IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-357 / 96-83

IN RE THE MARRIAGE OF JOHN EDWARD FRANCIS AND CYNTHIA SYLVIA FRANCIS n/k/a CYNTHIA SYLVIA BUREN

Upon the Petition of
JOHN EDWARD FRANCIS,
Appellant,

And Concerning
CYNTHIA SYLVIA FRANCIS n/k/a CYNTHIA SYLVIA BUREN,
Appellee.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

John challenges the order denying his application for modification of the child support provisions of the parties' dissolution decree. **AFFIRMED.**

Douglas R. Smalley of Riemenschneider, Rydell & Smalley, Des Moines, for appellant.

Phil Watson of Watson & Peterson, P.C., Des Moines, for appellee.

Considered by Cady, P.J., and Streit and Vogel, JJ. Sackett, C.J., takes no part.

VOGEL, J.

On April 10, 1986, the district court dissolved the marriage of John and Cynthia (Cindy) Francis. The parties have three children: Stefani, born November 11, 1973; Scot, born March 9, 1975; and Chris, born September 13, 1979. According to the original decree, John was required to pay $265 per child per month in child support for a period of four years. After the four year period, John was required to pay $300 per child per month until each child reached age eighteen. Chris was the only child who had not yet reached the age of eighteen at the time of trial.

In July or 1994, Cindy filed an Application for Modification to increase child support, citing John's large inheritance from his mother as a substantial change of circumstances. John received the inheritance of $298,842.71 in 1992. Just after Cindy applied for the modification, John withdrew $140,000 of the money and spent it on women and alcohol. The application for modification was never tried as the parties reached a stipulation on March 17, 1995, increasing the child support to $800. On June 8, 1995, John filed this petition for modification of the decree, seeking to decrease his support obligation, as new child support guidelines were to take effect July 1, 1995. John argued a new percentage would apply to his net income. He did not argue that his net income changed since the order modifying of March 17.

This district court denied the petition after a trial in November of 1995. The court used John's net income from the previous modification of $3217.16 per month; however, it added to that amount interest income of $583 per month. It determined

the interest income was the amount of interest John could have received on the $140,000 of an inheritance he recently spent. The court also found that, although Cindy was earning additional income totaling $1300 gross per month, the job obtained through the Great Lakes Temporary Service was only temporary. The district court, therefore, used the figure from the previous modification of $629.99 net per month.

Utilizing a net income of $3,800.40 for John and $626.99 for Cindy, the district court determined the child support obligation under the guidelines would be $787 per month. The district court also determined that if Cindy's higher income was assumed and a net income of $1033 was utilized, the child support obligation under the guidelines would be $756 per month. The district court concluded neither figure was sufficient to warrant modification of the current support figure of $800 per month.

John appeals.

I. ***Scope of Review.*** 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).

II. ***Imputed Income.*** John contends the district court erred in imputing income to him for child support purposes based on a five percent rate of return on the $140,000 in inheritance money which John has already spent. John does not dispute the inclusion of income earned on the unspent inheritance in determining his income for child support purposes; rather, he only disputes the use of imputed income based on an inheritance received after the dissolution which has already been spent.

In cases involving a modification of a child support obligation, receipt of an inheritance shall be considered in determining whether there has been a substantial change in circumstances. Iowa Code § 521.98(8)(b) (1995). Income which is earned as a result of an inheritance can be included in computing net income when a modification of a child support obligation is being examined. *See In re Marriage of Halbach*, 506 N.W.2d 808, 810 (Iowa App. 1993). The question remains as to whether income can be imputed on an inheritance received after dissolution which has already been spent.

Our supreme court has previously found an inheritance which was received after dissolution can provide a basis for modifying a child support obligation, as a substantial change of circumstances, even if the inheritance is no longer owned by the parent. *Smith v. Smith*, 239 Iowa 896, 897-98, 32 N.W.2d 662, 663-64 (1948). The district court did not use the imputed income to increase John's support obligation. It merely used that income to refuse to find a substantial change of circumstances to reduce John's support which he stipulated to in March of 1995. We conclude the

district court did not err in imputing income to John based on an inheritance which was both received and spent after a dissolution of the marriage.

III. ***Custodial Parent's Income.*** John contends the district court erred in determining Cindy's net monthly income for purposes of applying the child support guidelines. John argues the district court should have used a net monthly income figure of $1,033 for Cindy in calculating the child support obligation. We find, however, the district court made two sets of calculations using two different figures for Cindy's net monthly income. One set of calculations used a figure of $626.99, while the other set of calculations used $1,033. John's contention, therefore, is without merit.

IV. ***Application of the Child Support Guidelines.*** John contends the district court erred in applying the child support guidelines. As we discussed previously, we find the district court's determination of John's net monthly income is correct. We also noted the district court used two different net monthly income figures for Cindy. We agree with the district court's conclusion that, no matter which net monthly income figure is used for Cindy, a substantial change in circumstances has not been shown and there should not be modification in John's child support obligation.

V. ***Attorney Fees.*** John contends the district court erred in awarding Cindy attorney fees for the trial. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). To

overturn an award, the complaining party must show the trial court abused its discretion. *Id.* We find no abuse of discretion and refuse to disturb the award on appeal.

Cindy requests attorney fees for this appeal. 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 Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We determine each party should pay his or her own attorney fees for this appeal.

AFFIRMED.