment with a construction company. He quit, however, a few weeks later following a pay dispute. He also sought unemployment benefits. He initially provided documentation to Job Service for jobs each week as required to obtain unemployment benefits. However, Randy was denied

unemployment benefits after three weeks. After benefits were stopped, Randy only occasionally filed job applications with perspective employers.

Randy did file a grievance through his union seeking reinstatement of his job with North Star Steel. He has generally been working odd jobs for friends, and enrolled in a basic plumbing class at a community college.

On November 15, 1994, the trial court issued an order modifying the provisions of the dissolution decree. It decreased Randy's child support payment for Melissa to $41.00 per week. The court further ordered Katherine could claim the tax deduction for Melissa. The trial court found Randy's discharge from employment was neither self-inflicted or voluntary.

Katherine appeals. She asserts the trial court erred in denying her motion to continue based on lack of timely notice of the pretrial conference and trial dates. Additionally, she argues the trial court erred in failing to find Randy's loss of income was self-inflicted since he voluntarily consumed drugs knowing the company policy on the use of drugs.

I. Motion to Continue

Katherine contends the trial court erred in overruling her motion for continuance. Our standard of review is abuse of discretion. *In re Marriage of Hatzievgenakis*, 434 N.W.2d 914 (Iowa App. 1988).

000355

Trial courts have broad discretion in ruling on motions for continuance. *Rattenborg v. Montgomery Elevator Co.*, 438 N.W.2d 602, 605 (Iowa App. 1989)(citations omitted). We will not interfere absent a clear showing of abuse. *Hatzievgenakis*, 434 N.W.2d at 916. A trial court's ruling on a motion for a continuance is presumptively correct, and a party challenging the ruling has a heavy burden to overcome the presumption. *Rattenborg*, 438 N.W.2d at 605. Katherine was required to show a substantial justice would more nearly be obtained by granting a continuance. *See Bell,* 494 N.W.2d at 731(citing *State v. Miller*, 480 N.W.2d 894, 895 (Iowa 1992)). Prejudice must be shown to require a reversal for denial of such a motion. *Hatzievgenakis*, 434 N.W.2d at 916.

Katherine has failed to meet her burden to overcome the presumption the trial court's ruling on the motion for continuance was correct. She has not shown how she was prejudiced by the trial court's refusal to grant the continuance. Although Katherine did not receive notice of the pretrial conference date and trial date in a timely manner, she did receive notice several weeks before the pretrial conference and over a month before trial on the modification application. Katherine did not file her motion for continuance until October 12, several weeks after receiving notice of the pretrial and trial dates and a week after she allegedly received information that Randy was fired for a positive drug test. Katherine has failed to show the trial court abused its discretion in not granting her a continuance.

II. Modification

Our review of an action to modify child support is de novo. *In re Marriage of Bolick*, 539 N.W.2d 357, 359 (Iowa 1995). We give weight to the findings of the trial court, but are not bound by them. *Id.*

Under Iowa Code section 598.21(8), the district court may modify child support provisions in a dissolution decree when there is a substantial change in circumstances. Yet, not every change in circumstances will be sufficient. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983). Moreover, it must appear that continued enforcement of the original decree would, as a result of the new circumstances, result in positive wrong or injustice. *Id.*

Our legislature has enumerated many factors to consider in determining whether a substantial change has occurred. Iowa Code section 598.21(8). One of the factors is any change in earning capacity, income, or resources. Iowa Code § 598.21(8) (1995). A change in financial conditions, nevertheless, must be substantial and more or less permanent. *Vetternack*, 334 N.W.2d at 762.

Our appellate courts have repeatedly recognized that a parent may not rely on a claim of diminished income to obtain a modification of a support order if the parent's reduced earning capacity and inability to pay support is self-inflicted or voluntary. *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). Therefore, parents who reduce their income through an improper intent to deprive their children of support or in reckless disregard for their children's well-being are not entitled to a commensurate reduction in child support payments. A petition for modification will

be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987)(citations omitted).

In *Foley*, our supreme court found a parent's termination from employment for "insubordination" did not amount to a self inflicted or voluntary reduction of income since the reason for the termination did not reveal an intent to deprive the children of support or a reckless disregard for their well-being. *Foley*, 501 N.W.2d at 500. In reaching its holding, the court recognized the parent diligently obtained a new job at a salary of $25,000. *Id.* He had been earning $30,000 annually. *Id.*

Like *Foley*, we cannot conclude the actions by Randy which resulted in the loss of his employment necessarily revealed an intent to deprive his child of support or amounted to a reckless disregard for her well-being. Unlike the parent in *Foley*, however, Randy has been less then diligent in seeking a new job to help meet the financial needs of his child. In the more than five months between the termination of employment and modification trial, Randy only sporadically sought employment and quit the only job he obtained after a few weeks. He was content doing odd jobs for friends and taking a basic plumbing class at a community college. His actions were disconnected from the welfare of his child.

Randy argues his good faith is illustrated by the evidence he sought help for his drug dependency following his termination and sought reinstatement of his job by filing a grievance through his union. Yet, he has failed to comply with drug treatment

000358

recommendations, and there was no evidence to indicate the grievance would likely result in reinstatement. Randy was denied unemployment benefits following his termination based on his conduct. Furthermore, the union grievance may not be resolved for a year.

Considering his indolent attitude towards new employment, combined with conduct which placed his former job in jeopardy nearly every day he reported to work, we conclude the change in Randy's financial condition was self inflicted. *See Kern*, 408 N.W.2d at 390 (Individual engaged in unlawful activity at his own peril, his reduced financial ability is due to his own fault). We also observe Randy has continued to remain current on his other financial obligations, and has assets, including a retirement account, available to him. *See Vetternack*, 334 N.W.2d at 762.

Randy has failed to establish a substantial change of circumstances to warrant modification of child support. His conduct constitutes a reckless disregard for Melissa's financial well-being.

We modify the decision of the district court and reinstate the $105 per week child support obligation for Melissa, effective the date of the issuance of the procedendo. We also modify the decision to restore the tax deduction for Melissa to Randy. We otherwise affirm the decision of the district court. Costs to Randy.

AFFIRMED AS MODIFIED.

Huitink, J., concurs; Sackett, P.J., concurs in part and dissents in part.

SACKETT, P.J. (partially concurring)

I would affirm the trial court.

000359