IN THE COURT OF APPEALS OF IOWA

No. 5-477 / 94-1442

IN RE THE MARRIAGE OF LAWRENCE T. THOMAS AND HELEN R. THOMAS

Upon the Petition of

LAWRENCE T. THOMAS,

Petitioner-Appellant,

And Concerning

HELEN R. THOMAS,

Respondent-Appellee.

FILED
JUN 27 1996
CLERK SUPREME COURT

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

Lawrence appeals from the denial of his petition to modify his child support obligation. **AFFIRMED AS MODIFIED.**

John G. Martens of Sanderson, Ridout & Martens, Estherville, for appellant.

Max O. Pelzer and James D. Hart of Anderson, Pelzer & Hart, Estherville, for appellee.

Considered by Sackett, C.J., and Habhab and Cady, JJ.

HABHAB, J.

Lawrence and Helen Thomas were previously married to one another. They have five children: Tammy, born in 1973; Laurie, born in 1976; Christy, born in 1978; Tiffany, born in 1982; and Tiana, born in 1987.

A dissolution decree was entered on April 3, 1990. The decree incorporated the parties' stipulation. The court awarded the parties joint legal custody of the children, with Helen having primary physical care. Lawrence was ordered to pay child support of $900 per month until two of the children had married, died, or were no longer students. At that time his support would be reduced to $225 per month per child.

Lawrence is self-employed as a siding installer. In 1989, he had annual income of $14,533. At the time of the dissolution he estimated his net monthly income was about $1342. Helen estimated his net monthly income was about $2000. Both parties felt his income would probably increase in the future. In 1989, Helen had annual income of $1568 from part-time employment.

On March 9, 1994, Lawrence filed a petition for modification of the dissolution decree. He sought to have his child support obligation reduced. Two of the parties' children were emancipated, and he was presently paying $675 per month in child support for the remaining three children. He stated that instead of his annual income increasing it had been reduced to $13,159, and his net monthly income was

$1000. Lawrence had remarried in 1993. He testified he relied on his current wife for living expenses because of his onerous child support obligation. At the present time, Helen was employed part-time and had annual income of about $1625.

The district court denied Lawrence's request for modification. The court found Lawrence had failed to show a substantial change in circumstances because his present income was similar to his income in 1989. The court denied Lawrence's motion for enlargement. Lawrence now appeals.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We give weight to the trial court's factual findings but are not bound by them. *In re Marriage of Bolick*, 539 N.W.2d 357, 359 (Iowa 1995).

Iowa Code section 598.21(8) states that child support orders may be modified where there has been a substantial change in circumstances. Section 598.21(9) provides:

> Notwithstanding subsection 8, a substantial change in circumstances exists when the court order for child support deviates by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established pursuant to subsection 4. . . .
>
> This basis for modification is applicable to petitions filed on or after July 1, 1992, notwithstanding whether the guidelines prescribed by section 4 were used in establishing the current amount of support. . . .

Under section 598.21(9), a ten percent or more deviation constitutes a substantial change in circumstances even if the reasons listed under section 598.21(8) are not

met. *Schuler v. Rodberg*, 516 N.W.2d 902, 903 (Iowa 1994). Section 598.21(9) applies to all cases pending on or after its effective date, July 1, 1992. *Id.*

The district court recognized that the amount of Lawrence's child support obligation exceeded the amount required by the child support guidelines. The court concluded, however, that the guidelines did not require modification of pre-existing support orders absent some other change in circumstances sufficient to warrant modification under existing case law.

We are unable to agree with the district court's conclusion. If there is a deviation of more than ten percent from the amount required by the child support guidelines, then there has been a substantial change in circumstances, even if no other change has been shown. Here, Lawrence is obligated to pay child support of $675 per month. Under the current child support guidelines, his obligation would be to pay $432 per month. Lawrence's child support obligation deviates by more than ten percent from the amount required by the child support guidelines. In accordance with section 598.21(9), there has been a substantial change in circumstances.

We note that in the case of *In re Marriage of Hess*, 522 N.W.2d 861 (Iowa App. 1994), we declined to apply the ten-percent deviation rule "because of the stipulation between the parties which provided that neither parent was to pay child support to the other." *Id.* at 864. In further explanation, under the original decree in *Hess*, the mother was awarded the primary care of the parties' two children. This

decree was subsequently modified by stipulation of the parties so that each parent received custody of a child and neither parent was to pay child support. The stipulation, however, in *Hess* had initially worked to the mother's benefit, but at the time of the modification hearing, it was working to the father's benefit. *Id.* We further found that substantial injustice to the father would result if the stipulation were abandoned and the current child support guidelines were applied. *Id.*

No such injustice is present in this case. At the time of the parties' stipulation, Lawrence was obligated to pay slightly more than the amount required by the child support guidelines. He agreed to pay more than he was required because he believed his income would increase. However, Lawrence's net monthly income has decreased since the dissolution decree was entered. Under the terms of the decree, his child support obligation is now substantially in excess of the amount required by the child support guidelines. Under these circumstances, we believe section 598.21(9) may be applied, even though Lawrence's child support obligation was initially set by stipulation.

We conclude that under section 598.21(9), Lawrence's child support obligation should be reduced to the amount required by the child support guidelines, which is $432 per month for the three children still in Helen's physical care. We modify the parties' dissolution decree to make this change. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.