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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-610 / 92-360

IN RE THE MARRIAGE OF MICHAEL D. BROKAW AND ROSANNE BROKAW

Upon the Petition of

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MICHAEL D. BROKAW,

Appellant,

And Concerning

ROSANNE BROKAW,

Appellee.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

The husband appeals the district court's modification of the economic provisions of his dissolution decree. **AFFIRMED AS MODIFIED.**

Michael Mollman of Mollman & Wertz, Cedar Rapids, for appellant.

Stephen B. Jackson, Cedar Rapids, for appellee.

Considered by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J. 000038

Appellant Michael D. Brokaw appeals the district court's granting of appellee's motion for modification of custody and child support. We affirm as modified.

The marriage of Michael and Rosanne Brokaw was dissolved in February of 1988. The district court awarded the parties joint custody of their four minor children: Angela born Oct. 21, 1973; Joseph born February 21, 1975; Stephen born March 26, 1976; and Karen born July 20, 1977. Rosanne was given primary physical care. The decree directed Michael to pay child support of $45.00 per week, per child.

On March 14, 1988, Michael filed an application for modification requesting primary care and custody of the parties' oldest son, Joseph. On April 21, 1988, a decree of modification was entered granting primary physical care of Joseph to Michael. Michael's obligation to pay support for Joseph was terminated effective April 21, 1988, by the court's ruling dated July 11, 1990.

In addition, in its July 11th ruling the court established the child support according to the guidelines in the amount of $43.50 per child, per week for each of the three children remaining in Rosanne's physical care.

On December 6, 1990, after a juvenile adjudication, Joseph moved out of his father's home and took up residence with Rosanne. On March 25, 1991, Rosanne filed an application for modification, requesting the return of

custody of Joseph and increased child support. A hearing was held on February 3, 1992. Just prior to the hearing, Joseph moved out of Rosanne's home and moved in with a friend. The district court ruled that Rosanne would have primary custody of Joseph and increased child support to $65 per week per child. The district court also modified the original decree by holding that child support would continue until the children completed their high school education or reached twenty years of age, since two of the children would need longer to complete high school. Michael filed a motion to reconsider which the district court denied. Michael appeals.

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, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Substantial Change in Circumstances.

Michael first contends there was no substantial and material change in circumstances between the 1990 modification and the March 25, 1991, application or the February 1992 trial that would justify a modification.

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "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) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

We find there is a substantial and material change in circumstances to support a modification. The oldest son, Joseph, is no longer living with his father and stepmother. Juvenile authorities removed Joseph from his father's home and placed Joseph with Rosanne. It appears unlikely that Joseph will be able to return to Michael's house.

We also find a substantial change in circumstances since Angela would not graduate from high school until after her nineteenth birthday.

II. Child Support Award.

Michael next claims the district court erred in determining his gross income. The district court included income from Michael's off-duty jobs. Michael maintains the work from these jobs is not permanent and may be

terminated at any time for any reason. Michael insists only his income as a police officer should be included.

It appears from the record that Michael has been working off-duty jobs since 1988. In 1991, he earned over $11,000 from his off-duty employment. His off-duty jobs are not an anomaly or speculative. The district court found, and we agree, that there is a strong likelihood that Michael would continue to work off-duty jobs in the future. We find the district court correctly considered the income from Michael's off-duty jobs when figuring his gross income. In re Marriage of Brown, 487 N.W.2d 331, 333 (Iowa 1992). Should Michael's income change substantially, it may be appropriate for him to seek a modification of the decree.

III. Retroactive Child Support Payments for Joseph.

Michael also argues that the district court erred in finding that child support payments for Joseph were retroactive to the date of the filing of the modification petition. Michael contends that the retroactive payments essentially grant Roseanne rights to child support payments for a time when she had no legal right to such payments and he was under no obligation to pay.

The trial court has "the authority to require payment of child support retroactive to the date of the filing of the modification petition even in those circumstances when the dissolution decree created no obligation to pay child

support." In re Marriage of Chesterman, 462 N.W.2d 696, 698 (Iowa App. 1990).

We affirm the district court on this issue.

IV. Child Support Extending Beyond the Age of Eighteen.

Michael claims the district court erred in extending the age each child would be eligible for child support payments.

At trial, the oldest child, Angela, testified she would not graduate from high school until after her nineteenth birthday. The record shows Joseph is also behind in school. The district court therefore modified the decree to require Michael to pay child support until the child for which the support is being paid reaches the age of twenty or graduates from high school.

In the findings of fact section of the modification decree the district court stated, "until each child reaches the age of 20 or graduates from high school, whichever occurs first." The conclusions of law section of the modification contains the following language, "to continue until the child for which support is being paid reaches the age of 20 years or graduates from high school, whichever occurs last."

Obligations for support may include support for a child who is between the ages of eighteen and twenty-two who is regularly attending an accredited school in pursuance of a course of study leading to a high school diploma. Iowa

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Code § 598.1(2) (1991). Under the facts of this case, we find that granting continued child support on the basis of the children's educational needs was not premature.

We affirm with the understanding that the district court meant Michael was obligated to continue to pay child support until the child for which support is being paid reaches the age of twenty or graduates from high school whichever occurs first. We find the other language in the modification decree was in the nature of a clerical error.

Michael is obligated to pay child support for four children. Therefore, according to the child support guidelines, Michael's obligation will be calculated by taking his net monthly income, which is $2,678.13 and multiplying it by 42.3% for a support obligation of $1132.85 per month. After Angela either graduates from high school or turns twenty, Michael's net income will be multiplied by 36.7% for a support obligation of $982.87 per month.

V. Attorney Fees.

Michael, in his reply brief, claims the district court erred in awarding Rosanne trial attorney fees.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair

and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We find the district court did not abuse its discretion in granting attorney fees.

Rosanne also 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. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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).

We award Rosanne $750 in appellate attorney fees.

VI. Conclusion.

After considering all issues presented, we affirm the district court as modified.

Costs of this appeal are taxed to the appellant.

AFFIRMED AS MODIFIED.