IN THE COURT OF APPEALS OF IOWA

No. 6-459 / 95-1351

JUN 2 5 1997
CLERK SUPREME COURT

IN RE THE MARRIAGE OF GARY MICHAEL MURRAY AND DARRLYN GAIL MURRAY

Upon the Petition of
GARY MICHAEL MURRAY,
Petitioner-Appellant,

000329

And Concerning
DARRLYN GAIL MURRAY,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Gary appeals the district court's order modifying the parties' dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

Becky S. Knutson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellant.

John S. Harding, Des Moines, for appellee.

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

000330

HUITINK, P. J.

I. Background Facts and Proceedings.

Gary and Darrlyn were divorced in 1982. Darrlyn was awarded physical care of their two children: Christian, born November 13, 1975; and Holly, born May 26, 1978. Gary was ordered to pay child support of $50 per child per week.

Gary's child support was increased to $75 per child per week ($325 per child per month) in 1991. He was also required to pay twenty percent of his annual bonus as part of this obligation. The modified support ordered was less than the amount required by the applicable child support guidelines. The district court cited Gary's family expenses, Christian's private school tuition and transportation costs associated with Gary's visitation rights as reasons for deviating from the guidelines.

In April 1995 the district court again increased Gary's child support. The court found Gary's increased earnings justified an increase and ordered him to pay $700 per month for Holly's support, plus 22.5 percent of his annual bonus. This amount was less than the $958 support required by a strict application of the child support guidelines. The court justified its deviation from the guidelines citing Gary's "expenses with his new family and high cost of living on the east coast." Gary's modified support obligation was made retroactive to June 7, 1994.

In this appeal, Gary contends the district court's deviation from the guidelines was not substantial enough to accomplish its intended purpose. He also argues the

court erred by ordering him to apply portions of his 1996 and 1997 bonus to Holly's support and that the court should have set a termination date for his obligations for Holly. Lastly, Gary challenges the district court's award of attorney fees to Darrlyn.

II. Standard of Review.

Our review in this equitable proceeding is de novo. Iowa R. App. P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact but we do give them deference because of the district court's trial perspective. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Modified Child Support.

The issue in this case is limited to how much Gary's child support should be increased. The circumstances justifying an increase are not disputed.

There is a rebuttable presumption that the amount of child support resulting from the application of the child support guidelines is correct. Iowa Code § 598.21(4)(a) (1995). The court may order a different amount of support upon specified findings that application of the guidelines would be unjust and inappropriate. The guideline amount is appropriately adjusted upward or downward to accommodate the needs of the children and to do justice between the parties under the special circumstances of each case. *State ex. rel. Nicholson v. Toftee*, 494 N.W.2d 694, 695 (Iowa 1993).

An obligor's financial commitment to other children or stepchildren does not automatically justify a departure from the guideline amount. *State ex. rel. Epps v. Epps*, 473 N.W.2d 56, 58 (Iowa 1991). Consideration of these expenses is however germane to determining the obligor's ability to pay and may justify a departure from the guidelines. *State ex. rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994).

In 1991 the court found Gary's net monthly income was $3225. His family's living expenses were $3378 per month in 1991. Gary's net monthly income increased thirty-five percent to $4258 and his family's expenses increased by twenty-two percent to $4150 between modification proceedings. Darrlyn's 1991 net monthly income was $1585 and her monthly family expenses were found to be $2200. Since that time her net monthly income has increased nineteen percent to $1830 and her family living expenses have decreased to $2154.

Although the percentage increases in expenses in relationship to income favor Gary's contentions, we are unable to say the amount of the district court's downward deviation is clearly unreasonable. Because we find no abuse of the district court's discretion to deviate from the child support guidelines, we affirm on this issue.

Equity also requires Gary's modified child support should be retroactive and we accordingly affirm the district court's decision to make Gary's child support retroactive to June 7, 1994.

IV. 1996 and 1997 Bonus. 000333

Gary's support obligation included a percentage of his annual bonus. The payment method ordered by the court was intended to accomodate the varying amount of the bonus and its receipt in the calendar year following the year it was earned. As a result, Darrlyn received an annual child support supplement to compensate her for support she would have received had Gary's bonus been included in the prior year's income in determining his monthly support obligation.

The problem presented is whether Holly's eighteenth birthday in May 1996 necessitates an adjustment of the amount of Gary's 1996 and 1997 bonuses applied to his child support obligation. We, based on the foregoing record, conclude Gary should pay the entire percentage of his 1996 bonus ordered as part of his 1995 support obligation. His 1997 bonus, applicable to his 1996 support obligation, should be prorated based on the number of months for which child support accrued in calendar year 1996. The district court's modification decree is therefore modified to limit payment of Gary's annual bonuses as herein provided.

V. 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 do not find any abuse of discretion and affirm the district court's award of attorney fees. Each party shall pay their own appellate attorney fees and the costs are assessed one-half to each party. The judgment of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.