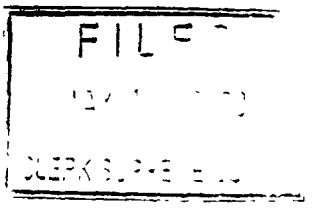
IN THE COURT OF APPEALS OF IOWA

No. 0-025 / 99-0306
Filed May 10, 2000

IN RE THE MARRIAGE OF KURT MORGAN ANDERSON and DEBORAH ANNE ANDERSON

Upon the Petition of
KURT MORGAN ANDERSON,
Petitioner-Appellee/Cross-Appellant,

And Concerning
DEBORAH ANNE ANDERSON,
Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Wapello County, Dan Morrison, Judge.

Respondent Deborah Anne Anderson appeals and Petitioner Kurt Morgan Anderson cross appeals from the district court's decision modifying certain provisions of their February 6, 1997 dissolution decree. Deborah contends (1) the district court should not have decreased the monthly child support; (2) the district court should have incorporated a visitation agreement in its order; and (3) she should have been awarded attorney fees. Deborah also requests appellate attorney fees. Kurt on cross-appeal contends the child support should have been reduced. **AFFIRMED AS MODIFIED.**

Kolleen K. Samek, Des Moines, for appellant.

J. Terrence Denefe and Paul Zingg of Kiple, Kiple, Denefe, Beaver & Gardner, L.L.P., Ottumwa, for appellee.

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

SACKETT, C.J.

Respondent-Appellant Deborah Anne Anderson appeals and Petitioner-Appellee Kurt Morgan Anderson cross appeals from the district court's decision modifying certain provisions of their February 6, 1997 dissolution decree. Deborah contends (1) the district court should not have decreased the monthly child support from $6,000 to $4,500; (2) the district court should have incorporated a visitation agreement in its order; and (3) she should have been awarded attorney fees by the district court. Deborah also requests appellate attorney fees. Kurt on cross-appeal contends the child support should have been reduced to $4,000 a month. We affirm in all respects except to modify to include in the decree that portion of the oral stipulation of settlement of visitation issues approved by the district court.

Deborah and Kurt were married May 26, 1984 and are the parents of four children born in September of 1984, January of 1987, March of 1989 and November of 1991. At the time of the dissolution primary care of the children was placed with Deborah. In addition to child support Kurt was ordered to pay Deborah alimony of $2,000 for thirty-six months. The parties each received approximate $250,000 in property.

Kurt is a licensed physician in Ottumwa. His specialty, which he has practiced since July of 1986, is otolaryngology, meaning he treats the ear, nose and throat. He filed this application contending that his income had substantially decreased do to certain factors including the decrease in third party payment of medical bills.

Deborah is a licensed nurse. In 1986 the parties agreed that she would devote full time to the children and the home. She has not worked outside the home since then. She has an earning capacity of just less than $30,000 annually. Deborah challenged Kurt's application for modification. She indicated she may move to St. Louis and sought visitation concessions should she do so.

The district court found the dissolution court determined that Kurt's 1996 income was $465,546 and the dissolution court found Deborah could earn $27,000 a year. The court found Kurt's income in 1997 was $309,850 and his income as of December 14, 1998, was $339,209.42.[1] The court found this to be a decrease of twenty-seven percent and further found the current level will be a realistic figure over the next several years. The court then reduced the child support effective February 15, 1999. No attorney fees were awarded. The district court did not address visitation stating it would not be addressed until Deborah moved more than 150 miles from Ottumwa.

Deborah contends that Kurt has failed to meet the burden necessary for a change in child support. She also contends because Kurt's child support is within the discretionary range of the child support guidelines that the earlier award cannot be revisited because Kurt continues to earn in excess of $6,000 a month.

Our review of a district court's modification of a dissolution decree is de novo. Iowa R. App. P. 4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We accord the trial court considerable latitude in making this

[1] The amount was amended from $389,209.42 to $339,209.42 after a 179(b) motion was filed.

determination and will disturb the ruling only when there has been a failure to do equity. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996).

A dissolution court may modify child support and alimony provisions of a dissolution decree when there has been a substantial change in circumstances since the entry of the decree. *See* Iowa Code § 598.21(8) (1997). The party seeking modification has the burden to prove the change in circumstances by a preponderance of the evidence. *See Walters*, 575 N.W.2d at 741. Not every change in circumstances is sufficient rather it must be permanent and substantial so that the changed circumstances would make it unjust to continue enforcement of the original decree. *See id.* Additionally, the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered. *See id.*

Applying the above rationale, we find that to justify a modification we need to answer yes to several questions, specifically, (1) did Kurt's income decrease, (2) was it an involuntarily decrease, and (3) is it substantial and permanent.

Deborah makes a series of arguments directed at her contention Kurt's income has not decreased. She points to an alleged increase in his gross income. She challenges his testimony as to increased expenses. The record, including Kurt's tax returns and testimony of decreases in Medicare and Medicaid payments and anticipated decreases in Wellmark payments, clearly support the district court's findings as to the decrease in Kurt's income. The district court considered that Kurt's income had decreased for two years. *See In re Marriage of Crotty*, 584 N.W. 2d 714, 718 (Iowa App. 1998) (affirming a district court's

consideration of two years income of a noncustodial parent in fixing child support.

There is no evidence that Kurt voluntarily decreased his earnings for purposes of decreasing his child support obligation. The evidence supports a finding that Kurt has not decreased his workload since the dissolution. He works sixty to seventy hours a week and saw 6,000 patients in 1996 and subsequent years. He has performed between 1,100 and 1,200 surgical procedures a year since the dissolution. He testified the average number of surgical procedures performed by others in this specialty nationwide is about 700. He testified he wishes to cut his hours. He is a recovering alcoholic and drug abuser and has been advised to cut his hours but he has not done so.

A decrease in annual income of over twenty-five percent is substantial and evidence indicates it will be permanent. The evidence indicates there will be further cuts in Wellmark contracts. There is evidence that Kurt's excessive work hours may need to be cut for his physical and emotional health. Kurt has met the necessary burden for modification. We dismiss Deborah's contention that because Ken's income exceeds $6,000 a month and is within the discretionary range that the initial child support award cannot be modified. When as here a parent's monthly net income as defined for child support purposes exceeds $6,000 a month then in this range the appropriate figure is deemed to be within the sound discretion of the court. Iowa Court Rules; Child Support Guidelines p. 523 (1997); *see also In re Marriage of Beecher*, 582 N.W.2d 510, 513 (Iowa 1998). In exercising its discretion the district court needs to look at the parties'

net monthly income as defined by the guidelines. *See In re Marriage of Shivers*, 557 N.W.2d 532, 534 (Iowa App. 1996).

In examining Kurt's contention that his support obligation should have been further decreased, we do not find the district court abused its discretion in the amount set. *See In re Marriage of Krone*, 530 N.W. 2d 468, 471 (Iowa App. 1995). We affirm the district court's modification of child support.

Deborah contends the district court should have required Kurt to pay her trial attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial position. *Crotty*, 584 N.W.2d at 719. Deborah has substantial assets and the ability to pay her own attorney fees. The district court did not abuse its discretion.

Deborah contends that the district court should have adopted in the modification order an oral stipulation between the parties concerning visitation. Prior to trial the court was told basically that the parties agreed (1) Kurt would continue seeing the children every Tuesday night and every Thursday night and return the children on those nights at 8:15 p.m.; (2) That the alternating weekend visitation Kurt is provided would be extended so the children would be returned by 8 p.m. on Sunday rather than 6 p.m.; (3) Kurt would continue to get six week summer visitation and an uninterrupted two week time during this six weeks be it in June, July or August when Deborah will have not visitation; (4) Kurt shall notify Deborah in writing by April 30th of each year of what six week period he wants and what two weeks of that period shall be uninterrupted time and (5) Deborah shall let Kurt know in writing by May 15th of each year what two interrupted week of visitation she wants; (6) During Kurt's six weeks of summer visitation Deborah

shall have visitation with the children on *one day each week except the uninterrupted* weeks from 9 a.m. to 8 p.m. The district court orally accepted this stipulation and said, "and he[2] will type that up so Counsel has a copy of it." There is no indication the stipulation was ever typed. There then followed on the record what were referred to as additional notations concerning the stipulation and agreement. This basically provided Deborah could remove herself to Saint Louis and specified some visitation there, leaving spring vacation the only issue to be resolved. Both counsel agreed to these additional provisions but these were not approved by the district court nor was the district court requested to approve them after there were dictated in the record.[3]

The district court in its initial ruling made no reference to the stipulation on visitation. The court did say, "The issue of visitation will be addressed by the court if and when either party moves more than 150 miles from Ottumwa."

In an Application for Reconsideration Deborah said it was error for the district court not to include in its ruling the stipulated agreement as to visitation it adopted. Deborah further contended that the district court should have ruled on the issue of Kurt's summer visitation in case of a move and it should reconsider its decision. In ruling on the motion the district court over ruled Deborah's motion but said, "except that counsel may present a jointly approved order to the court

[2] He is not identified.

[3] The oral stipulation provided in addition to specifying certain visitation that Deborah be allowed to move to St. Louis and that once relocated "Kurt would be entitled to one week end per month of visitation, every spring break and a modified Christmas schedule". It also provided the parties would exchange the children in Hannibal, Missouri, when Deborah resides in St. Louis.

regarding the visitation stipulation approved at trial." There is no record that such a stipulation was presented.

We modify the modification decree to include those provisions regarding visitation that we determine were both agreed to by the parties and specifically approved by the district court. We deny Deborah's request to include other provisions. First there is no evidence they were approved by the district court and secondly the most the evidence shows is there is a possibility Deborah may move. Consequently, we do not disagree with the district court's decision not to rule on the issue until such time as a move is actually planned and additional facts are available concerning it.

Deborah requests appellate attorney fees. We weigh her request by considering her financial needs, Kurt's ability to pay and the results of this appeal. *See In re Marriage of Fish*, 350 N.W. 2d 226, 231 (Iowa App. 1984). We award no appellate attorney fees. The costs on appeal shall be paid one half by each party.

AFFIRMED AS MODIFIED.