IN THE COURT OF APPEALS OF IOWA

No. 0-526 / 99-1168
Filed September 27, 2000

IN RE THE MARRIAGE OF JENNIFER MORLAN AND TRACY MORLAN

FILED
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CLERK SUPREME COURT

Upon the Petition of
JENNIFER MORLAN,
Petitioner-Appellant,

And Concerning
TRACY MORLAN,
Respondent-Appellee,

Appeal from the Iowa District Court for Hardin County, William C. Ostlund, Judge.

The petitioner appeals a district court order granting her petition to modify the child support provisions of the parties' dissolution decree. **AFFIRMED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown, for appellant.

Peter S. Cannon, Des Moines, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Jennifer Morlan appeals a district court order granting her petition to modify the child support provisions of the parties' dissolution decree. She contends the trial court should have employed a higher earning capacity for Tracy Morlan when it recalculated child support. We affirm.

Jennifer and Tracy divorced in October of 1991. They have one son, Brock, who was three at the time of the dissolution. In the original dissolution decree, the district court set child support at $200 per month based on the parties' stipulation. At the time, Jennifer did accounting work. Tracy had obtained an associate degree in graphic design in 1991. Thereafter, he worked for Dodger Industries as a graphic artist for four years and earned around $24,000 per year. He left employment with Dodger in 1995 when the company moved its business out of Iowa.

Jennifer now lives in Johnston with a friend, Jerry Atchison, who pays most of the expenses including health insurance for Jennifer and Brock. Jennifer is currently unemployed but expects to find accounting work in Des Moines and earn between $27,000 and $30,000 per year. She does have income of $500 per month from a rental property. Tracy lives in Eldora with his girlfriend and they share expenses. The record indicates Tracy is not currently looking for employment in the graphic design field. He is self-employed, earning income from three different businesses: Rock and Row Adventures, a tubing business which operates in the summer; Power Graphics, a freelance graphic design business; and Hardwood Floors, an installation and refinishing business.

On March 26, 1998, Jennifer filed an application to modify the child

support provision upward. The modification hearing took place on June 9, 1999. In ruling on the application, the district court found Jennifer had an earning capacity in the "neighborhood of $27,000." The modification court found Tracy's three businesses had zero profit in 1998. Based on Tracy's projections, the court concluded Tracy would earn between $15,000 and $16,000 in net profit from his businesses in 1999. Although the trial court concluded Tracy could earn approximately $24,000 per year in a graphics department or working construction, it believed he was making a good faith effort to be successful with his business endeavors. On June 21, 1999, the trial court entered its order modifying child support upward. Using Tracy's projected 1999 profits of approximately $15,500 and a figure of $25,000 earning capacity per year for Jennifer, the court arrived at an increased child support obligation of $221.83 per month.

Jennifer appeals. She does not contest the court's use of earning capacities over actual income in its calculation. She argues the court should have employed Tracy's higher earning capacity of $24,000 per year as a graphic artist, instead of his current earning capacity as an entrepreneur. Tracy did not file a responsive brief.

I. Scope of Review. Our scope of review of a child support modification action is de novo. *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998) (citations omitted). We give weight to the trial court's factual findings, especially when considering the credibility of witnesses, but are not bound by them. *Id.* at 741. We recognize that the district court "has reasonable discretion in determining whether modification is warranted and that discretion will not be

disturbed on appeal unless there is a failure to do equity." *Id.* (quoting *In re Marriage of Vettemack*, 334 N.W.2d 761, 762 (Iowa 1983)).

II. Earning Capacity. A primary factor to be considered in determining whether support obligations should be modified is whether an obligor's reduction in income and earning capacity is the result of activity, which, although voluntary, was done with an improper intent to deprive his or her dependents of support. *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998). The district court in this case determined Tracy was "making a legitimate, good faith effort to make his other business endeavors a success." Jennifer even conceded she did not think Tracy was "loafing." The court stated Tracy should be given the opportunity to realize profits from the time and money invested into his ventures, at least for the short term. The court also indicated that if Tracy's businesses did not soon become profitable, it would be inclined to impute a greater earning capacity to him in the future.

After a de novo review, we agree with the trial court. This is not a situation where the obligor has refused to pursue a previous career or quit a job to take a position with lower pay to avoid a support obligation. *See In re Marriage of Rietz*, 585 N.W.2d 226, 230 (Iowa 1998) (citations omitted). The sparse record indicates Tracy was simply unable to resume his graphic design career. His employment with Dodger ended because the company left the state. He looked for similar employment but was unable to find any. We distinguish this case from others where there was an intentional reduction in income or earning capacity. *See id.* (citation omitted). There is no hint in the record that Tracy is trying to avoid his obligations. One of his businesses had increased bookings in the past

year and Tracy projected additional profits. In fact, the trial court indicates that despite somewhat meager profits, Tracy has been able to keep current on most of his payments in addition to his own debts, indicating his willingness to meet his obligations. We conclude the trial court did equity in this case by modifying Tracy's child support obligation upward based on the projected profits of his three businesses.

AFFIRMED.