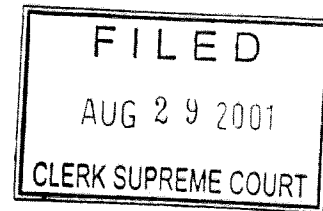


IN THE COURT OF APPEALS OF IOWA

No. 1-424 / 00-0698
Filed August 29, 2001

IN RE THE MARRIAGE OF TONI ANN WENZEL
AND JEFFREY JAMES WENZEL

Upon the Petition of
TONI ANN WENZEL,
Petitioner-Appellee,



And Concerning
JEFFREY JAMES WENZEL,
Respondent-Appellant.

Appeal from the Iowa District Court for Wright County, Ronald H. Schechtman, Judge.

The respondent appeals a district court order dismissing his petition to modify the child support and visitation provisions of the parties' dissolution decree. **AFFIRMED.**

James W. McCarthy, Fort Dodge, for appellant.

G.A. Cady III of Hobson, Cady & Cady, Hampton, for appellee.

Considered by Sackett, C.J., and Mahan and Zimmer, JJ.

MAHAN, J.

The respondent, Jeffrey Wenzel, appeals a district court order dismissing his petition to modify the child support and visitation provisions of the parties' dissolution decree. He contends the district court erred in: (1) calculating his gross yearly income; (2) failing to reduce his monthly child support obligation; (3) failing to order each party share visitation transportation; and (4) failing to order any day care required for the children be provided by his mother. Both parties request an award of appellate attorney fees. We affirm.

Background Facts and Proceedings. A decree dissolving the marriage of Jeffrey and Toni Wenzel was entered on March 17, 1998. The court approved by decree a stipulation executed by the parties. The stipulation and decree provided for joint legal custody of the parties' two daughters, Kami and Kara, and placed primary physical custody with Toni. The stipulation and decree established a schedule of visitation and required Jeffrey to provide all of the transportation for visitation, so long as Toni and the children reside within fifty miles of Jeffrey's residence. Jeffrey's child support obligation was set at \$375 per month.

The parties' property settlement awarded Jeffrey an eighty-acre tract and a house in Ventura. Jeffrey paid Toni \$80,000 cash for her interest in jointly held property. He raised the money by borrowing from his father and grandfather, and mortgaging the Ventura property. Jeffrey rents out the basement of the Ventura property for \$260 per month.

Jeffrey works as a grain farmer. He farms the eighty acres he owns and leases an additional 280 acres. Due to low grain prices, his farm income decreased following the dissolution. His average income between 1995 and 1999 was \$12,669. Jeffrey works for his father and grandfather, without remuneration, to pay back the monies he owes to both.¹

At the time of dissolution, Toni worked part-time. Toni obtained full-time employment after the dissolution, and earns \$11 per hour for a forty-hour week.

Jeffrey filed a petition for modification on August 9, 1999. He requested a reduction in his child support obligation, an equal division of responsibility for visitation transportation, and a requirement his mother be the day care provider for the children. On February 28, 2000, the court filed an order dismissing the modification petition and requiring Jeffrey to pay \$945 of Toni's attorney fees. The court subsequently denied Jeffrey's motion pursuant to Iowa Rule of Civil Procedure 179(b). Jeffrey appeals.

Scope of Review. Our review is de novo. Iowa R. App. P. 4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997).

¹ Jeffrey owes his father \$21,681. His father agreed to retire the debt in five years if Jeffrey helps him on a regular basis. Jeffrey owes his grandfather \$50,000. He agreed to pay back his grandfather by working for him at the rate of \$5.00 per hour.

Child Support. Jeffrey argues the district court erred in finding he had a gross yearly income of \$18,205 per year. Jeffrey contends the court incorrectly concluded he obtained income from his Ventura home, and incorrectly imputed as income money earned working for his father to repay a debt owed. He requests a reduction in child support to \$203.40 per month,² based on an income of \$12,669, his average farm income over the last five years.

The child support guidelines create a rebuttable presumption the amount of child support resulting from the application of the guidelines is the correct amount of child support to be awarded. *In re Marriage of Gulsvig*, 498 N.W.2d 725, 727 (Iowa 1993). All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations. *In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997). When income is subject to fluctuation, an average income over a reasonable period of time should be used. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996).

A party seeking modification must prove the following:

1. There must be a substantial and material change in the circumstances occurring after the entry of the Decree;
2. Not every change in circumstances is sufficient;
3. It must appear that continued enforcement of the original Decree would, as a result of changed conditions, result in positive wrong or injustice;
4. The change in circumstances must be permanent or continuous rather than temporary;
5. The change in financial conditions must be substantial; and

² At trial, Jeffrey requested a reduction in child support to \$275 per month. It is unclear from the record how Jeffrey came up with the lower figure.

6. The change in circumstances must not have been within the contemplation of the trial court when the original Decree was entered.

State ex rel. Pfister v. Larson, 569 N.W.2d 512, 514 (Iowa Ct. App. 1997). See also Iowa Code § 598.21(8) (1999). "[A] substantial change of circumstances exists when the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines. . . ." Iowa Code § 598.21(9).

The district court added to Jeffrey's average farm income \$1200, for income received from the rental of the Ventura home, and \$4336, for income earned and applied to the debt owed by Jeffrey to his father. The guideline support amount calculated, based on an income of \$18,205, did not result in a ten percent or more variation from what Jeffrey paid pursuant to the decree. Therefore, the court concluded, no modification of child support was necessary.

The district court properly calculated Jeffrey's income. The rental income included in the court's calculation represents far less than what Jeffrey would receive in rent if he rented out the Ventura home for the entire year.³ Jeffrey testified he had rented the basement of the house for four months in the previous two years, and a renter would be moving in within the next month. He expected to continue the rental arrangement "during the near future."

Similarly, the court properly included as income monies earned by Jeffrey and applied to debt repayment. As the court explained, "[t]here is little difference

³ The district court used the lower figure because even though "depreciation could be taken on a portion of this residence, together with allotting part of the utilities, taxes and insurance, maintenance, there still is something left for income."

than if Jeff worked for XYZ, took the earnings and applied it on his father's debt."⁴ The court did not err in using the information provided by Jeffrey to calculate the income from the debt repayment and include it in its calculations.⁵ We affirm the district court on the child support issue.

Visitation. In his petition for modification, Jeffrey requested the equal division of responsibility for transportation. Jeffrey argues Toni's improved financial circumstances since the entry of the decree requires a sharing of transportation responsibilities. We disagree.

To modify visitation privileges, the party seeking modification must show a change of circumstances has occurred since the entry of the initial decree. *In re Holub*, 584 N.W.2d 731, 733 (Iowa Ct. App. 1998). Generally, a much less extensive change of circumstances need be shown in visitation right cases. *Id.*

The decree provides for a change in transportation arrangements if the parties live further than fifty miles apart. The parties currently live six miles apart, as they did at the time of the decree. Jeffrey has failed to show a change in circumstances requiring a modification of the decree's transportation

⁴ The court properly excluded from its calculation of income the uncertain and speculative amounts earned by Jeffrey from working for his grandfather and applied to repayment of the debt owed to him. See *Nelson*, 570 N.W.2d at 105. The record contains no evidence to demonstrate how many hours per week Jeffrey worked for his grandfather to repay the debt, or how much remained to be paid on the debt. In contrast, Jeffrey testified he worked about seventeen hours per week to repay the debt owed to his father, and his father had agreed to a five-year period of repayment, after which no more would be owed. This enabled the court to determine approximately how much per year Jeffrey was repaying in the form of labor.

⁵ Jeffrey claims the debt owed to his father was incurred during the marriage. However, Jeffrey presented no paperwork or other evidence to prove his assertion. Jeffrey testified he borrowed the sums from his father during the pendency of the divorce.

requirements. We find nothing in the record to indicate the transportation agreement was based on Toni's financial condition at the time of the dissolution. Therefore, Toni's improved financial condition is of no import to the transportation determination.

In addition, Jeffrey requested any day care required by the children be provided by his mother. Jeffrey's mother provided day care free of charge at the time of dissolution. Toni stopped using Jeffrey's mother as a day care provider after the dissolution. At the time of trial, she paid approximately \$90 per month for day care. However, as of fall 2000, both children were to be enrolled in school full-time, thus reducing the amount of day care time necessary. Due to the limited amount of time the children now spend in day care, and the amount of extra time it would take to transport the children to and from their grandmother's home in the country, Toni chose to discontinue use of Jeffrey's mother as a day care provider.⁶ The courts need not micromanage the day-to-day care of the children. Toni, as the parent with physical care, may determine whether the children need day care and who would best be able to provide it, taking into consideration proximity to the school and school schedule. We affirm the district court on this issue.

Attorney Fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). A successful party does not have a vested right

⁶ Toni testified when the youngest was in preschool it was more convenient to have her go to day care a block away from the school rather than travel to the grandmother's house in the country.

to appellate attorney fees. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Wood*, 567 N.W.2d at 684; *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We order Jeffrey to contribute \$1000 toward Toni's appellate attorney fees. We deny Jeffrey's request for attorney fees.

AFFIRMED.