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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-290 / 93-1311

IN RE THE MARRIAGE OF BARBARA RAE ASCHE AND GERALD DEAN ASCHE

Upon the Petition of
BARBARA RAE ASCHE,

Appellant,

And Concerning
GERALD DEAN ASCHE,

Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

Appeal from modification and contempt proceedings. **REVERSED AND REMANDED.**

John G. Sorensen of Stanton & Sorensen, Clear Lake, for appellant.

Roger L. Sutton of the Sutton Law Office, Charles City, for appellee.

Heard by Donielson, C.J., Huitink, J., and Perkins, S.J.*

*Senior judge from the fifth judicial district serving on this court by order of the Iowa Supreme Court.

DONIELSON, C.J.

At issue is whether a noncustodial parent is entitled to a reduction in his child support obligation and may purge himself of contempt by paying only $50 a month toward a support arrearage which exceeds $6,750. We hold the appellee failed to meet his burden to warrant modification of his support obligation and has substantial assets from which he should be ordered to pay the arrearage in full. The trial court's ruling is reversed and remanded with instructions.

This is an appeal from modification and contempt proceedings related to the dissolution of Gerald and Barbara Asche's marriage. Gerald and Barbara were married on July 17, 1982. They had two sons, Gregory born October 7, 1984, and Jeffrey born April 1, 1985. Jeffrey has muscular dystrophy, a degenerative muscle disorder.

The parties were divorced on March 2, 1990. At the time of the dissolution Gerald was employed by the Unisys corporation in a supervisory capacity and was earning approximately $30,000 a year. Barbara was awarded the physical care of the parties' children, and Gerald was ordered to pay $725 per month in child support.

On March 31, 1992, Gerald's employment with Unisys was terminated due to the closing of the plant. He received severance pay until June 20, 1992, at which time he began to receive $208 per week in unemployment benefits. The unemployment benefits ended in May 1993.

When his employment ended Gerald received a gross distribution of $109,241 in stock and cash from his Unisys savings plan. Gerald rolled over between $70,000 to $80,000 of these funds into an IRA to avoid income taxes and penalties for early distribution.

In July 1992 Gerald unilaterally reduced his child support payments from $725 to $50 a month. On July 8, 1992, he filed a petition to modify his child support obligation. He claimed the involuntary termination of his employment resulted in a substantial change in circumstances warranting a reduction of his child support payments. A hearing on the modification petition was held on April 22, 1993. The only source of income Gerald listed on his affidavit of financial status was unemployment benefits. Gerald was nearly 54 years old at the time of the hearing and described his health as excellent. He has a high school and some college education.

At the modification hearing Gerald testified he was seeking but had not yet obtained employment. He claimed he was spending 40-60 hours a week looking for a new job. He was pursuing a managerial position in manufacturing and was also looking into starting his own business. Gerald was limiting his job search to positions which paid at least $10 an hour.

Per Gerald's testimony and financial affidavit, it appeared he had a net worth in excess of $175,000. His two

most substantial assets were his IRA worth $80,669.64 and his one-third interest in a farm valued at $75,000.[1] Gerald testified he would sustain adverse tax consequences if he attempted to liquidate either his interest in the farm or his IRA. While his evidence in this regard was not particularly detailed, his testimony indicated he inherited the farm with his siblings and it was subject to special use restrictions in order to obtain advantageous estate tax treatment. See 26 U.S.C. §§ 2032A, 6166.

Gerald's testimony and financial affidavit submitted at the time of the modification hearing revealed he had sold over $8,000 of stock since receiving his Unisys savings plan distribution in 1992. He testified he had liquidated these assets to pay expenses which were accumulating. While he had managed to pay only $50 a month toward his child support obligation since July 1992, he was current on his $261 monthly mortgage payments at the time of the modification hearing.

On May 20, 1993, Barbara filed an application to have Gerald held in contempt due to his failure to comply with his support obligation. A hearing on her application was held July 6, 1993. On August 4, 1993, the trial court entered rulings on both the modification and contempt proceedings. The trial court ruled Gerald's loss of employment and corresponding drop in income supported a

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1. The farm is not Gerald's homestead.

reduction in his child support obligation. Since Gerald had no present income which the trial court could use in applying the child support guidelines, it presumed he had a minimum wage earning capacity ($4.65/hr) and calculated his monthly income based on a 40-hour week to reach the conclusion he could net $725 a month. Using this minimum wage level of income, the court reduced Gerald's support obligation by 65%, from $725 to $250 a month.

With respect to the contempt action the district court found Gerald had willfully failed to pay support. The district court sentenced Gerald to spend thirty days in jail but suspended mittimus providing he paid his current support obligation of $250 a month plus an additional $50 per month toward the arrearage. Barbara appeals and argues the district court erred in granting Gerald's application for modification. She maintains he still has significant earning capacity and substantial assets from which to satisfy his support obligation. She further argues the district court erred in failing to order Gerald to pay the arrearage in full.

In this equity action our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court but are not bound by them. Iowa R. App. P. 14(f)(7).

I. **Modification.**

Modification of child support is justified only if there has been a substantial change in circumstances since the entry of the original dissolution decree. In re Marriage of Phillips, 493 N.W.2d 872, 874 (Iowa App. 1992). The party seeking modification has the burden to show such a change has occurred. Id. Not every change in circumstances is sufficient to justify modification of child support provisions. Id. In determining whether there is a substantial change in circumstances we are to consider, among other things, changes in the employment, earning capacity, income or resources of a party, the receipt by a party of a pension, and contempt by a party of existing court orders. Iowa Code §598.21(8)(a), (b), (j) (1993).

There is a growing reluctance to modify decrees, and a noncustodial parent's current inability to pay has become less important and long range capacity to earn has become more of a consideration. See In re Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983). When a noncustodial parent is not employed we will look at his or her earning capacity in determining the appropriate level of support. See e.g., In re Marriage of Fountain, 492 N.W.2d 707, 710 (Iowa App. 1992).

We believe Gerald failed to carry his burden to establish a substantial, material and permanent change in circumstances. It is not questioned his employment with

Unisys was terminated involuntarily and through no fault of his own. It also appears from Gerald's testimony he had been unable to find similar high-paying employment for at least a year after his termination. However, Gerald limited his job search to positions paying at least $10 an hour. This may not be a realistic goal for a 54-year-old man residing in Cerro Gordo County.

Gerald put on no evidence regarding the availability of positions paying less than $10 an hour. Instead, he merely represented to the court he had no source of income other than unemployment benefits which were to terminate in May 1993. Without evidence of actual or potential earnings the trial court felt resigned to use the minimum wage in determining Gerald's earning capacity. We believe this was an error. If Gerald failed to provide evidence of his actual earning capacity in Cerro Gordo County then he failed to carry his burden of proof to support modification.

Our conclusion Gerald failed to carry his burden is bolstered by the fact he has assets of substantial value. While he claims he will suffer adverse tax consequences if forced to use his farm or IRA to pay child support, the greater concern is what adverse consequences his children will endure if his support obligation is substantially reduced. Every parent has a legal obligation to support his or her children, In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976), and this obligation is not excused or

abated merely because compliance with it will negatively impact upon a parent's net worth.[2]

This is not a case in which it is asserted the assets are nonalienable or not otherwise subject to execution. Gerald has a considerable amount of property and must be expected to use it to support his children where he otherwise has no source of income. We believe Gerald's duty to support his children takes precedence over his concerns about adverse tax consequences. Requiring a parent to utilize his or her assets in lieu of reducing a support obligation is not unprecedented. See, e.g., Vetternack, 334 N.W.2d at 763 (incarcerated parent's support obligation not modified and his equity interest in home charged for unpaid support payments). We conclude Gerald failed to carry his burden to warrant a modification of his support obligation. The trial court's reduction of child support from $725 to $250 a month is reversed.

II. **Contempt**.

On appeal Barbara claims the trial court properly found Gerald in contempt but erred in allowing him to purge it by paying only $50 a month toward the arrearage. In his brief Gerald claims the contempt finding should be

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2. We reject Gerald's argument that assets awarded to him at the time of the dissolution of the marriage cannot be considered in subsequent modification and contempt actions.

reversed. Gerald filed no cross appeal with respect to this issue, Iowa R. App. P. 5(a), and it is well settled one who does not appeal may not have a more favorable result in the appellate court than he secured below. Randolph Foods, Inc. v. McLaughlin, 253 Iowa 1258, 1277, 115 N.W.2d 868, 879 (1962). In both law and equity actions errors or propositions not assigned will not be considered on appeal. Id. at 1279, 115 N.W. 2d at 880. Therefore, the adjudication of contempt will not be reviewed on appeal and we examine only the punishment imposed by the trial court.

Chapter 665 of the Iowa Code provides the procedural framework for a contempt action arising out of a dissolution decree. Ickowitz v. Iowa Dist. Court for Polk County, 452 N.W.2d 446, 449 (Iowa 1990). The punishments which may be imposed are set forth in Iowa Code sections 598.23 and 598.23A. In determining what punishment to impose, the trial court was to utilize the imprisonment, income assignment, bond or community service measures described in those statutes.

The trial court allowed Gerald to avoid jail by merely paying $50 a month toward a child support arrearage which exceeded $6,750.[3] At the rate of $50 month Gerald would

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3. In its contempt ruling the trial court made no specific finding as to the amount of the child support arrearage. Both parties cite the figure of $6,750 in their briefs, although Barbara sets forth other amounts as well. On remand the trial court is instructed to determine the amount of the arrearage.

have over eleven years to repay the arrearage. We conclude this punishment for Gerald's contempt was neither authorized by statute nor adequately punitive under the circumstances of this case. Gerald unilaterally reduced his support payments by 93% from $725 to $50 a month despite the fact he was receiving $900 a month in unemployment benefits and had sold over $8,000 of stock. Gerald's conduct was clearly contumacious and ordering him to purge the contempt by paying only $50 a month amounts to a tacit approval of his conduct.

Gerald has substantial assets from which he can pay the arrearage in full. We remand this matter to the trial court with instructions Gerald be resentenced to 30 days in jail. Mittimus is to be withheld only if Gerald posts a cash bond for the full amount of the arrearage within seven days as required by section 598.23A. Should Gerald fail to pay the full amount of the arrearage within three months of the resentencing, the bond is to be forfeited as provided in the statute.

REVERSED AND REMANDED.