IN THE COURT OF APPEALS OF IOWA

No. 1-270 / 90-1522

IN RE THE MARRIAGE OF BECKY MARIE ROACH and JOHN ALVIN ROACH, JR.

FILED
OCT 29 1991
CLERK SUPREME COURT

Upon the Petition of

BECKY MARIE ROACH n/k/a BECKY MARIE SIEFERING,

Appellee,

And Concerning

JOHN ALVIN ROACH, JR.,

Appellant.

Appeal from the Iowa District Court for Dallas County, Jerrold W. Jordan, Judge.

Respondent challenges the district court's order which modified the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Lorna A. Gilbert of Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C. for appellant.

Robert W. Conrad, Knoxville, and Michael P. Brice, Oskaloosa, for appellee.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

OXBERGER, C.J.

Becky and John Roach, Jr. were married in 1968. They had two children: John Todd Roach (Todd), born October 17, 1970; and Christopher Adam Roach (Chris), born December 28, 1975.

The Roachs were divorced on September 24, 1982. The decree adopted a stipulation entered into by the parties. Under the decree John was to pay child support of $250 per month per child until each child reached 18 years of age. The decree specifically provided the court would retain jurisdiction to determine the appropriateness of support payments for postsecondary education.

At the time of the decree both parties lived in Perry, Iowa, and they agreed to share custody, care and control of the children. Later Becky remarried and moved to Oskaloosa. The children moved with her. Since the time of the decree Becky has been diagnosed as having multiple sclerosis. John still lives in Perry. He too has remarried.

Once Todd reached the age of 18, in October 1988, John quit paying child support for him. Todd enrolled at Iowa State University. Becky brought this petition for modification seeking to have John contribute to the children's postsecondary education expenses.

Under the terms of the decree, the parties agreed to place the amount of $8,800 in trust for the children's

education. John did not put the money in trust, but placed it in an investment account under Todd's name pursuant to the Uniform Gifts to Minors Act. At the time of the modification hearing there was about $18,600 in the account. This was after Todd was given $4,700 from the account for his first year of college.

The district court determined John's gross annual salary from his Subchapter S corporation is about $90,000. His net annual income is about $58,000, or $4,833 per month. John's present wife earns about $11,000. Becky earns about $7,200 per year working in her present husband's rental properties. Becky's net annual income is about $5,400, or $450 per month. Becky's present husband earns about $30,000.

The district court found there had been a substantial change in circumstances since the time of the decree. The court ordered John to pay $400 per month in child support for Todd while he is going to college and under the age of 22. Todd's college expenses should be paid by the fund set aside for that purpose. If the fund is not sufficient to cover those expenses, John must pay 90% of the remaining college expenses.

The court applied the child support guidelines and ordered John to pay $773 per month for Chris until he reaches the age of 18. The court reserved jurisdiction in regard to the parties' obligation for Chris' posthigh school education.

The court also ordered John to place the children's education fund in a trust account. Becky and John are to be equal trustees of the account.

John appealed the decision of the district court.

I. Our scope of review in dissolution cases is de novo. In re Marriage of Craig, 462 N.W.2d 692, 693 (Iowa App. 1990). While we are not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Id.

II. Because Todd is now an adult, while Chris is still legally a child, John has differing obligations to the two. We first consider John's child support obligation to Chris.

In order to modify the child support award for Chris there must be a substantial change in circumstances since the original decree. John contends there has not been such a change. He states his income has only increased slightly, and the increase was not unexpected.

A trial court has reasonable discretion in determining if modification of a dissolution decree is warranted. In re Marriage of Shepherd, 429 N.W.2d 145, 147 (Iowa 1988). A trial court's conclusions will not be disturbed on appeal unless there has been a failure to do equity. Id. A dissolution decree should be modified only when there has been a change in circumstances which is permanent or continuous, rather than temporary. Id.

We find there has been a substantial change in circumstances since the initial decree in this case. John's increased income is only one factor involved in our decision. We also consider the fact that both parties have remarried, Becky has moved, and the condition of Becky's health.

Once the district court found there had been a substantial change in circumstances, the court correctly determined the child support guidelines should be applied to determine John's child support obligation as to Chris. See In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991).

We believe the guidelines for one child should have been applied because only one child, Chris, is under the guidelines. The guidelines do not apply to offspring who are over 18 and in college. Under the most current guidelines, John should pay $1,184 per month in child support for Chris.

However, Becky did not file an appeal or cross-appeal in this case. We are thus unable to increase John's child support obligation for Chris. On John's appeal we affirm the amount of child support for Chris as ordered by the district court.

III. John contends the district court should not have ordered him to pay support for Todd and a portion of Todd's college expenses. He also believes the court did not fully consider Todd's own resources.

We find there has been a substantial change in circumstances as to Todd as well. Todd is now an adult and is attending college. The original decree specifically retained jurisdiction to determine the appropriateness of support for postsecondary education.

Under Iowa Code section 598.1(2) a court may order support for an adult child between the ages of 18 and 22 who is a full-time student at a college. The child support guidelines are not applicable to determine support for an unmarried adult child under 22 years of age who is a student. In re Marriage of Lindberg, 462 N.W.2d 698, 702 (Iowa App. 1990).

Support for an adult child may be awarded based on: (1) the ability of the child for college; (2) the age of the child; (3) the financial conditions of the parents; and (4) whether the child is self-sustaining. Id.

A divorced parent should be required to assume only a reasonable portion of the child's educational expenses. In re Marriage of Hasley, 433 N.W.2d 40, 41 (Iowa App. 1988). This places a cap on the amount a parent could be required to contribute. In re Marriage of Frink, 409 N.W.2d 477, 481 (Iowa App. 1987). What is reasonable must be determined by examining the parent's financial resources and the child's educational needs. In re Marriage of Lieberman, 426 N.W.2d 683, 686 (Iowa App. 1988). The financial resources of the child are a factor to be considered. In re Marriage of Boehlje, 443 N.W.2d 81, 84 (Iowa App. 1989).

Todd's educational expenses should include his tuition, books, laboratory costs, and room and board, because these items are incident to the postsecondary education itself. See Frink, supra. The investment account set up in Todd's name should be available for these expenses. We agree with the district court that John should be responsible for 90% of Todd's expenses of attending a state-supported university in Iowa once the investment account has been exhausted.

The more difficult question is whether John should be responsible for an additional amount of support for Todd, beyond Todd's college expenses. We find such additional support is unnecessary in this case. The costs of Todd's lodging, food, tuition and books are included in his college expenses. We determine John should not be legally responsible for such other costs as Todd incurs. As John pointed out, Todd has previously worked during the summer, and will probably continue to do so. We therefore eliminate the provision in the modification ruling which ordered John to pay $400 per month towards Todd's support.

IV. John also contends the court should not have made retroactive awards of support. In addition, John was ordered to reimburse Becky for certain expenses she had incurred in relation to Todd's first year of college.

Alimony or child support payments under a divorce decree may not be reduced retroactively. In re Marriage of Shepherd, 429 N.W.2d 145, 147 (Iowa 1988). However, a

court may order an increase in child support payments retroactive to the date of filing the petition to modify. Id.

Because we have deleted John's support obligation for Todd, there is no basis for a retroactive award of any support for Todd. Also, John has no obligation to reimburse Becky for any expenses she incurred on behalf of Todd, such as his car expenses. We do order that Becky be reimbursed $780.92 for certain college expenses from the education fund. We affirm the order of the district court regarding a retroactive award of child support for Chris.

V. We determine John needs to carry only an amount of life insurance which will cover his total support obligation for Chris. This amount will therefore decrease over time.

VI. Becky was awarded $1,000 in attorney fees by the district court. John challenges this award.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Campbell, 451 N.W.2d 192, 195 (Iowa App. 1989). Awards of attorney fees must be for fair and reasonable amounts and based on the parties' respective abilities to pay. Id. We do not believe the district court abused its discretion in this case.

VII. Becky also asks for attorney fees for this appeal. Attorney fees are not recoverable as a matter of right, but rest within the discretion of the court. In re

Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). We order John to pay $750 towards Becky's attorney fees for this appeal.

AFFIRMED AS MODIFIED.