IN THE COURT OF APPEALS OF IOWA

No. 6-718 / 96-0102

IN RE THE MARRIAGE OF CATHI VAN BAALE AND THOMAS SIMS VAN BAALE

Upon the Petition of
CATHI VAN BAALE,

Petitioner-Appellee,

And Concerning
THOMAS SIMS VAN BAALE,

Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Thomas Van Baale appeals from the denial of his request to modify the child support provisions of the dissolution decree. **AFFIRMED.**

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for appellant.

Kolleen K. Samek, Des Moines, for appellee.

Heard by Cady, P.J., Huitink, J., and McCartney, S.J.*

*Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

HUITINK, J.

Respondent Thomas Van Baale ("Tom") appeals from the order of the district court denying his application for modification of his child support obligation payable to his former spouse, petitioner Cathi Van Baale. We affirm.

Tom, age forty-five, and Cathi, age thirty-nine, were divorced on September 15, 1992. The parties were granted joint legal custody of their two children, Chelsi, age eleven, and Emily, age eight. Cathi was awarded primary physical custody and Tom was ordered to pay $650 per month in child support. The court retained jurisdiction to redetermine Tom's child support obligation pending a Civil Service Commission decision concerning Tom's employment as a police officer for the City of Des Moines. Tom had been terminated from the police department in June 1992 following an incident in December 1991 at the family's home. Tom pled guilty to a charge of interference with official acts and no contest to a domestic abuse charge in connection with the incident.

The trial court entered an order in April 1993 directing Tom to pay Cathi $500 per month in child support from February 1993 until February 1994, at which time Tom's obligation would increase to $600 per month. The court set Tom's earning capacity at $20,000 gross income per year and projected his earning capacity one year from the date of the order to be $30,000 gross income per year.

This award was more than required by the Child Support Guidelines. The court acknowledged that in imputing a $20,000 earning capacity, Tom's obligation under the guidelines would be $326 per month. The court justified the deviation based on the standard of living Tom had been providing the family and also based on the family's living expenses. The order further provided that if Tom were reinstated with the Des Moines Police Department, then the original order directing Tom to pay $850 per month would be retroactively reinstated as of August 1992.

In April 1995, Tom sought a modification of his child support obligation asserting four substantial changes in circumstances: (1) he had been unsuccessful in his appeal of the Civil Service Commission's decision not to reinstate him with the Des Moines Police Department; (2) his 1993 gross taxable income did not approach $20,000 and his 1994 gross taxable income did not approach $30,000; (3) his current obligation deviated by more than ten percent from the guidelines; and (4) Cathi's net monthly income had increased. The trial court denied the order and directed Tom to pay the costs of the action and $2000 in attorney fees to Cathi.

In its order denying the modification, the district court reasoned that Tom's failure to be reinstated as a police officer was within the court's contemplation at the time the April 1993 support order was entered. The court further explained the case was not a "guidelines case" as the court had already determined in its April 1993 order deviating from the guidelines. The court also noted the April 1993 award was based on Tom's earning capacity. The court determined Tom's 1994 earnings,

$15,154, were not a permanent change in his earning capacity necessitating a reduction in his child support. The court further noted Tom's employment search had neither been "long or broad enough to establish he lacked the capacity to earn $30,000 per year." Finally, the court determined that Cathi's increased earnings of four percent in base pay alone did not justify a decrease in Tom's obligation.

Tom appeals the district court's order arguing that substantial changes have occurred in his earning capacity, his actual earnings, and in Cathi's actual earnings. If the court grants a reversal, Tom requests trial attorney fees. In the alternative, he contends the trial court abused its discretion by awarding fees to Cathi given the relative financial positions of the parties.

I. Standard of Review.

Our review in a modification proceeding is de novo. *In re Marriage of Hubbard,* 315 N.W.2d 75, 80 (Iowa 1982); Iowa R. App. P. 4. Because the trial court was present to hear and observe the witnesses, we give weight to its findings but we are not bound by them. *Id.*; *see also* Iowa R. App. P.14(f)(7). The district court has reasonable discretion in determining whether modification is warranted and such discretion will not be disturbed on appeal unless there is a failure to do equity. *In re Marriage of Kern,* 408 N.W.2d 387, 389 (Iowa App. 1987) (citing *In re Marriage of Vetternack,* 334 N.W.2d 761, 762 (Iowa 1983)).

II. Modification of Child Support.

To justify a modification of the child support provision, "some material change must be shown in the circumstances of the parties, financially or otherwise, making it equitable that other or different terms must be imposed." *In re Marriage of Smith,* 501 N.W.2d 558, 560 (Iowa App. 1993); *see also* Iowa Code § 598.21(8) (1995). A substantial change in circumstances also exists "when the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current support guidelines." Iowa Code § 598.21(9) (1995).

The principles enumerated in *Vetternack* are applicable:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

There is a rebuttable presumption that the amount of child support resulting from the application of the guidelines is correct. *In re Marriage of Benson,* 495 N.W.2d 777, 780 (Iowa App. 1992). The guidelines may be adjusted if the court finds, in writing, that an adjustment is necessary to provide for the needs of the children and to prevent substantial injustice. *In re Marriage of Blum,* 526 N.W.2d 164, 165.

Tom raises several arguments on appeal in support of his request for reduction of his child support obligation. He argues Cathi failed to rebut the presumptive correctness of the guidelines result.

Alternatively, Tom argues his support obligation, $600 per month, exceeds the guidelines amount by more than ten percent and is, therefore, a "per se" substantial change in circumstances. *See* Iowa Code § 598.21(9); *see also In re Marriage of Salmon,* 519 N.W.2d 94, 96 (Iowa 1994). He computes this deviation by using a 1995 gross income of $20,000 for himself and a gross income of $45,000 for Cathi to arrive at a $350 per month obligation under the current guidelines.

Tom also challenges the court's attribution of a $30,000 earning capacity. He claims this amount is excessive citing his lower earning history since April 1993. In 1993 Tom's taxable income was $9600; in 1994 it was $15,695; and he expected a taxable 1995 income of $19,000.

Tom further contends his failure to regain his job with the Des Moines Police Department limits his employment options. He cites his self-employment income as a pizza franchisee and passive rental income as his only sources of current income. Tom also claims he was forced to sell assets to meet his support obligation.

Tom also claims the trial court did not make a specific finding, as required by law, that use of his actual earnings would result in substantial injustice. *See In re Marriage of Bonnette,* 492 N.W.2d 717, 721 (Iowa App. 1992). He contends his actual earnings, instead of his earning capacity, should be employed in setting his support obligations according to the guidelines. Alternatively, Tom asserts he is entitled to a deviation from the guidelines if the $30,000 figure is applied.

Finally, Tom argues Cathi's income has significantly increased since the entry of the April 1993 order. Her financial affidavits filed in 1991 at the time of the original dissolution proceedings indicated she was earning $29,950.44 gross income and $16,051.62 net income per year. However, her income tax returns reflect an income of $45,298 in 1993 and $37,210 in 1994. Her financial affidavit filed in September 1995 indicates a gross income of $42,761.76 and a net income of $29,478.36. Tom contends Cathi has been regularly working overtime that would continue to be available to her. He argues her increase in earnings alone constitutes a substantial change in circumstances.

We reject Tom's argument that Cathi failed to rebut the presumptive correctness of the guidelines result. The April 1993 order determined that based upon the standard of living provided by Tom "for some time" and also based upon the family's living expenses, a deviation from the guidelines was in order. Tom did not appeal this decision. Therefore, he cannot challenge this determination on appeal from the modification. *See In re Marriage of Guyer,* 522 N.W.2d 818, 821 (Iowa

1994) (principles of res judicata preclude court from relitigating issue or claim that has previously been decided). We also reject his contention that the current award's more than ten percent deviation from the guidelines is a "per se" substantial change in circumstances. These circumstances have not sufficiently changed to justify modification.

Tom's argument for modification based on his unsuccessful appeal of his termination is without merit. The April 1993 order provided for an increase in support if his appeal was successful. It accommodated an adverse result by reducing Tom's obligation to $600 per month.

We also reject Tom's challenge to the use of his earning capacity rather than his actual earnings since 1994. The April 1993 order was based on his earning capacity. Tom did not appeal from that decision. He is therefore barred from asserting this issue on appeal of the modification order. *See In re Marriage of Guyer,* 522 N.W.2d at 821. Furthermore, the fact that his taxable income was less than his earning capacity is not a sufficient change of circumstances. We agree with the reasoning of the trial court that the yearly income of $30,000 was not intended as a prediction of what Tom would earn in 1994, but rather represented what Tom is capable of earning.

We also agree with the trial court's assessment of Tom's efforts to obtain more rewarding employment. Most of the jobs Tom sought were law enforcement, security, or corrections related. However, it is unlikely Tom will find such employment. The district court correctly determined the April 1993 order was based upon Tom's ability to earn income "generally" rather than in a particular occupation. Accordingly, we find Tom has failed to establish by a preponderance of the evidence that he has experienced a substantial change in his earning capacity that was not contemplated by the district court.

Finally, we reject Tom's contention that, even applying a $30,000 earning capacity, he is entitled to a deviation from the guidelines. Tom has not shown that application of the guidelines would result in substantial injustice in his case. *See In re Marriage of Blum,* 526 N.W.2d at 165.

Tom also argues that Cathi's increased earnings entitle him to a reduction in his child support obligation. *See* Iowa Code § 598.21(8)(a). Cathi received a four percent raise in base pay as a Polk County Deputy Sheriff in July 1995, and at the time of the modification proceeding she was working a substantial amount of overtime in order to meet family expenses. Since the April 1993 order, her gross earnings have increased by almost forty-three percent. However, Cathi indicated she could not continue to work overtime because of the strain on the children. It would be inequitable to modify Tom's award and, by doing so, require Cathi to continue to work overtime in order to support her family. *See In re Marriage of Brown,* 487 N.W.2d 331, 333 (Iowa 1992) (where court held that a noncustodial parent's support obligation should not be so burdensome that the parent is required to work overtime to satisfy it). Furthermore, we do not find the increase in her income over the last three years standing alone represents a substantial change in circumstances. *See In re Marriage of Dawson,* 467 N.W.2d 271, 275 (Iowa 1991) (tripling of former wife's net income over past decade and decrease in former husband's income did not establish substantial change in circumstances required for modification of husband's child support obligation). We agree with the district court that Tom has not shown Cathi's increased earnings entitle him to a modification of his child support.

We affirm the district court's denial of the modification in its entirety.

III. Attorney Fees.

Tom was not the prevailing party in the modification proceeding and we have affirmed that decision. Accordingly, we reject his request for trial attorney fees. *See* Iowa Code § 598.36 (1995) ("in a modification of an order or decree under this chapter, the court may award attorney fees to the prevailing party . . . ").

In the alternative, Tom has requested that Cathi's attorney fee award be either vacated or reduced given the disparity between the parties' incomes and the fact that Tom's child support obligation exceeds the guidelines amount. Iowa courts have considerable discretion in awarding attorney fees. *In re Marriage of Miller,* 524 N.W.2d 442, 445 (Iowa App. 1995). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* Cathi was the prevailing party in the modification proceeding. We find no abuse of discretion in the trial court's award of $2000 in attorney fees to Cathi.

Both parties have requested appellate attorney fees. An award for attorney fees is not a matter of right but rests with the court's discretion and depends on the parties' respective financial circumstances and ability to pay. *In re Marriage of Eastman,* 538 N.W.2d 874, 877 (Iowa App. 1995). Although Cathi has the resources available to pay her attorney fees, she has nevertheless successfully defended the district court's decision on appeal. We award her $1000 for appellate attorney fees.

AFFIRMED.