

IN THE COURT OF APPEALS OF IOWA

No. 3-647 / 93-282

IN RE THE MARRIAGE OF WENDY J. BOVIS AND DAVID S. BOVIS

Upon the Petition of
WENDY J. BOVIS,

Appellee,

And Concerning
DAVID S. BOVIS,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

David Bovis appeals the child support provisions of the parties' dissolution decree. **REVERSED AND REMANDED.**

Carter Stevens of Beecher, Rathert, Roberts, Field, Walker & Morris, P.C., Waterloo, for appellant.

No appearance by appellee.

Considered en banc.

HUITINK, J.

Wendy and David Bovis were married on March 14, 1987. They have one child, Ariel Lynn Bovis, born on April 9, 1988.

Wendy filed a petition for dissolution of marriage on November 12, 1991. She filed a financial affidavit on that date which stated she was employed at Western Home and had net monthly income of $500. Wendy subsequently became unemployed and began receiving ADC benefits. David is employed at a Kinney Shoe Store. The district court found he had net monthly income of $781.

The parties entered into a stipulation wherein they agreed to joint physical custody of Ariel. They also agreed to a divided physical care arrangement where Wendy has physical care for eight months and David has physical care for the months of April, May, June, and July. The noncustodial parent is entitled to visitation while the other party has physical care. The parties agreed David would pay child support based on the child support guidelines, but would not pay support for the four months he had physical care.

A hearing was held in district court on January 4, 1993, and the parties "proved up" the divorce. The court entered a decree of dissolution on January 5, 1993, which incorporated the parties' stipulation. On the same day, the court issued a supplemental dissolution decree. The court stated it would not be in the best interests of the

child to terminate David's child support obligation during the months he has physical care of the child and eliminated this provision from the dissolution decree. The court ordered David to pay child support, as required by the child support guidelines, of $195 per month.

David filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) and a motion for new trial. He included an affidavit from his attorney, Carter Stevens, which stated an attorney, Kay Delafield, from the Child Support Recovery Unit had been contacted, and Delafield told him Wendy would not be entitled to ADC payments during the time David had physical care. The district court determined that even when David pays child support for the entire year, it will not entirely reimburse the State for the ADC payments received by Wendy during the eight months she has physical care of Ariel, and therefore, it would be unfair to the taxpayers to only require David to pay child support for eight months. The court denied David's posttrial motions. He appealed.

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 them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

David first contends he should have been afforded an opportunity to make a record with regard to the proposed

change requiring him to pay child support for twelve months instead of eight months. He claims the district court should not have modified the parties' stipulation without giving the parties an opportunity to present evidence and argument on this issue.

Arguably, the district court did not have jurisdiction to increase David's child support obligation from eight months to twelve months because the dissolution decree reserved only the right to fix the amount of child support, not to modify the time period for which he must pay support. It could be argued that the dissolution decree became a final judgment on issues not specifically reserved by the district court. A trial court may alter its final judgment only by: (1) a timely motion to enlarge under Iowa Rule of Civil Procedure 179(b); (2) a petition to vacate under rule 252; (3) a motion for new trial under rule 244; or (4) a nunc pro tunc order. See Graber v. Iowa Transp., Inc. v. Ritter, 356 N.W.2d 497, 499 (Iowa 1984). None of these procedures were used in this case.

However, we will assume the district court did have jurisdiction. So assuming, we conclude this case must be reversed and remanded.

A stipulation concerning child support will be enforced only to the extent it is in the best interests of the child. In re Marriage of Bonnette, 492 N.W.2d 717, 721 (Iowa App. 1992). The court is not bound by the parties' stipulation and may disregard the stipulation entirely. In

re Marriage of Van Zee, 488 N.W.2d 721, 725 (Iowa App. 1992). The binding force of a stipulation as to child support depends upon the approval of the court. Id.

An argument similar to the present one was discussed in the case In re Marriage of Davis, 447 N.W.2d 571 (Iowa App. 1989). We noted the parties should have known the trial court did not have to accept their stipulation, and they had an opportunity at the hearing when the stipulation was presented to make a record. Id. at 573. We did not find the parties were entitled to an additional hearing after the court refused to accept their stipulation when they had the opportunity to present evidence earlier. Id.

Here, David had an opportunity to make a record at the hearing on January 4, 1993. He did not take advantage of this opportunity. We conclude he was not entitled to an additional hearing on the modification of the parties' stipulation.

David also contends the district court should not have modified the parties' stipulation to require him to pay child support for twelve months instead of eight months. He states he should not be required to pay child support while he has the care of the child.

This case involves divided physical care because physical care is granted to one parent for a period of time and to the other parent for a period of time. See In re Marriage of Will, 489 N.W.2d 394, 397 (Iowa 1992). Divided physical care is different from split physical care, which

occurs when each parent has physical care of at least one child. Id. In cases involving split physical care the court must calculate the amount of child support for each parent, while assuming the other parent is a noncustodial parent. In re Marriage of Hansen, 465 N.W.2d 906, 911 (Iowa App. 1990). The court may then offset the parents' child support obligations. Id.

Different considerations come into play in cases involving divided physical care. This is because many of the expenses of maintaining a home for the parent and the child do not abate, even when the child is absent. See State ex rel. Lara v. Lara, 495 N.W.2d 719, 721 (Iowa 1993).

There is no evidence in the record to show whether Wendy's expenses are reduced during the four months David has physical care of Ariel. If Wendy's expenses are substantially reduced, then it may be equitable to reduce or eliminate David's child support obligation when he has physical care the child. On the other hand, if Wendy's expenses remain substantially the same, then David's child support obligation should continue through all twelve months of the year. We remand to the district court for findings on this issue. We do not retain jurisdiction.

Costs of this appeal are assessed one-half to Wendy Bovis and one-half to David Bovis.

REVERSED AND REMANDED.