IN THE COURT OF APPEALS OF IOWA

No. 1-637 / 11-0091
Filed September 8, 2011

**IN RE THE MARRIAGE OF SCOTT D. FORD
AND BETH ANN FORD**

**Upon the Petition of
SCOTT D. FORD,**
Petitioner-Appellant,

**And Concerning
BETH ANN FORD,**
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Annette J. Scieszinski, Judge.

Petitioner appeals the district court ruling denying his request to modify his child support obligation. **AFFIRMED AS MODIFIED.**

J. Terrance Denefe of Kiple, Denefe, Beaver, Gardner & Zingg, L.L.P., Ottumwa, for appellant.

Gregory G. Milani of Orsborn, Milani, Mitchell & Goedken, L.L.P., Ottumwa, for appellee.

Considered by Sackett, C.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

I. Background Facts & Proceedings.

Scott Ford and Beth Ford were married in Las Vegas, Nevada, in 1996. They have two children. A dissolution of marriage decree was entered for the parties in New Mexico on January 31, 2005. Under the parties' stipulation, they had joint legal custody of the children, with Beth having physical care. Scott was ordered to pay child support of $991 per month, which was based on his stated salary of $55,000 per year. The decree provided Beth would obtain health insurance for the children and Scott would reimburse her for fifty percent of the cost. The decree also provided, "[h]owever, for each month for which [Scott] maintains credible health insurance coverage on the children through his employment or otherwise, he shall not be required to reimburse [Beth] as stated above."

At the time of the dissolution decree, Scott was employed in advertising sales by the Palm Beach Post, a newspaper in Florida, where he earned about $55,000 per year. Scott lost his job in October 2007 when the company downsized. He was not able to find a job in a similar position. After about three months, he decided to open his own tailoring and dry cleaning business in Wellington, Florida. Scott testified the company was just breaking even and he was not drawing a salary. Scott has remarried, and his wife, Tabitha, is an investment banker who earns about $104,000 per year. Tabitha invested money in Scott's new business.

Beth works out of her home in Ottumwa, Iowa, writing and editing medical specialty publications for Ingenix Publications, a publishing company owned by United Healthcare. She earns about $57,000 per year.

On August 5, 2008, Scott filed in Iowa an application for modification of the parties' dissolution decree. The district court entered an order on October 23, 2009, which denied Scott's request to modify his child support obligation. The court found, "the trial record does not demonstrate that he is incapable of producing income of $55,000, and he still has the skills that allowed him to earn that amount in the past." The court concluded, "Scott has fallen short in proving that a substantial change in circumstances warrants reduction in his child-support obligation." The court denied Scott's post-trial motion pursuant to Iowa Rule of Civil Procedure 1.904(2).

Scott appealed the district court's decision. The Iowa Court of Appeals issued a decision on July 26, 2010, which agreed it was equitable to assign Scott an annual earning capacity of $55,000. *See In re Marriage of Ford*, No. 10-0023 (Iowa Ct. App. July 26, 2010). We remanded, however, to the district court "to determine whether Scott's monthly child support would fall within the ten-percent variation rule in section 598.21C(2)(a) when his annual earnings are fixed at $55,000." *Id*. If there was a variation of more than ten percent, we directed the district court to modify Scott's child support obligation accordingly. *Id*.

The district court issued its declaratory ruling on remand on October 29, 2010. The court calculated Scott's child support obligation pursuant to the 2009 Iowa Child Support Guidelines, effective July 1, 2009, using the evidence presented at the August 2009 modification hearing. The court determined that

under the guidelines Scott should pay a monthly total of $1006.85, which represented $777.68 in periodic child support, plus $229.17 for cash medical support. Because the total amount did not differ by more than ten percent from the amount Scott was currently paying, the court did not modify his child support obligation.

Scott filed a motion pursuant to rule 1.904(2), claiming the court had improperly calculated his child support obligation and arguing that the court had addressed the issue of health insurance when that issue had not been previously raised. Beth filed a resistance, and the matter was set for hearing. At the hearing, Scott offered exhibits to support his claim he was providing health insurance for the children. The district court admitted the exhibits, but did not consider them, stating it could not consider new evidence that had not been presented during the original modification proceeding.

The district court concluded that under the Iowa Child Support Guidelines, which were in effect at the time of the modification hearing in August 2009, the court properly included cash medical support. The court found, "the trial evidence falls short of proving, as a matter of fact or law, that any medical insurance in place for the kids at the time of trial would operate to supplant a due application of the Guidelines." The court engaged in an alternative calculation of Scott's child support obligation, assuming his $55,000 per year earning capacity was the result of self-employment.[1] The court again concluded there was not a ten percent difference between the amount that would be due under the 2009

[1] Under this alternative calculation, the court found Scott would be obligated to pay a total amount of $968.79, representing $739.62 in child support and $229.17 for cash medical support.

Guidelines to the amount Scott was currently paying, and determined there was not a substantial change in circumstances. Scott appeals the district court's decision.

II. Standard of Review.

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.907. In equity cases, we give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by those findings. Iowa R. App. P. 6.904(3)(*g*). In modification actions, the court has reasonable discretion in determining whether to modify a dissolution decree, and that discretion will not be disturbed unless there is a failure to do equity. *In re Marriage of Vetternack*, 334 N.W.2d 751, 762 (Iowa 1983).

III. Merits.

A. Scott contends the district court should have modified the parties' dissolution decree to reduce his child support obligation. He first questions whether the court should have applied the Iowa Child Support Guidelines which became effective on July 1, 2009. On appeal, we remanded for the court to consider "if there is more than a ten percent variation between the $991 per month child support obligation . . . and the amount that would be owed at the imputed salary of $55,000 under Iowa's guidelines, which became effective July 1, 2009." *In re Marriage of Ford*, No. 10-0023 (Iowa Ct. App. July 26, 2010). Thus, the district court was required to use the Guidelines that had become effective on July 1, 2009. Furthermore, the Guidelines themselves provide, "The

guidelines shall apply to cases pending on July 1, 2009." Iowa Ct. R. 9.1. We conclude the court used the right version of the Iowa Child Support Guidelines.

B. Scott next argues the district court did not properly apply Iowa Court Rule 9.12, which provides for medical support orders. Under rule 9.12(3), "If neither parent has health insurance available at 'reasonable cost,' if appropriate according to Iowa Code section 252E.1A, the court shall order cash medical support." No evidence was presented during the modification hearing as to whether either parent had health insurance available at "reasonable cost." In fact the issue of medical support was not raised during the modification hearing.

We determine the district court did not properly apply rule 9.12. Cash medical support should only be ordered if neither one of the parents has health insurance available at a reasonable cost. Iowa Ct. R. 9.12(3). Under rule 9.12(2), the court is to determine whether insurance is available at reasonable cost by applying the medical support table in rule 9.12(4), multiplying the percentage disclosed in that people either parent's gross income, and comparing that figure to the cost of the child's portion of the health insurance premium. Beth's Child Support Guidelines Worksheet, submitted on remand, shows she had gross income of $53,449. Her net income is $3538.11. Beth has two children. According to the medical support table, the appropriate percentage is five percent. Five percent multiplied by $53,449 equals $2672.45. The child's portion of the health insurance she pays is $154.61 per month, or $1855.32 per year. As this sum does not exceed $2672.45, which is five percent of Beth's gross income, the health insurance is available at reasonable cost. Because

health insurance is available at reasonable cost, the district court should not have ordered cash medical support under rule 9.12(3).

C. In the declaratory ruling on remand, the district court found Scott would owe $777.68 in child support under the Iowa Child Support Guidelines based on his earning capacity of $55,000 per year. In ruling on the rule 1.904(2) motion, the court found if Scott was imputed an earning capacity of $55,000 per year as a self-employed person then his child support obligation would be $739.62 per month. In the previous appellate opinion, income of $55,000 per year was imputed to Scott based on his prior earnings in sales work, not based on his current self-employment in the tailoring and dry cleaning business. We determine Scott's child support obligation should be $777.68 per month.

Under the parties' dissolution decree, Scott's child support obligation was set at $991 per month. The amount that would be due under the Iowa Child Support Guidelines, $777.68, varies by more than ten percent from the amount Scott is currently paying. Under Iowa Code section 598.21C(2)(a) (2007), this means there has been a substantial change in circumstances. We conclude the dissolution decree should be modified and Scott's child support obligation should be set at $777.68.

D. Scott has asked to have his child support obligation reduced retroactively to three months after the date the notice of the pending action for modification was served on Beth. Scott filed his application for modification on August 5, 2008. Because the district court did not reduce Scott's child support obligation, the court did not address whether any reduction would be retroactive.

Section 598.21C(5) provides that a child support order "may be retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party." Case law, however, provides that "although a support order may be retroactively increased, it may not be retroactively decreased." *See In re Marriage of Barker*, 600 N.W.2d 321, 323 (Iowa 1999). We conclude Scott's child support obligation may not be retroactively reduced.

IV. Appellate Attorney Fees.

Beth seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 767 (Iowa 1997). On a request for 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 was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We determine Beth should pay her own appellate attorney fees.

We affirm the decision of the district court as modified. Costs of this appeal are assessed one half to each party.

AFFIRMED AS MODIFIED.