FILED
APR 12 2000
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1999-341 (9-594) / 98-1634
Filed April 12, 2000

IN RE THE MARRIAGE OF JILL S. ROLEK AND DENNIS F. ROLEK,

Upon the Petition of
JILL S. ROLEK,
Appellant,

And Concerning
DENNIS F. ROLEK,
Appellee.

Appeal from the Iowa District Court for Polk County, Gregory A. Hulse, Judge.

Petitioner appeals the child support provision of the modification of the dissolution decree. **AFFIRMED.**

Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellant.

Blair A. Bennett, Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

000353

VOGEL, J.

Petitioner, Jill S. Rolek, appeals the child support provision of the modification of the dissolution decree. Because we find the modification made by the trial court accounted for the special circumstances of the parties, we affirm.

Background facts. The marriage of Jill S. Rolek and Dennis F. Rolek was dissolved in October 1986. At the time of the dissolution, there were three minor children, Rachel (age seven), Alex, and Brian (twins, age four). The parties were granted joint legal custody. Jill received physical care of the children with liberal visitation established for Dennis. At the entry of the dissolution decree, Dennis was ordered to pay $1,000 per month per child in child support. The support was set prior to the adoption of the current child support guidelines. Jill filed an application for a modification of child support on September 2, 1997, seeking additional support. Rachel had reached the age of majority so the modification only concerned Alex and Brian, then age fifteen. The trial court considered Jill's request for additional child support and, finding a substantial change of circumstances, increased the support payment to $2,400 per month for the two boys. Jill now appeals, asserting the $400 per month increase should have been greater.

Scope of review. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew the rights on the issues properly presented. *In re Marriage of Vieth,* 591 N.W.2d 639, 640 (Iowa App. 1999). We give weight to the fact findings of the district court,

especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). "The trial 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." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987).

A number of principles concerning modification 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. *See In re Marriage of Glass,* 213 N.W.2d 668, 671 (Iowa 1973); *Mears v. Mears,* 213 N.W.2d 511, 514-15 (Iowa 1973); *Spaulding v. Spaulding,* 204 N.W.2d 634, 635 (Iowa 1973).

Net monthly incomes. The trial court found the "gross earnings" of Jill and Dennis, at the time of the original decree, to be approximately $17,000 and $186,000 respectively. At the time of the modification action, Jill's gross income had increased to approximately $158,095 while Dennis's remained substantially unchanged. Jill claims Dennis should have been attributed a higher income for purposes of the child support calculation as much of his current income came from nontaxable sources, including disability payments. She also disputes the

court's determination of Dennis's farm income and the appropriateness of deducting both alimony and medical expenses from Dennis's income prior to determining his applicable income for use with the child support guidelines. The court set Dennis's net monthly income at $13,760 before alimony was deducted and $11,122 after the deduction. We find the trial court appropriately weighed many factors before determining the parties' incomes and we affirm those findings.

Child support. The trial court correctly noted that although the original amount of child support was not determined under the current child support guidelines, the parties' current incomes are high, both exceeding $6,000 net per month, and fall into the discretionary range of support. The court was then free to consider an amount which would be in the best interests of the children and fair to both parties. *In re Marriage of Beecher,* 582 N.W.2d 510, 513 (Iowa 1998).

Factors Considered on modification:

Special needs child. The modification court found a material and substantial change in circumstances was the increased financial needs of Brian. At the time of the decree, Brian, was suffering from mild cerebral palsy. He was experiencing some weakness on his right side. As the years passed, Brian's condition has worsened to the point of experiencing seizures, a developmental disorder which has slowed his mental ability to about a third or fourth grade level, and a physical handicap including an inability to move his right arm. Brian requires special, skilled care and almost constant supervision. When it becomes

necessary for Jill to pay for respite care, the cost is approximately $100 per day and $475 per week. The court found respite care necessary for Brian to learn life skills and for Jill to recharge her strength. The special needs of a child may be an adequate change in circumstances for a court to require an upward deviation from the child support guidelines. *In re Marriage of Ludwig*, 478 N.W.2d 416, 419 (Iowa App. 1991). We agree with the trial court's finding of a substantial change of circumstances for Brian's changed needs.

Calculating the extra expenses required of Jill for Brian's special needs, we find her expenses average $519 per month. This figure includes two weekends each month, at $400 per month or $4,800 annually, and three weeks during the summer, at $475 per week, or $1,425 for three weeks of respite care. The total annual cost is $6,225 or $519 per month. We conclude the trial court's child support increase of $400 per month was equitable in assessing Dennis's share of these extraordinary expenses. The court ordered the increase to begin on May 1, 1998. We decline Jill's request to make the payment retroactive to December of 1997. We note the court retained jurisdiction to determine the financial responsibility of each party for Brian's care after his eighteenth birthday.

Visitation. Jill argues a $400 per month increase is not adequate as Dennis is no longer exercising his visitation rights with Brian and Alex. Jill claims this change in circumstance has increased her responsibilities of caring for the boys, and in particular the special needs of Brian. The result of Dennis's failure to exercise visitation is, Jill notes, having to absorb the full time cost of general living expenses for the boys. Therefore, Jill argues that the court should grant an

additional amount of child support to account for the extra expense she must assume as the only parent providing physical care for the boys.

Previously, the supreme court has refused to reduce a child support obligation due to a noncustodial parent's increased visitation and, thus, greater childcare costs. "Because some form of shared physical care is the norm, our guidelines incorporate the reasonable living expenses of the noncustodial parent and need no further adjustment." *In re Marriage of Fox,* 559 N.W.2d 26, 29 (Iowa 1997). Conversely, we will not order an upward deviation from the support guidelines because a parent refuses to exercise visitation rights. In this case, with child support in the discretionary range, the court stated it considered the visitation issue in setting an increase of $400 per month support. We need not decide whether this was a proper factor for the court to consider, even in the discretionary income range, as we have affirmed the increase based on Brian's special needs.

Child support in the discretionary range. The trial court made no modification of child support based purely on the current child support guidelines. Jill argues this should have been done. At the $6,000 income level, support for two children would be $1,398 per month. This figure "is preliminary in the sense that it is subject to consideration for adjustment upward or downward when special circumstances warrant it." *Beecher,* 582 N.W.2d at 513. Under "special circumstances," we have the substantial change of circumstance of a child with severe disabilities, adding a cost of approximately $519 per month for his special needs. The trial court's increase from $2,000 per month to $2,400, effectuated

the principle of doing "justice between the parties under the special circumstances of the case." Iowa Child Support Guidelines (July 1, 1995).

Attorney fees. 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 Hansen,* 514 N.W.2d 109, 112 (Iowa App. 1994). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Castle,* 312 N.W.2d 147, 150 (Iowa App. 1981) (citation omitted). Dennis and Jill both have sufficient incomes to pay their own attorney fees. We find an award of attorney fees is not appropriate in this case.

AFFIRMED.