IN THE COURT OF APPEALS OF IOWA

No. 6-632 / 95-2191

IN RE THE MARRIAGE OF KRISTIN KAY TAYLOR AND RICHARD DOUGLAS TAYLOR

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Upon the Petition of
KRISTIN KAY TAYLOR,

Appellee,

And Concerning
RICHARD DOUGLAS TAYLOR,

Appellant.

Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge.

Appellant appeals from the entry of a decree of modification. **AFFIRMED.**

Richard D. Taylor, Ankeny, pro se.

Sally Heckman Peck, Iowa City for appellee.

Considered by Cady, P.J., Huitink, J., and Peterson, S.J.*

*Senior judge from the First Judicial District serving on this court by order of the Iowa Supreme Court.

PETERSON, S.J.

This is an appeal by Richard Taylor of the modification of the decree dissolving his marriage to Kristin Taylor. He contends the court erred in finding his earnings at $40,000 per year, in awarding Kristin both tax exemptions, requiring both parties to pay their own attorney fees, in not awarding back child support and not enforcing the COLA provisions of the original decree. We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

Kristin Kay Taylor Simon (Kristin) and Richard Douglas Taylor (Richard) were married on June 6, 1970. They have two sons, Jeremy born on August 9, 1978, and Benjamin, born on August 4, 1980. A stipulation of agreement and decree of dissolution was filed on August 18, 1983. Pursuant to that decree, Richard was to have physical care of the children and Kristin was to pay $659 in child support every four weeks.

The decree provided for a reduction in Kristin's support obligation whenever one of the children resided with her for a consecutive thirty-day period. It provided for annual adjustments in the level of support based on changes in Kristin's income and percentage changes in the National Consumer Price Index (COLA provision). It provided that the parties were to file a stipulation with the court reflecting these annual adjustments and if they could not agree on the adjustments, either could request the appointment of a special master.

Kristin calculated the COLA adjustment and increased her support payments to $683 in 1984 and to $700 in 1985. The parties did not file stipulations with the court reflecting these adjustments and no adjustments have been made to the support level after 1985. Kristin's child support payments remain at $700. In 1992, she began to make monthly support payments rather than payments every four weeks.

When Kristin increased her child support payments in 1984 and in 1985, she advised Richard that it was being done as a result of the COLA provision in the decree. However, Richard did not seek an adjustment in the child support payments pursuant to that provision of the decree until August of 1994 when he raised that issue in a letter to Kristin.

At the present time, Richard is employed as a free-lance writer and earns approximately $12,966 per year. He also has rental income of approximately $3,000 per year. For a brief period of time, he was employed as an editor of a fishing magazine and received approximately $30,000 per year. Richard also claims that if he were to be employed by someone else, he would earn approximately $40,000 to $50,000 based on his educational background. Kristin is employed as a registered nurse, and her income is approximately $46,388 per year.

The trial court modified the decree and set Kristin's child support at the sum of $809 per month for two children and $522 per month for one child. The trial court applied the guidelines; however, it determined Richard had an earning capacity of $40,000 per year in calculating the support obligation.

The court further found that Richard was estopped from using the parties' COLA provision to collect additional accrued child support, but did determine that because Kristin was required to make child support payments every four weeks rather than monthly, she owed an additional child support amount of $2100 for the years 1992, 1993, and 1994. The trial court also granted Kristin both child support exemptions for tax purposes and required both parties to pay their own attorney fees.

The standard of review accorded applications to modify support orders is de novo. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983). In our review, we are not bound by the findings of the trial court, but give those findings some weight, especially as to the credibility of witnesses. Iowa R. App. P. 14(f)(7).

Richard initially contends the trial court erred in using $40,000 as his yearly income in determining Kristin's child support obligation. We disagree. In setting the amount of child support, it is appropriate to consider the earning capacity of a parent. However, before using earning capacity rather than actual earnings, the court must make a finding that if actual earnings were used substantial injustice would result so 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 believe in this situation that a substantial injustice would result if the child support were determined by using Richard's actual income as opposed to his earning capacity in that it would require Kristin to pay a greater amount of child support.

Richard next contends the trial court erred in awarding Kristin both the dependency exemptions for income tax purposes. We disagree. If the primary care remains in one parent and the noncustodial parent is current on all child support obligations, then the noncustodial parent may be awarded the dependency exemptions. *In re Marriage of Pothast*, 539 N.W.2d 199, 203 (Iowa App. 1995). The record does not contain sufficient information for us to review the criteria for tax exemptions as discussed in *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991).

Richard next contends the trial court erred in not requiring Kristin to pay a portion of his attorney fees. The awarding of attorney fees rests within the discretion of the trial court and takes into consideration the respective parties' abilities to pay. *In re Marriage of Weidner*, 338 N.W.2d 351, 361 (Iowa 1983); *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We find the trial court did not abuse its discretion in requiring each party to pay their own attorney fees.

Richard's next two issues are basically the same. He contends the trial court erred in not awarding him back child support based on the COLA provision of the original decree. We disagree. The trial court held that Richard was estopped from enforcing the COLA provisions of the decree. Estoppel by acquiescence occurs when a person knew or ought to have known of an entitlement to enforce a right and neglects to do so for such a time as would imply an intention to waive or abandon that right. *In re Marriage of Fields*, 508 N.W.2d 730, 731 (Iowa 1993). Richard was

aware of the COLA provision in the decree in 1985 when Kristin increased her child support. He has not enforced that in spite of the enforcement provisions in the decree, and we agree with the trial court that he is estopped to enforce it at this time.

The trial court was correct in entering judgment for the additional child support as a result of Kristin's unilateral payment on a monthly basis rather than on the basis of every four weeks.

Kristin contends that the court should not have entered judgment against her for the accrued support. She has not filed a cross-appeal, and consequently we decline to address these issues. *Boyd v. Boyd & Boyd, Inc.*, 386 N.W.2d 540, 545 (Iowa App. 1986). Kristen also seeks attorney fees on appeal. Appellate attorney fees are discretionary. *In re Marriage of Ask,* 551 N.W.2d 643, 646 (Iowa 1996). We deny Kristen's request for appellate attorney fees.

We affirm the trial court in all respects.

AFFIRMED.