IN THE COURT OF APPEALS OF IOWA

No. 6-469 / 95-1536

IN RE THE MARRIAGE OF ROBERT D. ANDERSEN AND DIANA R. ANDERSEN

FILED
AUG 30 1996
CLERK SUPREME COURT

Upon the Petition of
ROBERT D. ANDERSEN,
Appellee/Cross-Appellant,

And Concerning
DIANA R. ANDERSEN n/k/a DIANA R. WEBER,
Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Shelby County, Leo F. Connolly, Judge.

Diana Weber appeals and Robert Andersen cross-appeals from a modification of the parties' dissolution decree decreasing Diana's child support obligation. **AFFIRMED AS MODIFIED.**

Ken Sojka of Buckley & Sojka Law Offices, Harlan, for appellant.

William T. Early of Kohorst Law Firm, Harlan, for appellee.

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

PER CURIAM

This is an appeal by a wife claiming the district court should have further reduced her child support obligation. The husband cross-appeals, claiming the child support obligation should have been increased. We affirm as modified by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Robert and Diana Anderson were divorced on March 4, 1991. Robert was granted primary physical care of the parties' three children: Elisha, born on December 15, 1975; Marsha, born on June 25, 1978; and Mark, born on July 2, 1981. Diana was ordered to pay child support of $240 per month until the youngest child reached the age of eighteen.

Robert is now employed by a school district where he has annual income of $16,187 and net monthly income of $1,342. Diana owns a beauty shop which gives her minimal income. She also works part-time at a convenience store. In 1994, she had total annual income of $6,239. Diana has had some problems with depression.

On February 10, 1995, Diana filed an application to modify the dissolution decree to reduce her child support obligation. In his answer, Robert asked to have Diana's child support obligation increased. The district court determined Diana had the ability to work full-time for minimum wages and imputed to her a net monthly income of $590. Applying the child support guidelines, the court ordered Diana to pay $180 per month for the parties' three children.

Diana has appealed the district court decision and Robert cross-appealed. Diana contends her child support obligation should be based on her actual income. She states her average net monthly income over the past four years has been $323. Robert claims that with a full-time, minimum wage job, Diana's net monthly income would be $774.

Before using earning capacity rather than actual earnings, a court must make a finding that, if actual earnings were used, substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *In re Marriage of Flattery,* 537 N.W.2d 801, 803 (Iowa App. 1995). We find there is sufficient basis in the record to use Diana's earning capacity rather than her actual earnings. Diana admitted she was able to work forty hours per week, and evidence was presented to show some minimum wage jobs were available in the area. We agree with the district court that Diana's child support obligation should be based on net monthly income of $590.

We note that under the original dissolution decree, Diana was to pay $240 per month in child support until the youngest child reached the age of eighteen. This amount was not calculated under the child support guidelines, and made no provision for a decrease in support due to the number of children being supported. Diana's child support is now calculated under the child support guidelines. The amount required to be paid in child support under the guidelines is determined by the number of minor children supported.

Elisha became eighteen on December 15, 1993. Diana's child support obligation for Elisha should be eliminated, retroactive to February 14, 1995, the date Robert received notice of the modification application. Beginning on March 1, 1995, we determine Diana's child support obligation should be $155 per month under the child support guidelines for two children. Marsha turned eighteen on June 25, 1996, while the present appeal was pending. Beginning on July 1, 1996, Diana's child support obligation should be $108 per month under the child support guidelines for one child. This obligation will continue until July 2, 1999, when Mark becomes eighteen.

Both Diana and Robert seek attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court as we have modified. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.