

IN THE COURT OF APPEALS OF IOWA

No. 7-048 / 96-1271

000231

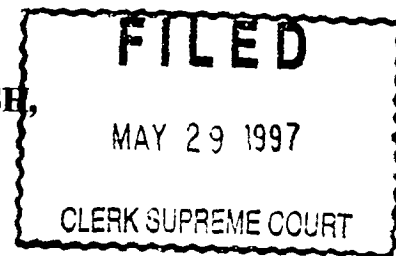
**IN RE THE MARRIAGE OF DIANA LYNN MAUK
AND BERNARD WAYNE MAUK**

Upon the Petition of
DIANA LYNN MAUK n/k/a DIANA LYNN CORNISH,

Petitioner-Appellee\Cross-Appellant,

And Concerning
BERNARD WAYNE MAUK,

Respondent-Appellant\Cross-Appellee.



Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Diana and Bernard appeal from an order modifying the child custody and support provisions of their dissolution decree. **AFFIRMED AS MODIFIED.**

William J. Schadle, West Des Moines, for appellant.

Robert H. Laden and Gregory D. Brandt, Des Moines, for appellee.

Heard by Habhab, C.J., Sackett, and Streit, JJ., but decided en banc.

CADY, J. 000232

Diana Cornish and Bernard Mauk appeal from an order modifying the child custody and support provisions of their dissolution decree. On our review, we affirm.

Diana and Bernard were granted a decree of dissolution on January 23, 1986. They have two children: Jamison, born December 26, 1980, and Lyndsay, born October 31, 1984. The decree granted Diana primary physical care of the children. Lyndsay's primary physical care is not at issue in this appeal. Bernard was ordered to pay child support in the amount of \$50.00 per week per child.

Bernard's income has fluctuated. He is employed by Federal Express where he receives a considerable amount of overtime pay. He also has worked for Bridgestone Firestone, but at the time of trial he was receiving only strike pay. Bernard's gross annual income for the four years preceding trial was: 1992 - \$31,870; 1993 - \$43,953; 1994 - \$41,081; and 1995 - \$36,962. Diana is employed by Norwest Mortgage. She earns \$43,200 annually.

Diana and the children moved several times after the original decree was entered. She remarried in 1988 and moved from the family residence to Ankeny. In 1989, the family moved to West Des Moines. In 1992, the family upgraded into a newer home, approximately two minutes from the previous residence, and in the same school district. In 1996, the family moved seven blocks into Diana's third husband's home, located in the same school district. Jamison has been in the West Des Moines School District for the last eight years.

Bernard also remarried. He and his wife, Carol, have a daughter, Kara, who was three years old at the time of the hearing on the modification. Bernard and his family live in the same home he occupied with Diana prior to the dissolution. Bernard has consistently exercised visitation with Jamison in accordance with the provisions of the dissolution decree.

Diana filed her petition for modification of the dissolution decree on November 1, 1995, requesting an increase in child support. Bernard filed an amended answer on December 14, 1995, requesting physical custody of Jamison. Approximately two weeks before the amended answer was filed, Bernard arranged a meeting with Jamison. Bernard testified Jamison indicated at the meeting he wanted to live with him. Bernard further testified:

MR. MAUK: I told him that we would have to go through legal procedures and that if he wanted to live with me, he would have to show me he wanted to come to my house. But he would have to do it on his own. I couldn't help him. That is something he would have to figure out for himself. It was a deterrent.

....

MR. MAUK: I told him he could take a cab, ride his bike, whatever, if that is what he wanted to do, but he had to do it

The day after Jamison had this conversation with his father, he had a conversation with Diana. Jamison repeatedly stated he wanted to live with his father.

Diana testified Jamison had never previously stated his desire to live with his father. She further testified Jamison had a preference to live with his dad because

Bernard had promised him a truck and he would get to do more snow skiing, water skiing, hunting, jetting, and other activities that usually fill their weekends.

The district court filed an order of modification on May 10, 1996. The court denied Bernard's request for a modification of custody. It increased Bernard's child support obligation to \$646.46 per month for two children and \$441.49 for one child. The court awarded Diana a judgment against Bernard for attorney fees in the amount of \$3000. The district court denied Bernard's rule 179(b) motion on June 18, 1996.

The court filed an order nunc pro tunc on June 26 which, among other things, specified that Diana's gross annual income was \$43,200 and her net monthly income was \$2,757. It also found Bernard's gross annual income was \$34,000 and his net monthly income was \$2,163. The order required Bernard to pay \$621 per month in child support and \$424 when only one child was eligible for support. Both Bernard and Diana filed notices of appeal.

Bernard argues the district court erred in declining to modify Jamison's custody and in awarding Diana \$3000 in trial attorney fees. Diana argues the district court erred in setting Bernard's gross annual income at \$34,000 for purposes of determining his child support obligation. She contends his gross annual income should have been set at \$39,216 (his average gross income for the last four years), and the amount of his child support obligation should be modified accordingly. Both parties request an award of appellate attorney fees.

I. Scope of Review: Our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. 14(f)(7); *In re Marriage of Fox*, 559 N.W.2d 26, 28 (1997).

II. Custody: To change custodial provisions of a dissolution decree, the petitioner must prove by a preponderance of the evidence conditions since the decree was entered have so materially and substantially changed that the child's best interests make it expedient to make the requested change. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa App. 1995). The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. *In re Marriage of Federici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must also prove an ability to minister more effectively to the children's well being. *Rierson*, 537 N.W.2d at 806. This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa App. 1993).

In denying Bernard's request for change in the physical care of Jamison, the court noted Jamison's desire to live with his father was the only factor in favor of a change of physical care. Further the court determined Bernard had failed to prove he could provide a superior home for Jamison.

We agree the only factor weighing in favor of a modification of physical care is Jamison's expressed desire to live with his father. Although Bernard alleges Diana's second marriage since the divorce and multiple changes in residence also constitute changes in circumstances, they are insufficient to support modification. The record fails to reveal the moves had a negative impact on Jamison. Further, there was conflicting testimony regarding Jamison's relationship with Diana's new husband. Bernard testified Jamison was unhappy with the marriage. Diana testified her husband had a good relationship with Jamison and Jamison also enjoyed the companionship of his stepbrother. Our focus turns to Jamison's expressed preference.

The question whether Bernard can provide a superior home for Jamison is far more complicated than asking Jamison which parent he wants to live with. *See Jahnel*, 506 N.W.2d at 475. We give less weight to Jamison's preference in this modification action than we would if this were the original custody decision. *Id.*

With theses principles in mind, we nevertheless fully consider Jamison's expressed preference. As a child approaches his age of majority, we recognize a greater ability to understand and evaluate this difficult issue. Jamison was fifteen years old at the time of trial. It is apparent from the record he desires to live with his father. However, Jamison did not articulate any compelling reasons. Diana testified Jamison told her it was because his father promised him a truck and additional outdoor recreational activities.

We agree with the trial court Bernard has failed to prove he can provide a superior home for Jamison. The record does not reveal Jamison has expressed any concrete reasons to substantiate a finding that Bernard can provide a superior home.

Additionally, we observe the difficult family dynamics that can arise following the dissolution of a marriage to which children were born. Parents and children can be subjected to a variety of emotional forces, which can cloud judgment and create confusion. Parents, of course, are in the best position to mitigate these emotional forces, but at times can be responsible for aggravating them.

III. Child Support: Child support provisions of a dissolution decree may be modified where there has been a substantial change of circumstances. Iowa Code § 598.21(8) (1995). Iowa Code section 598.21(9) provides a substantial change of circumstances exists when the court-ordered child support award deviates by ten percent or more from the amount that would be due pursuant to the most current child support guidelines. Iowa Code § 598.21(9).

In this case the trial court granted Diana's application for modification for child support, finding a substantial change of circumstances under Iowa Code section 598.21(9). The trial court found that Bernard's gross income was \$34,000 and his net monthly income was \$2,136. Diane cross-appealed alleging Bernard's income should be averaged based on his tax returns for the four years prior to trial. Bernard contends the trial court's finding was accurate.

The court must determine the parent's net monthly income from the most reliable evidence presented. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). This often requires the court to carefully consider all of the circumstances relating to the parent's income. *Id.* Income averaging is an appropriate method of determining income for the purposes of child support for a self-employed person or one who has fluctuating income. *In re Marriage of Robbins*, 510 N.W.2d 844 (Iowa 1994). See *In re Marriage of Roberts*, 545 N.W.2d 340, (Iowa App. 1996)(income averaging used to determine the income of an attorney in private practice); *In re Marriage of Robbins*, 510 N.W.2d 844 (Iowa 1994)(income averaging used to determine the income cement/construction worker); *In re Marriage of Cossel*, 487 N.W.2d 679 (Iowa 1994)(Income averaging used to determine income of a farmer); *In re Marriage of Powell*, 474 N.W.2d 531 (Iowa 1991)(income averaging used to determine the income of self-employed doctor of chiropractic).

Bernard's employment situation is not one which requires the use of income averaging. Although Bernard's income has fluctuated in the past four years, the fluctuation has not been the result of outside factors typically associated with periodic or seasonal income fluctuations which are subject to income averaging. Rather, the fluctuations have been the result of Bernard's employment choices in jobs with relatively stable incomes. In 1992 Bernard received an annual gross income of \$510 from Bridgestone and \$31,360 from Federal Express for a total annual gross income of \$31,870. In 1993 he receive an annual gross income of \$17,070 from Bridgestone

and \$26,883 from Federal Express for a total annual gross income of \$43,953. In 1994 he earned a gross annual income of \$18,361 from Bridgestone and \$25,720 from Federal Express. In 1995 he earned \$36,962 from Federal Express and strike pay of \$3,270. The first full year during which Bernard received strike pay and no additional income from Bridgestone was 1995.

Observing this income history, it is apparent the fluctuations in Bernard's income were the result of his choice to begin working for Bridgestone and Federal Express at the same time. This fluctuation is not likely to continue since Bernard no longer maintains a second job, and works full-time for Federal Express. In 1995, all Bernard's earnings came from Federal Express.

We find \$36,962 represents Bernard's gross annual income from Federal Express. This amount includes overtime, which we find should be included in his income because it is consistent and not speculative. *See In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). His strike benefits, however, are uncertain under the facts of this case and should be excluded.

We find Bernard has an gross annual income is \$36,962. After applying the deductions under the Child Support Guidelines, Bernard's net monthly income is \$2311. Diana's net monthly income is \$2757. We modify the trial court's child support determination and find Bernard's child support obligation is \$663 per month when two children are eligible and \$453 when one child is eligible.

IV. Attorney Fees: The trial court ordered Bernard to pay \$3000 of Diane's trial attorney fees. The trial court acted within its range of discretion in awarding these fees. *See In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We conclude the parties should be responsible for their own appellate attorney fees.

V. Conclusion: We affirm the trial court's order denying modification of Jamison's primary physical care and awarding attorney fees to Diana. We modify the child support obligation. Further, each party should pay their own appellate attorney fees with costs taxed to Bernard.

AFFIRMED AS MODIFIED.

All judges concur except Sackett, J. who concurs in part and dissents in part.

SACKETT, P.J. (concurring in part; dissenting in part)

I would affirm the child support award. The trial court did not abuse its discretion in fixing Bernard's income.