IN THE COURT OF APPEALS OF IOWA

No. 3-129 / 92-0827

FILED
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CLERK SUPREME COURT

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IN RE THE MARRIAGE OF JANET L. STELLISH
AND KENNETH M. STELLISH

Upon the Petition of
**JANET L. STELLISH,**

Appellant.

And Concerning
**KENNETH M. STELLISH,**

Appellee.

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Appeal from the Iowa District Court for Cherokee County, Richard J. Vipond, Judge.

The petitioner wife appeals a judgment of the district court denying her application for modification of the original divorce decree. **AFFIRMED.**

M. W. Miller, Jr. of Miller, Miller, Miller, Green & Miller, Cherokee, for appellant.

John P. Loughlin of the Loughlin Law Firm, Cherokee, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

HAYDEN, J. 000538

The district court dissolved the marriage of Kenneth and Janet Stellish on December 5, 1989. The court awarded custody of the parties' minor child, Sadie, to Janet. Sadie was born on January 26, 1985. Pursuant to a stipulation entered into by the parties, Kenneth was required to pay $250 per month in child support.

On September 10, 1991, Janet filed an application for modification, seeking an increase in Kenneth's child support obligation. Janet argued Kenneth's financial situation had improved significantly in the two years since the original decree was filed. She maintained Kenneth's income increased over $100,000 between 1989 and 1990. Janet noted the value of Kenneth's farm machinery rose from $30,000 in 1989 to $52,000 at the time of trial, his equity in his farm increased from $94,000 to $120,000, and Kenneth had purchased a $75,000 farm, a $6200 automobile, and $7300 worth of boats since the dissolution. Janet conceded her earning capacity had not decreased, but her asset valuations had decreased.

A hearing was held on this matter in April 1992. The district court denied Janet's request for increased child support. The court concluded Kenneth's net monthly income was $1005. The court noted, pursuant to the child support guidelines in 1989, Kenneth would be required to pay only $232, and pursuant to the current guidelines Kenneth would be required to pay only $249 per month. The court

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concluded there had been no substantial change of circumstances.

Janet appeals, arguing Kenneth's net worth has risen substantially since the original decree, while the value of her assets has decreased. Janet also contends she should be awarded attorney fees incurred at trial and on appeal.

Our review of this modification proceeding is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we give them weight. Iowa R. App. P. 14(f)(7). The district court has considerable discretion in determining whether a modification is warranted. In re Marriage of Walhert, 400 N.W.2d 557, 560 (Iowa 1987); In re Marriage of Brands, 392 N.W.2d 855, 856 (Iowa App. 1986). We will not disturb its ruling unless there is a failure to do equity. Walhert, 400 N.W.2d at 560; Brands, 392 N.W.2d at 856.

I. Janet contends the district court erred in refusing to increase Kenneth's child support obligation. She argues the court (1) failed to properly determine Kenneth's net monthly income, and (2) should have increased Kenneth's obligation based on a stipulation incorporated into the original dissolution decree.

Modification of a dissolution decree is allowed only when there has been a material and substantial change of circumstances since the original decree. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991) (citing Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973)). The burden

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rests on the party seeking the modification to establish such a change of circumstances by a preponderance of the evidence. Id. (citing Mears, 213 N.W.2d at 515).

We must consider the financial circumstances surrounding Kenneth and determine his net monthly income. His income as a farmer has fluctuated over the years. Kenneth's income tax returns showed he made a profit of $31,976 in 1987, suffered a loss of $31,436 in 1988, suffered a loss of $28,904 in 1989, and made a profit of $71,572 in 1990. In 1991, Kenneth made a profit of $27,736. In determining Kenneth's net income as a farmer, the district court averaged his income over a five-year period from 1987 to 1991. His average annual gross income over this period equals $14,230. Kenneth's net annual income is $12,060 or $1005 per month.

Janet argues the district court should not have taken an average of Kenneth's income over a five-year period. She contends the court, in determining whether a substantial change of circumstances exist, should consider only the increase in Kenneth's income from 1989 to 1990, which equaled $101,514, or the average of his income for 1990 and 1991. We disagree with Janet's argument. The Iowa Supreme Court has held:

> Where the parent's income is subject to substantial fluctuations, it may be necessary to average the income over a reasonable period when determining the current monthly income.

In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991); see Walhert, 400 N.W.2d at 560; In re Marriage of Blume,

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473 N.W.2d 629, 632-33 (Iowa App. 1991). A five-year period of time, under the circumstances of this case, is reasonable. We adopt the district court's method of calculation and the income tax figures for purposes of determining whether a substantial change of circumstances exists sufficient to justify a modification.

The record shows Kenneth has acquired some assets since the filing of the dissolution decree. Kenneth explained he is gradually purchasing used farm equipment from his father so the value of his equipment has increased. At the time of the dissolution Kenneth owned a 1976 pickup and 1973 Pontiac. He now owns a 1987 Blazer and 1976 pickup. The difference in value between these vehicles and acquisition of some other assets since the dissolution fails to constitute a substantial and material change of circumstances.

Janet's financial circumstances also must be considered in determining whether a modification is warranted. She was not working at the time of the dissolution in December 1989 nor was she employed at the time of the modification hearing in April 1992. Between December 1989 and November 1991, Janet was attending Western Iowa Tech. She was pursuing a two-year associate degree. Janet was eight hours short of completing the degree when she left school in November 1991. Kenneth paid for this education pursuant to the terms of the dissolution decree. Janet testified she has not applied for any jobs following the dissolution

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until February 1992. At that time Janet began working at a liquor store, which she is interested in purchasing. Janet testified, however, she has received no wages while working at the liquor store between February 1992 and the modification hearing, which was held in April 1992. It appears Janet's lack of employment and wages therefrom has been voluntary on her part. Janet has a live-in boyfriend, Rodney Melton. He testified he moved into Janet's residence in February 1991 and continued to reside there at the time of the modification hearing.

Each parent has a duty to contribute to the support of his or her minor child in proportion to his or her ability or circumstances. Brands, 392 N.W.2d at 857. A modification of a child support obligation should be denied if a parent voluntarily reduces his or her income. In re Marriage of Phillips, 493 N.W.2d 872, 877 (Iowa App. 1992) (citing In re Marriage of Dawson, 467 N.W.2d 271, 275 (Iowa 1991). The district court found Janet had the capacity to earn $301 per month. The court used this monthly income figure for Janet and an amount of $1005 for Kenneth's monthly income to determine the child support obligation was within the child support guidelines. The district court found Kenneth's obligation is within the current guidelines:

> Under [the 1989 child support guidelines] the respondent's net monthly income of $1,005 would result in payments of $232 per month for the support of one child even if the petitioner's net monthly earning capacity were no more than $301.

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> . . . Under the present guidelines the respondent's net monthly income of $1,005 would result in payments of $249 per month for the support of one child even if the petitioner's net monthly earning capacity were no more than $301. Application of the present guidelines would therefore not result in an increase in the amount of child support payments. (Emphasis added.)

We adopt these findings of the district court's as our own.

We determine Janet has failed to show a material and substantial change of circumstances necessary to modify the child support provisions. There is no evidence or contention in the record a deviation from the child support guidelines would be justified in this case. Kenneth's monthly child support obligation shall remain at $250. The district court properly denied Janet's request for modification of the child support provisions. We affirm the decision of the district court.

Janet also argues the district court should have increased Kenneth's child support obligation based on the following stipulation, which was incorporated in the original dissolution decree: "The child support award shall increase in accordance with the respondent's increase of net income." This stipulation merely provides for the modification of the child support provisions upon proof of a substantial change of circumstances, which Janet has failed to prove. As determined by the district court, the stipulation does not provide a separate or additional basis for a modification of Kenneth's child support obligation. We affirm the district court on the issue of child support.

II. Janet contends the district court erred in failing to award attorney fees to her. She also claims she is entitled to attorney fees on appeal.

An award of attorney fees is not a matter of right, but rests within the sound discretion of the trial court. In re Marriage of Schissel, 292 N.W.2d 421, 428 (Iowa 1980); In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). The decision of the trial court will not be disturbed on appeal absent an abuse of discretion. Schissel, 292 N.W.2d at 428. An award of attorney fees may be granted depending on the parties' respective abilities to pay. In re Marriage of Richards, 439 N.W.2d 876, 883 (Iowa 1989) (citation omitted). 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 affirm the trial court's denial of attorney fees at that level. We also decline to award attorney fees to Janet on appeal; each party shall be responsible for his or her own appellate attorney fees.

Costs of this appeal are taxed to Janet.

**AFFIRMED.**