

IN THE COURT OF APPEALS OF IOWA

No. 4-073 / 93-872

IN RE THE MARRIAGE OF BARBARA KAYE MEYER AND DARWIN CURTIS MEYER

Upon the Petition of
BARBARA KAYE MEYER,

Appellant,

And Concerning
DARWIN CURTIS MEYER,

Appellee.

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan, Judge.

Petitioner appeals a judgment of the district court modifying the child support provisions of the parties' original dissolution decree. **AFFIRMED AS MODIFIED.**

John L. Thompson, Tama, for appellant.

Michael J. Schuster of Schuster & Mick, Guttenberg, for appellee.

Considered by Hayden, P.J., and Habhab and Cady, JJ.

HAYDEN, P.J.

Darwin and Barbara Meyer were married in 1975 and divorced on March 10, 1983. Pursuant to the dissolution decree, Barbara was awarded physical custody of the parties' two minor children, Christopher James, born in 1976, and Shayla Ann, born in 1980. Darwin was ordered to pay child support of $250 per month.

Barbara filed an application for modification in February 1985. The case was set for trial in August 1985, but the parties entered into a settlement. The stipulation granted them joint legal custody of the children. They also agreed to increase Darwin's child support obligation to $300 per month beginning August 20, 1985. Although the parties did not actually sign the stipulation until November 10, 1989, Darwin began paying the increased child support at the time the stipulation was entered into. In the meantime, on January 12, 1987, the district court had dismissed Barbara's modification action pursuant to Iowa Rule of Civil Procedure 215.1. Although a renewed application for modification does not appear in the file, an order approving the stipulation was entered by the district court on November 14, 1991.

By the parties' agreement, Christopher lived with Darwin from September 1989 to April 1991. Darwin testified the parties entered into an agreement his child support obligation would be reduced to $200 per month while Christopher was in his care. Barbara admitted there had

been an oral agreement. No written agreement was ever signed, and the parties did not submit their agreement to the court.

In April 1991 Christopher returned to the care of Barbara. However, in June 1992 he became the subject of juvenile proceedings. On September 4, 1992, the juvenile court placed Christopher in the physical care of Darwin.

On December 9, 1992, Darwin filed a petition to modify the parties' dissolution decree. The parties agreed the decree should be modified to reflect Christopher's physical placement. Darwin asked for an order requiring Barbara to pay child support for Christopher. Furthermore, he sought an order showing he was only obligated to pay the sum of $200 per month in child support for the twenty months from September 1989 to April 1991.

The district court determined it was without authority to reduce the amount of Darwin's child support obligation which had already accrued. However, the court gave him a credit of $100 per month on his future child support obligation for a period of twenty months. The court ordered Darwin to pay child support of $295 per month for Shayla, subject to the $100 credit for twenty months. The court ordered Barbara to pay child support of $417 per month for Christopher, beginning in April 1993. Darwin was ordered to maintain health insurance for the children. Barbara appealed.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

I. Barbara contends the district court should not have modified the decree to give Darwin a credit on his child support to reflect an alleged excess he had paid in the past. She states there was no actual agreement between the parties to reduce Darwin's child support obligation to $200 per month while Christopher lived with him. Furthermore, she claims it is not equitable to reduce Darwin's child support in the future, even if there had been an agreement.

There is a rebuttable presumption 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. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). A court cannot vary the amount of child support without a written finding application of the guidelines would be unjust or inappropriate. In re Marriage of Powell, 474 N.W.2d 531, 533 (Iowa 1991).

Here, the district court determined an injustice had arisen because under the court's prior order, Darwin was required to pay child support of $300 per month. The court also determined the parties had entered into an agreement

Darwin's obligation would be reduced to $200 per month when Barbara had physical care of Shayla and Darwin had physical care of Christopher. The district court found Darwin was more credible on the issue of whether the parties had entered into an agreement for the reduction of his child support. We give weight to the trial court's factual findings, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

Under Iowa Code section 598.21(8) (1991), judgments for child support may be retroactively modified only from the date the notice of the pending petition is served on the opposing party. Thus, we have no authority to modify Darwin's support obligation for the period of September 1989 to April 1991. We agree with the district court this creates an injustice because Darwin is required to pay child support for this period in excess of the amount agreed upon by the parties. We concur with the district court a departure from the child support guidelines is warranted to credit Darwin for the excess child support he paid for twenty months. We affirm the district court's decision to reduce Darwin's child support obligation by $100 per month for a period of twenty months.

II. Barbara contends the district court improperly calculated her child support obligation. Barbara admitted she earned $29,034 annually as a speech pathologist. Darwin presented evidence to show she had net monthly income of $1,853. The district court used this amount and

determined Barbara's child support obligation was $417 per month.

Barbara contends her net monthly income is actually $1,635 and her child support obligation should be $368 per month. We note Barbara did not submit her income tax returns or any other financial information to show her income tax obligation was other than the amount estimated by Darwin using an income tax program. We conclude Barbara was properly ordered to pay child support of $417 per month.

III. Barbara claims the district court improperly calculated Darwin's child support obligation. The district court determined Darwin earned $21,912 annually as a salesman and had net monthly income of $1,311. Darwin's child support obligation was calculated to be $295.

Barbara contends Darwin's child support obligation should be based on his earning capacity, not his present income. Darwin earned about $30,000 in 1990 and 1991 and had net monthly income of about $1,485. Barbara believes Darwin voluntarily reduced his income.

We determine Darwin has not voluntarily reduced his income. He testified he had a falling out with his employers in Florida. He then moved to Illinois, where he had three different sales jobs in 1992. The evidence showed Darwin was trying to increase his income, not reduce it. We conclude the district court properly calculated Darwin's child support obligation.

IV. Although he did not file a cross-appeal, Darwin asks in his brief to have Barbara's child support obligation made retroactive to December 14, 1992, the date Barbara received notice of the petition for modification.

Under section 598.21(8), any modification of child support can be made retroactive only to the date on which the notice of the pending petition for modification is served on the opposing party. State ex rel. Welter v. Kitner, 512 N.W.2d 309, 312 (Iowa App. 1993). A court has authority to require retroactive payment of child support even in those circumstances when the dissolution decree created no obligation to pay child support. In re Marriage of Chesterman, 462 N.W.2d 696, 698 (Iowa App. 1990).

We note Barbara paid no child support for Christopher for the twenty months he lived with Darwin previously. She had not paid any support for Christopher after the juvenile court placed him in Darwin's physical care. It is the policy of this State for every parent to contribute to the support of his or her children in accordance with the means available. In re Marriage of Smith, 501 N.W.2d 558, 560 (Iowa App. 1993).

We determine the district court's order should be modified to make Barbara's child support obligation for Christopher retroactive to December 14, 1992.

We affirm the decision of the district court, except as we have here modified. Costs of this appeal are assessed to Barbara.

AFFIRMED AS MODIFIED.