IN THE COURT OF APPEALS OF IOWA

No. 0-029 / 99-0402
Filed May 31, 2000

IN RE THE MARRIAGE OF LINDA BAHEA CHRISTIAN AND DUANE ALAN CHRISTIAN

Upon the Petition of
LINDA BAHEA CHRISTIAN,
Petitioner-Appellee,

And Concerning
DUANE ALAN CHRISTIAN,
Respondent-Appellant.

FILED
MAY 3 1 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Hamilton County, Carl E. Peterson, Judge.

The respondent appeals a district court ruling on his petition to modify the child custody and child support provisions of the parties' dissolution decree. **AFFIRMED.**

James W. McCarthey, Fort Dodge, for appellant.

Linda Bahea Christian, Webster City, pro se.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

The respondent appeals a district court ruling on his petition to modify the child custody and child support provisions of the parties' dissolution decree. Respondent argues the district court erred in calculating petitioner's child support obligation by failing to consider petitioner's earning capacity rather than her actual earnings. Respondent requests an award of appellate attorney fees. We affirm.

Linda and Duane Christian's marriage was dissolved on April 5, 1989. The parties were granted joint custody of their three children: Courtney, born October 14, 1983, Carly, born February 26, 1985, and Chance, born May 20, 1988. Linda was awarded primary physical care of the children. Duane was originally ordered to pay $150 per week in child support. In May 1996, this amount was modified by stipulation to $750 per month for three children, $600 per month for two, and $513 for one. In July 1998, the juvenile court transferred primary physical care of Courtney to Duane where she has remained since.

Duane has worked for Frigidaire for approximately thirteen years. His gross income in 1998 was $40,200, an amount he expects to be similar in 1999. Linda was not employed until after the dissolution when she began working part-time for Freeman Journal as a telemarketer earning $5.75 per hour. Her part-time hours were from 9:00 a.m. to 1:00 p.m. If she were to work full-time at the same job, her monthly salary would be approximately $1,034.58 instead of $517.25. However, her employer did not have a full-time position available.

Because she likes her job, she has not applied for employment elsewhere. Linda also earns an additional $250 per year from interest on a certificate of deposit.

Linda has no physical disabilities which would limit her employment. She has a high school education. The district court concluded Linda had reached the level of her earning capacity at the time of trial. The court based its conclusion on the following: (1) Linda's present employment is the first regular wage earning job she has had either during the marriage or after the dissolution, (2) the job is apparently secure, (3) the job allows for certain flexibility in time, and (4) there are representations the part-time position may ultimately work into a full time position.

The district court further modified the child support provisions of the decree. Duane was ordered to pay $885.36 per month in child support and Linda is to pay $50 per month in child support for Courtney. This leaves Duane with a child support obligation of $835.36. Duane appeals.

I. Standard of Review. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). However, we have a duty to examine the entire record and may adjudicate rights on those issues properly presented. Iowa R. App. P. 14(f)(7).

II. Earning Capacity. Duane contends the trial court erred in not imputing Linda's full-time earning capacity in its calculation for child support. He

argues had the court done that, at minimum wage, Linda would be responsible for $251.86 per month in child support instead of just the $50.

Both parents have a legal obligation to support their children, not necessarily equally but in accordance with his or her ability to pay. *Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable*, 474 N.W.2d 581, 583 (Iowa App. 1991). Both father and mother have a duty to support. *Id.*

In setting an award of child support, it is appropriate to consider the earning capacity of the parents. *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa App. 1991). However, before using earning capacity rather than actual earnings, a court must make a finding, if actual earnings were used, substantial injustice would result or adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *In re Marriage of Kriegel*, 551 N.W.2d 887, 889 (Iowa App. 1996).

We recognize upon initial review of this case the use of earning capacity may seem appropriate over that of actual earnings. However, the district court carefully considered the issue and concluded Linda's employment is her first regular wage earning experience either during or after the marriage; the job appears secure; and the position may ultimately result in full-time employment. More importantly, the district court noted the part-time nature of the job allows Linda flexibility to be present for the supervision of the children. That is an important factor in the instant case. Courtney was subject to juvenile court intervention because of behavioral problems. The district court notes the two

youngest children are also experiencing behavioral problems. Her present employment allows her to provide supervision for the children after school.

The district court concluded the use of actual earnings would not result in substantial injustice. We agree.

III. Attorney Fees. Duane requests appellate 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. *Drury*, 475 N.W.2d at 672. In deciding whether to award attorney fees on appeal, the court considers "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 Grady-Woods*, 577 N.W.2d 851, 854 (Iowa App. 1998) (citing *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa App.1994)). We decline Duane's request for appellate attorney fees.

AFFIRMED.