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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

1-315 / 90-1740

499

IN RE THE MARRIAGE OF STEPHEN J. NIELSEN AND JANEA K. NIELSEN

Upon the Petition of

STEPHEN J. NIELSEN,

Appellant/Cross-Appellee,

And Concerning

JANEA K. NIELSEN,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

Stephen appeals and Janea cross-appeals the district court's ruling which modified the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Eric Borseth, Pleasant Hill, for appellant.

Ann Fitzgibbons, West Des Moines, for appellee.

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

SCHLEGEL, J.

The parties' marriage was dissolved on July 17, 1989. They have one child, Anthony, born July 28, 1987. The district court awarded primary physical care of Anthony to Janea and ordered Stephen to pay child support in the amount of $600 per month based on his net income of $2400 per month.

Nine months after the decree was filed, Stephen filed a modification application seeking to reduce his child support obligation. Stephen stated there had been a change at his place of employment such that he was no longer earning substantial overtime as he had done in the two years preceding the divorce. He asserted his present net income fell from approximately $2400 per month to $1550 per month. Meanwhile, Janea obtained a job where her net income rose from $250 per month to $809 per month. The court reduced Stephen's child support obligation from $600 to $450 per month, finding there had been a substantial change in circumstance, not because of the reduction in Stephen's income, but because of an increase in Janea's income.

Stephen appeals; Janea cross-appeals. Our review is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by these determinations. Iowa R. App. P. 14(f)(7).

We must determine if the trial court properly reduced Stephen's child support obligation. Stephen is employed by the American National Can Company as a press operator; he was so employed at the time of the dissolution hearing in May 1989. Because the company was undergoing a great deal of growth in 1987 and 1988, Stephen had to work substantial amounts of overtime in those years. In 1988 his gross income was $40,545. Starting in February or March 1989, the company reduced the amount of available overtime. As a result, Stephen's overtime decreased, and his gross income in 1989 was less than $35,000. The trial court found his net income at the time of the modification was $1547 per month.

During the time between the decree and the modification, Janea took a new job as receptionist at Josephs Distributing. She increased her monthly net income from $250 to $810. The trial court found this employment was a substantial change in circumstances not within the contemplation of the court or the parties at the time of the decree. See In re Marriage of Huss, 438 N.W.2d 860, 861 (Iowa App. 1989). Additionally, the court noted the changed circumstances at Stephen's employment existed prior to the entry of the original decree and, therefore, did not alone constitute a substantial change in circumstances. See id. We determine there has been at least one substantial change in circumstances.

Financial statements were presented, and the trial court specifically noted that Stephen's "present income is about $1,550 per month." In modifying the decree, however, the court used $2400 as Stephen's income; this amount was determined to be his income at the time of the original decree. The court should have used Stephen's present income, $1547. In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991). We use the current child support guidelines of December 31, 1990, to modify the trial court's October 11, 1989, decree in order to reflect Stephen's actual income. In re Marriage of McElroy, 475 N.W.2d 221, 224 (Iowa App. 1991).

Due to Janea's net monthly income of $809 and Stephen's of $1547, we utilize the guideline figure of 23.2 percent to determine Stephen's child support obligation for this one child should be $360 per month. We believe the district court erred by failing to use Stephen's current net monthly income to calculate the reduction in support. We modify the order to reduce Stephen's child support obligation from $450 per month to $360 in accordance with his ability to pay.

Janea claims the trial court erred in failing to grant her 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 the trial court abused its discretion. Id. We believe the trial court did not abuse its discretion.

In addition, Janea 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 determine each party shall pay his or her own attorney fees, and costs are taxed one-half to each party.

AFFIRMED AS MODIFIED.