IN THE COURT OF APPEALS OF IOWA

No. 2-904 / 12-0322
Filed January 9, 2013

IN RE THE MARRIGE OF MARY MARGARET FRASER STRANG AND ROBERT J. STRANG

Upon the Petition of

MARY MARGARET FRASER STRANG,
Petitioner-Appellee,

And Concerning

ROBERT JAMES STRANG,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Marsha A. Bergan, Judge.

Robert James Strang appeals child support and attorney fees provisions of a modification of his dissolution decree. **AFFIRMED.**

Maurine A. Braddock of Honohan, Epley, Braddock & Brenneman, L.L.P., Iowa City, for appellant.

Rachel C.B. Antonuccio of Antonuccio Law & Mediation, L.L.C., Iowa City, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Robert James Strang appeals the child support and attorney fees provisions of a modification of his dissolution decree. Robert contends the trial court should have retroactively offset his child support obligation by the social security dependent benefits the children receive due to his retirement. He further argues Mary should be required to pay his trial and appellate attorney fees. Because Robert had knowledge of the social security benefits at the time of the decree and did not earlier obtain modification for an offset towards his child support obligation, he may not now recoup his past child support payments. His request for attorney fees is also denied. We affirm.

I. Background Facts and Proceedings.

Robert and Mary Strang were divorced after a twelve-year marriage, in February 2006. During the parties' marriage, Robert worked full-time performing medical research and pursuing a Ph.D. in Pharmacy.[1] Mary also worked full-time as a pediatric nurse. Twins Rachel and Robbie were born to the couple in October 1999.

In July 2004, Robert began receiving social security retirement benefits for himself and dependent benefits for his children. Mary asserts that Robert failed to disclose to her that he was receiving the benefits. She claims she learned of the benefits the day before the parties' dissolution trial, confronted Robert with the non-disclosure the day of trial, and negotiated a favorable settlement

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[1] Robert also has a M.D. and worked in the past as a physician. In total, he has three advanced degrees. At the time of dissolution, Robert earned $31,238 per year from part-time pharmacy work and $13,200 per year in social security retirement benefits.

agreement as a result of Robert's transgression. Robert contends that Mary handled the marital finances and would have had knowledge of the benefits, as she would have deposited the children's checks.

Although both Robert and Mary were represented by counsel, Robert contends he had no knowledge that his child support obligation should have been offset by the amount of social security benefits that the children were receiving due to their status as his dependents. He claims there was no agreement between the parties related to the benefits. Mary contends that the parties agreed on the child support figure, which was to be paid in addition to the social security dependent benefit payments.

The stipulation approved in the decree awarded the parties joint legal custody and Mary physical custody of the children. Robert was required to pay $865 per month in child support. The stipulation did not mention the social security dependent benefits, nor were the benefits identified on either party's financial affidavits.

Robert filed a petition for modification July 30, 2009, seeking shared care of the children. Although the court ordered Mary to produce documentation of the social security income she received on behalf of the children, and that amount exceeded what Robert was ordered to pay in child support, the court found "no basis on which to change the child support" in that action. The court reasoned that Robert's request to modify child support was connected to his

request to modify the physical care arrangement. Because the court declined to modify physical care, it also denied modification of child support.[2]

Between the time of the modification trial and the ruling, Robert's income changed.[3] His doctor advised him to discontinue work in January 2011 due to his need for surgery. Robert had the surgery March 31, 2011. After his recovery he sought work, but at age seventy-two, was unable to find employment. Thus, his income since January 2011 has been social security retirement benefits and food stamps. He has obtained food from a crisis center and assistance with his electrical bills.[4] He was only able to pay child support in the amount of $290.83 in 2011. Mary initiated an action through the Child Support Recovery Unit for recovery of delinquent support payments. Enforcement efforts ceased when the

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[2] Although Robert had retired by the time of the hearing on his first petition for modification, the court found:

> no cause to make any change in child support based on Robert's petition as pled. . . . Neither party tried the case to show a change of circumstances with regard to the parties' incomes since the original support order was entered that would warrant a modification of child support, so the Court should not *sua sponte* undertake to modify child support with an inadequate record.

[3] While the first petition was filed on July 30, 2009, the trial was not held until September 2010. The district court did not enter its ruling until October 18, 2011.

[4] Robert applied for unemployment insurance, but was denied when it was determined that he voluntarily left his job. However, in its December 28, 2011 decree of modification, the district court noted in its findings of fact:

> [U]nder all the circumstances of this case, Robert did not voluntarily reduce his income in January of 2011. While it is true that Robert voluntarily "retired," he did so because he was facing serious medical issues that necessitated surgery followed by a fairly lengthy recovery. It is undisputed that Robert needed to have the surgery and that he had to recuperate post-surgery. It also appears that Robert is attempting to find work at the present time, albeit unsuccessfully. Although Robert states that he is healthy, the Court does take judicial notice that fewer job opportunities may be available for a person of Robert's age.

court suspended Robert's child support obligation, pending further hearing, on November 17, 2011.

Robert filed a second petition for modification on October 26, 2011.[5] In the second amended petition,[6] Robert requested that his child support obligation be reduced retroactively, effective either three months from the date of the first or second petition for modification, and that his total child support obligation from the date of the dissolution decree be offset by the social security dependent benefits the children received during that period. Robert also requested the court permanently suspend or terminate his future child support obligation and order Mary to pay his attorney fees.[7]

In its December 28, 2011 decree of modification, the district court found modification was warranted due to the substantial change in Robert's financial circumstances, and that implementation of an offset of Robert's support obligation based on the social security benefits received by the children was equitable. The court noted that when the parties entered the agreement, Robert was already receiving the social security benefits and Iowa law provided that "dependent benefits would generally offset any regular amount of child support ordered." However, the court observed that there was no express agreement in

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[5] The decree of modification entered regarding the July 30, 2009 petition was not filed until October 18, 2011.

[6] Robert's first amended application to modify child support, captioned "Application to Suspend Child Support," was filed November 17, 2011. A second amendment was made regarding the issue of life insurance, which is not at issue on appeal.

[7] Robert receives legal services through the Volunteer Lawyers Project (VLP). His attorney submitted a fee affidavit seeking reimbursement from Mary, which would benefit the VLP, not Robert, as he has paid no attorney fees for the modification action.

the stipulation or decree which precluded implementation of an offset in a modification action.

The court further concluded an offset should be implemented effective with the next support payment due, and that Robert's obligation was completely offset by the dependent benefits. However, the court declined to grant a retroactive modification and denied Robert's request for attorney fees. On appeal, Robert claims the general rule that child support can only be modified retroactively from three months after service of a petition for modification should not apply, because the issue is not changing the amount of support, but rather whether the support payment should be offset by the social security dependent benefits. Robert seeks a credit against his purported overpayment, claiming his timely payments through December 2010 were made due to mistake and misapprehension of the law.

II. Scope and Standard of Review.

We conduct a de novo review of petitions for modification of child support. *See* Iowa R. App. P. 6.907 (2011). *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We give weight to the district court's fact findings, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.907; *McCurnin*, 681 N.W.2d at 327. The district court has reasonable discretion in determining whether modification is warranted and we will not disturb that discretion on appeal unless there is a failure to do equity. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). Prior cases have little precedential value, and we must base our decision on the facts and

circumstances unique to the parties before us. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). Our primary concern is the best interests of the children. *Lambert v. Everist*, 418 N.W.2d 40, 42 (Iowa 1988).

III. Discussion.

A. Decree.

The parties dissolution decree was entered on February 14, 2006. The parties entered into a stipulation, approved by the court, awarding Mary physical care of the parties two children, now age thirteen. The parties also stipulated that Robert pay child support in the sum of $865 per month. As noted by the district court in its Decree of Modification filed December 12, 2011,

> At the time that the parties were divorced, Robert was receiving Social Security retirement benefits for himself as well as Social Security dependent benefits for the two children. He began receiving both of those benefits in approximately July of 2004 while the parties were still living together as a family. There is no dispute that both of those benefits (Bob's individual benefits and Bob's dependant benefits for the children) were being received by Robert at the time that the parties dissolution was finalized.
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> The child support amount to which the parties agreed in February 2006 when they presented their Stipulation of Settlement and proposed Decree of Dissolution of Marriage to the Court was based on the child support guidelines worksheet that was attached to the parties' Stipulation of Settlement, filed February 14, 2006, as Exhibit B. That worksheet indicates that Robert included his own Social Security retirement benefits in his income for purpose of calculating child support. The Social Security dependant benefits for the children were not included in Robert's income on that worksheet. There was no mention in the Stipulation of the dependant benefits Robert was receiving for the children. Robert began paying his agreed $865.00 each month to Mary for the support of the children, and Mary also began to receive the Social Security dependency benefits for the children.

Unfortunately, although Robert was represented by counsel, he was never informed of the impact of social security dependent benefits on his obligation to pay child support.

B. 2009 Modification action.

The provisions of a dissolution decree may be modified when there has been a substantial change in circumstances. *See* Iowa Code § 598.21C (2009). "However, not every change in circumstances constitutes a sufficient basis for modification." *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991). A substantial change of circumstances for modifying a child support obligation "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 § 598.21C(2)(a).

Robert's modification action filed in 2009 sought a modification of physical care, custody, visitation, and child support. Robert acknowledges that the primary purpose of the modification action to was to obtain shared care of the children. Ultimately Robert's modification was denied. However, the court was aware that Mary was receiving social security benefits for the children as the court asked for documentation at the end of the trial of the amounts she was receiving for the children. Because the court concluded that Robert's request to modify child support was premised upon his request for shared care and shared care was denied, the court concluded that "there is no cause to make any change in child support based on Robert's petition as pled." Rather than appeal this ruling, Robert chose to file the instant Application to Modify Support.

C. 2011 Application to Modify Support.

Robert's Application to Modify Child Support filed on October 26, 2011, was substantially granted by the Decree of Modification filed on December 28, 2011. The court reduced Robert's child support obligation to $616.06 per month. The court also noted that currently the children were receiving social security dependent benefits in the sum of $627.00 per month and these benefits would "fully satisfy and substitute for the support obligations for the same time period," effective January 1, 2012. Mary has not cross-appealed to challenge these terms of the Decree of Modification.

However, the court denied Robert's request for any retroactive credit or retroactive modification of his support obligation because of the double payment of child support and social security benefits. On appeal, Robert seeks to be credited or given an offset for the social security benefits towards his child support obligation "from the very beginning." He requests that Mary be ordered to reimburse him $50,461 for the overpayment of child support.

Our legislature has expressed the public policy of Iowa with regard to application of an offset of child support as a result of dependent benefits based on disability. "*Unless the court otherwise provides*, dependent benefits paid to the child support obligee as a result of disability benefits awarded to the child support obligor fully satisfy and substitute for the support obligations for the same period of time for which the benefits are awarded." Iowa Code § 598.22C(1) (emphasis added).

Our supreme court has also observed "[c]ommon sense dictates that social security disability benefits should not be treated any differently than social security retirement dependency benefits for the purpose of calculating an obligor parent's support obligation." *In re Marriage of Belger*, 654 N.W.2d 902, 907-08 (Iowa 2002). In *Belger*, our supreme court concluded that an obligor parent is entitled to credit towards the obligor's child support payment for social security retirement dependency benefits a child receives to the extent of the child support obligation. *Id*. at 908-09. The court stated:

> An obligor parent is entitled to a credit only up to the extent of his or her obligation for monthly payments of child support made during the period in which the child receives benefits on the obligor parent's behalf. The excess is regarded as a gratuity to the child under the support order.

Id. at 908 (citations omitted).

However, "a retired parent must seek formal modification of his or her child support order with the district court" to obtain relief via an offset. *Id.* at 909. The court explained:

> The changed circumstance warranting modification is the receipt of federal social security benefits the child was not receiving at the time the dissolution decree was entered. Judgments for child support subject to modification may be retroactively modified only from three months after the date the notice of the pending modification petition is served on the opposing party. Iowa Code § 598.21(8) (2001). Retroactive modification would "fly in the face of our long-standing rule that a court has no authority to divest the parties of rights accrued under the original decree." *Newman* [v. *Newman*], 451 N.W.2d [843,] 845 [(Iowa 1990)].

Id.

Here, the children were receiving social security benefits at the time of the entry of the decree. However, Robert established a change in circumstances

since the entry of the decree by his reduced income and his strained financial condition. Notwithstanding, a parent entitled to an offset may not later claim "unjust enrichment by the custodial parent who receives social security as well as child support payments." *Newman*, 451 N.W.2d at 845 (concluding a retroactive credit "would be patently unfair to the custodial parent who has long since parted with the funds to support her charges"). In essence, to avail himself of his rights, Robert had the burden to initiate a modification action to seek relief at an earlier date.[8] In *Newman*, our supreme court also concluded that even if the obligor's failure to initiate a modification action is due to "mistake" or a "misapprehension of the law" the obligor may not be afforded relief back to the date of the decree.[9] *Id.* We agree with the district court that Robert is not entitled to recoupment of his past child support payments.

D. Fees.

We review a denial of attorney fees for abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Whether attorney fees should be awarded depends on the respective abilities of each party to pay the costs of legal services. *Id.*

Robert requests that Mary pay his trial and appellate attorney fees. While Mary has a greater ability to pay, she strained to pay her own attorney fees. Robert received pro bono legal services from the Volunteer Lawyer's Project and

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[8] We acknowledge that Robert filed a modification action in 2009 but as we have noted, Robert failed to appeal from the adverse ruling.

[9] In *Newman* our supreme court recognized there could be an exceptional case where an arrearage occurs because of the time lag between the onset of disability and the commencement of benefits where in fairness a credit towards the arrearage should be permitted but here there was no arrearage or time lag. *Newman*, 451 N.W.2d at 845.

has not been successful on appeal. We conclude that the district court did not abuse its discretion in denying Robert's request for attorney fees and we deny his request for appellate attorney fees.

IV. Conclusion.

Robert had knowledge of the dependent care benefits at the time of the decree and is not now entitled to a retroactive credit and recoupment of his child support payments. Robert's request for trial and appellate attorney fees is denied.

AFFIRMED.