IN THE COURT OF APPEALS OF IOWA

FILED
AUG 24 1988
CLERK SUPREME COURT

IN RE MARRIAGE OF BEVERLY A. CLAUER AND GARRY F. CLAUER

Upon the Petition of)
BEVERLY A. CLAUER,)
Petitioner-Appellant,)
And Concerning)
GARRY F. CLAUER,)
Respondent-Appellee.)

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8-206
87-825

Appeal from the Iowa District Court for Dubuque County (*DM 2002*), *L.D. Lybbert, Judge.*

Petitioner wife appeals the order in this modification action, challenging the court's determination of the child support due her. **AFFIRMED AS MODIFIED.**

Joseph J. Bitter, Dubuque, for petitioner-appellant.

Robert L. Day, Jr., Dubuque, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson and Schlegel, JJ.

SCHLEGEL, J. 57

Petitioner, Beverly Clauer (now Beverly Sawvell) appeals the court's order in the modification action brought by respondent, Garry Clauer. She asserts that 1) the amount of arrearage of child support determined by the court was in error, 2) the court erred in failing to increase the child support award, and 3) the court erred in refusing to award reasonable attorney's fees. Both parties seek attorney's fees on appeal. Our scope of review is de novo. Iowa R. App. P. 4. We affirm as modified.

The parties' marriage was dissolved by decree rendered in January 1977. The decree incorporated a stipulation entered into by the parties, providing, among other things, for physical custody of the two children, Garry Jr., born October 22, 1971, and Michael, born February 23, 1973, to be in Beverly. The decree stated that Garry was to pay child support in the amount of "$60.00 per week, said allowance and support to continue and be payable on the Monday of each week commencing on the first Monday following the Decree of Dissolution of Marriage and payable thereafter until such time as the youngest child reaches majority, marries, or is emancipated." (Emphasis added.) The stipulation further obligated Garry to maintain health, accident, and hospitalization insurance on the children "comparable to that now in effect until such time as the support obligation . . . ceases." The decree of dissolu-

tion also provided for visitation, and in part provided a period "including but not limited to a 30 day period during the months of June, July or August of each year for the purpose of vacation, same to be exercised by the respondent only upon 30 days prior notice."

In May of 1978, an order was entered in this case abating Garry's child support obligations during the summer months of June, July and August during the period in which he has physical possession and custody of the children.

Later, the older child, Garry Jr., went to live with his father. The parties then agreed that as long as Beverly was employed, Garry would not need to pay any support, and that she would support Michael and Garry would support Garry Jr. Beverly contends that the agreement provided that if she became unemployed, the support would resume. Beverly subsequently lost her job. She has been diagnosed as having Lupus disease, which is disabling to the point of rendering her unemployable. She was laid off from her job on February 5, 1985, and she asked Garry to resume child support payments, which he refused. Beverly garnished his wages, and after receiving some support by that means, Garry started paying support again. The district court found that from September 1, 1984, to October 1, 1986, Garry had paid a total of $945.55, including funds received as a result of garnishment. The parties had agreed that all child support had been paid in full to September 1, 1984.

The district court found the agreement for the termination of child support during Beverly's employment to be valid; that under the agreement, child support should resume following Beverly's loss of employment; and that from that time to the time of this modification Garry was obligated to pay child support at the rate of $30 per week for Michael. The court found that from February 5, 1985, to October 1, 1986 (the date of the trial), Garry's obligation for child support totaled $1,740, of which he had paid $945.55 during that time, leaving a balance due in the amount of $794.45. The court further found that there had been no significant change in circumstances since the date of the original decree, so that there was no basis for either increasing or decreasing the amount of future child support for Michael "from the $30 per week amount provided in the original Decree based on the parties' stipulation at that time." Beverly claims that the court is in error in those findings. We agree and modify the order of the district court.

Beverly claims that the court was in error in assuming that the child support payable following its resumption was $30 per week. She claims that it should have been found to be $60 per week. As heretofore quoted above, support provided in the decree was ordered to continue until "the youngest child reaches majority, marries, or is emancipated." In answer to respondent's application for modifi-

cation, Beverly asked that the decree, as entered in January 1977, and as modified on May 11, 1978 (providing relief from payment of child support during respondent's possession of the children in the summer), "stand and that all terms therein remain in full force and effect."

Divorced parents may contract between themselves as to support of their minor children provided the best interests of the children are not thereby injured. Proof of such an agreement need not be undisputed or established as an absolute certainty; reasonable certainty is sufficient. Existence of the mutual understanding may be implied from conduct and circumstances shown by admission of the party charged or circumstantial evidence. Denning v. Denning, 185 N.W.2d 328, 240 (Iowa 1971). Parents cannot lightly contract away or otherwise modify child support obligations; the court will give effect to such agreements only if they do not adversely affect the best interests of affected minor children. In re Marriage of Zeliadt, 390 N.W.2d 117, 119 (Iowa 1986).

The district court found that Garry and Beverly had agreed that since Garry Jr. was living with Garry Sr., Beverly was not entitled to child support as long as she was employed. The court further found that upon her termination from employment, Garry was obligated to resume payment of alimony as required under the original decree.

We believe the district court was in error in determining that the obligation for support was for the sum of $30 per week from February 1985. The clear language of the decree imposed a burden to pay $60 per week until the youngest child reached majority, married, or was emancipated. This language was never modified by court order or by agreement of the parents. A court is without authority to modify a decree retroactively. Vrban v. Levin, 392 N.W.2d 850, 852 (Iowa App. 1986) (citing Gilliam v. Gilliam, 258 N.W.2d 155, 156 (Iowa 1977). The court apparently interpreted the language of the decree as being intended to read: "$30 per week per child . . . ." However, it is not necessary to resort to interpretation when the language--selected by the parties by way of stipulation--is clear. See, Allen v. Highway Equipment Co., 239 N.W.2d 135, 139 (Iowa 1976). Respondent did not ask that such an interpretation be made. Accordingly, we hold that from February 1985 to the time of trial (October 1986), Garry was obligated to pay $60 per week in child support. We find no support in the record for the court's finding that Michael lived with Garry during the summer months of 1985 and 1986. Accordingly, it is error to ignore those months in calculating the arrearage in child support payable. With this modification, adopting the district court's findings as to amounts that should have been and amounts paid, Garry should have paid the total sum of

$4,920 of which he has paid $945.55, leaving a balance due in the amount of $3,974.45.

Garry claims he should have credit for the orthodonture work he has been required to pay for Garry Jr., since he has had the expense of support for him while he has been in his custody. Under the decree, Garry was obligated to provide medical insurance for both children. Because of provisions of the union contract under which he worked, the children were not permitted to be covered under the insurance at his place of employment when Beverly remarried. Under the decree, Garry would have been obligated to provide such insurance whether it was provided by his employment or not. It is obvious, however, that the parties relied upon his ability to include them on his employer's plan, to make such provision. It would thus be equitable to allow Garry some credit for dental expenses of such an extraordinary kind. Accordingly, we allow one-half of those expenses as credit upon the accrued child support. Garry's unpaid child support from September 1, 1984, to the date of the trial in district court on this matter shall be fixed at $3,224.45.

The district court found that there had been no significant change in circumstances since the date of the original decree. We disagree. Garry Jr. now lives with his father. Beverly has remarried. Beverly is now unemployable. These are very significant changes in circumstances

from those that existed at the time of the original decree. Those changes justify a determination, anew, of the amount of child support that should be paid. Based upon the record in this matter, Garry is ordered to pay child support in the amount of $40 per week for the support of Michael Clauer, with such support to be payable until he attains age 18, completes high school, marries, dies, or becomes emancipated and shall continue under the provisions of Iowa Code section 598.1(2) (1985), until age 22 if he shall continue his education as therein provided. The award of joint custody by the court is affirmed.

Beverly is awarded judgment against Garry for $500 for her appellate attorney's fees and is awarded judgment in the amount of $500 for her trial attorney's fees. The costs of this appeal are to be taxed to Garry.

AFFIRMED AS MODIFIED.