IN THE COURT OF APPEALS OF IOWA 000029

No. 7-485 / 96-2207

FILED
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CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARK ALAN BAHR AND KIM MARIE BAHR

Upon the Petition of
MARK ALAN BAHR,
Appellant,

And Concerning
KIM MARIE BAHR,
Appellee.

Appeal from the Iowa District Court for Fayette County, James L. Beeghly, Judge.

On appeal from the denial of his petition for modification, the appellant argues he should not be required to continue to pay $330.72 per month in child support for his son nor college tuition and expenses for his daughter. **AFFIRMED AS MODIFIED.**

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for appellant.

Gaylen V. Hassman of Engelbrecht, Ackerman & Hassman, Waverly, for appellee.

Heard by Cady, C.J., and Sackett and Huitink, JJ.

HUITINK, J.

Mark Alan Bahr appeals the denial of his petition for modification of the child support provisions of the decree dissolving his marriage to Kim Marie Haupt. We affirm as modified.

I. Background Facts and Proceedings.

Mark Bahr and Kim Haupt were divorced on December 23, 1981. They have two children, Jamie, age five at the time of the decree, and Joshua, age three at the time of the decree. The court awarded Kim physical custody of the children. Mark was ordered to pay $350 per month in child support for the children.

In January 1988, the decree was modified and Mark's support obligation reduced to $225 per month. The decree was modified again in December 1993; Mark's child support obligation was increased to $453.16 per month until June 28, 1994, at which time Mark's support obligation was reduced to $330.72 per month for Joshua. The court ordered Mark and Kim each to pay one-half of Jamie's college tuition, books, lab and computer fees, based on the cost of attending a state university in Iowa, and $50 per month for her personal expenses. The court also ordered the parties to make the same post high school educational support available to Josh, assuming he qualifies for such support under Iowa Code chapter 598.

After the December 1993 modification, Mark continued his farming operation. He farms approximately eight hundred acres of row crop, one hundred sixty acres of which he owns, and six hundred forty acres of which he rents. In 1994, Mark

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discontinued his hog operation and began raising ostriches. The ostrich operation has produced very little income. However, by November 1996, Mark increased the number of ostriches from two to sixty, including fourteen adult breeding stock.

Kim works full-time as a certified nurse's aid. She also works part-time at a convenience store and has co-signed an educational loan to help Jamie fund her college education.

On January 26, 1996, Mark filed a petition requesting a modification of his child support obligation under the December 1993 decree, based on substantial farm losses of $22,439 in 1993, $11,005 in 1994, and $4452 in 1995. A trial was held on November 8, 1996. On November 15, 1996, the court entered an order refusing to modify the decree. At the time of the order, Jamie was a twenty year old junior at DePaul University, and Joshua was an eighteen year old senior in high school. Mark appeals the district court's ruling.

II. Standard of Review.

We review modification proceedings 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)).

III. Mofication 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 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, 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 (Iowa App. 1994).

Mark argues the substantial farm losses he suffered in 1993, 1994, and 1995 justify a reduction in his child support obligation under the child support guidelines.

The district court found Mark failed to show a material and substantial change in circumstances since the December 1993 decree which would support modification of his child support obligations.

The district court found Mark's reduced income in 1994 and 1995 was transitory. The startup expenses of the ostrich operation drained Mark's income; however, the court found Mark likely to experience a "significant increase in income from the ostrich operation in the near future." The court noted Mark would have shown a profit in 1995, if his tax return was adjusted for depreciation, earned income credit, and a new employee benefits program costing $4614. Moreover, Mark's 1993 return reflects income for a period of time contemplated by the court in its December 1993 decree. The court also noted Mark's 1993 loss was greater than his 1994 loss.

We agree with the district court's assessment Mark has failed to prove a substantial and material change in circumstances since the December 1993 decree. Moreover, Mark has not proven any change in circumstances is permanent, rather than temporary. We affirm the district court's order denying the modification.

Mark also objects to paying his share of Jamie's college expenses, arguing the cost of DePaul, a private university, is much higher than the cost of a state university in Iowa. Mark requests his support obligation be reduced to $50 per month per child as long as each child continues to be enrolled as a full-time student qualifying for support under Iowa Code chapter 598. We reject Mark's argument.

On July 1, 1997, code section 598.21(5A) became effective. That statute provides, in part, the court may order a post secondary education subsidy if good cause is shown. Iowa Code § 598.21(5A)(1997). The statute instructs the court on calculating the amount of the subsidy and the contributions of each parent and the child. *See Id.* The statute caps each parent's contribution at thirty-three and one-third percent of the total cost of the child's post secondary education, based upon the reasonable cost of attending an in-state public institution and necessary post secondary education expenses. *See Id.*

The district court found the cost of attending DePaul is not substantially higher than the cost of a state university in Iowa because Jamie receives financial aid, grants, and scholarships. Moreover, the decree assesses the parties' obligations for Jamie's education based on the cost of tuition at the University of Iowa. We are unable to determine from this record that Mark's obligation exceeds the statutorily defined cap of one-third the cost of tuition at an in-state university in Iowa. Accordingly, we affirm the district court's denial of modification.

Based on our review of the record, we affirm the decision of the district court; however, we modify each parent's obligation for Jamie's college expenses accruing after July 1, 1997, to accomodate recent legislative changes to Iowa Code section 598.21(5A). Mark's obligation shall not exceed thirty-three and one-third percent of the total cost of Jamie's post secondary education. Joshua is also entitled to receive this post secondary educational support, if he meets the requirements under chapter 598.

IV. Attorney Fees.

Both parties have requested appellate attorney fees. An award of 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). Kim has successfully defended the district court's decision on appeal. Accordingly, we award her $1760 for appellate attorney fees.

AFFIRMED AS MODIFIED.