FILED
AUG 04 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-621 / 93-0531

IN RE THE MARRIAGE OF RHONDA LYNN HERR AND KURT C. HERR, SR.

Upon the Petition of
RHONDA LYNN HERR,

Petitioner-Appellee,

And Concerning
KURT C. HERR, SR.,

Respondent-Appellant.

Appeal from the Iowa District Court for Appanoose County, Dan F. Morrison, Judge.

The husband appeals from the modification of the child support provisions of the dissolution decree. **AFFIRMED.**

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa, for appellant.

Mark J. Smith and Kyle D. Williamson of Wells, McNally & Bowman, Davenport, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

Rhonda and Kurt Herr were married in 1971 and divorced in 1986. They have two children: Kurt, Jr. born in 1972; and Courtney born in 1978. The parties were awarded joint legal custody of the children. Rhonda was granted primary physical care of Courtney and Kurt was awarded primary physical care of Kurt, Jr. Kurt was ordered to pay child support of $43 per month for Courtney and to maintain medical insurance for the children. Rhonda was not ordered to pay any child support.

On May 7, 1992, Rhonda filed a petition to modify the dissolution decree. She sought an increase in Kurt's child support obligation. She also sought a modification to make Kurt responsible for one-half of Courtney's medical expenses not covered by insurance.

At the time of the dissolution decree, Rhonda was employed by Hy-Vee Food Stores, Inc., where she had a net monthly income of about $607. Kurt was employed by Young Radiator Company in Centerville, Iowa. He had net monthly income of about $867.

Rhonda married Richard Thiessen in 1986, and is now known as Rhonda Thiessen. Her husband is employed and contributes his income to the household expenses. Kurt has also remarried. His current wife, Diane, has two children from a previous marriage. Diane is not employed outside the home, but does receive child support payments.

Kurt, Jr. became eighteen years old on August 15, 1990. Kurt contributed to Kurt, Jr.'s expenses incurred while attending a junior college for two years. In the summer of 1992, Kurt, Jr. became self-supporting.

At the time of the modification hearing, both Rhonda and Kurt had the same jobs they did at the time of the dissolution decree. Rhonda's net monthly income had increased to $1,491, and Kurt's had increased to $1,822.

The district court found there had been a substantial change in circumstances in that Kurt, Jr. no longer resided with Kurt and Kurt no longer contributed to his support. The court applied the child support guidelines and ordered Kurt to pay $410 per month in child support. The court did not modify the provision concerning health insurance, finding there was not a substantial change of circumstances to warrant such a modification. Kurt appealed.

Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

Kurt contends there has not been a substantial change in circumstances since the time of the original decree. He states the dissolution court was aware of the fact Kurt, Jr. was older and would become emancipated earlier than Courtney. He also claims application of the child support

guidelines would be inequitable to him because he has planned his finances based on his assumption he would only be paying $43 per month in child support.

I. We need not decide whether the fact Kurt, Jr. no longer resides with Kurt and Kurt no longer contributes to his support constitutes a substantial change in circumstances as found by the trial court. This matter can be resolved under Iowa Code section 598.21(9), which provides:

> Notwithstanding subsection 8, a substantial change of circumstances exists when the court order for child support deviates by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established pursuant to subsection 4.

The supreme court has ruled section 598.21(9), which became effective July 1, 1992, should be applied to all cases heard after that date. Schuler v. Rodberg, No. 92-1948 (Iowa May 25, 1994). The present action was heard on March 5, 1993, and decided on March 15, 1993. Therefore, section 598.21(9) applies in this case.

Under the child support guidelines, Kurt is required to pay $410 per month in child support. The amount he was required to pay under the dissolution decree deviates by more than ten percent from that amount. Pursuant to section 598.21(9), we conclude there has been a substantial change in circumstances.

Once we determine child support should be modified, the present guidelines should be applied. In re Marriage of

Bergfeld, 465 N.W.2d 865, 869 (Iowa 1991). There is a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded. Id. The court cannot vary the amount of the child support without a written finding that the guidelines would be unjust or inappropriate. In re Marriage of Powell, 474 N.W.2d 531, 533 (Iowa 1991).

In our de novo review of the record, we find insufficient evidence to show application of the child support guidelines here would be unjust or inappropriate. We conclude Kurt should pay child support of $410 per month as required by the child support guidelines.

II. Rhonda requests 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 order Kurt to pay $500 towards Rhonda's appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Kurt.

AFFIRMED.