IN THE COURT OF APPEALS OF IOWA

No. 3-520 / 12-1984
Filed August 7, 2013

IN RE THE MARRIAGE OF MARSHA LYNN TOLLEFSRUD AND DANIEL NEIL TOLLEFSRUD

Upon the Petition of
MARSHA LYNN TOLLEFSRUD,
Petitioner-Appellee,

And Concerning
DANIEL NEIL TOLLEFSRUD,
Respondent-Appellant.

Appeal from the Iowa District Court for Winneshiek County, Monica L. Ackley, Judge.

Daniel Tollefsrud appeals from the district court's ruling modifying his child support obligation. **AFFIRMED.**

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Parrish, P.L.C., Decorah, for appellant.

Stephen J. Belay of Anderson, Wilmarth, Van Der Matten, Belay & Fretheim, Decorah, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Daniel Tollefsrud appeals from the district court's ruling modifying his child support obligation, complaining the district court improperly calculated his income for child support guidelines purposes. The district court's determination of income is not unreasonable. We decline Daniel's invitation to average his income for child support calculation purposes. We find no reason to disturb the court's findings and ruling, and we, therefore, affirm.

I. Background Facts and Proceedings.

Daniel and Marsha Tollefsrud's marriage was dissolved in 2007, at which time, based upon the parties' stipulated figures, Daniel was ordered to pay $500 per month in child support for his three minor children.

Marsha filed a petition to modify the child support obligation in August 2011, contending modification was required by the child support guidelines.

There is no dispute that for purposes of the child support guidelines, Marsha's annual income is $46,763. In this modification action, Marsha asserted Daniel's annual income was $49,372, and she requested that he be ordered to pay $893.62 per month in child support.

Daniel submitted no financial affidavits in this action; rather, he provided tax returns for the years 2007-2011. Daniel is a full-time mechanic earning $22.50 per hour. Daniel also states he farms approximately 590 acres (of which he rents 340 acres) producing corn and soybeans. His 2011 federal asset report notes $984,665 in net farming assets. Daniel testified in relation to his 2011 tax filing. He noted he earned $403,496 from the sale of crops in 2011; received

$2728 in taxable cooperative payments and $52,922 in agricultural program payments; and opted to claim a federal loan as earnings in the amount of $73,946.[1] Schedule F of his 2011 tax return indicates total farm income of $533,092.

Daniel claimed expenses, however, totaling $528,972, including $101,048[2] in depreciation expense for machinery or equipment. His appellate brief summarizes his claimed farm loss and income for the years 2007 through 2011 as follows:

2007:	<$31,069.00> (farm loss)
	$14,116.00 (adjusted gross income)
2008:	<$41,119.00> (farm loss)
	$25,545.00 (adjusted gross income)
2009:	<$50,255:00> (farm loss)
	<$3,796.00> (adjusted gross income)
2010:	$11,363.00
	$49,554.00 (adjusted gross income)
2011:	$ 4,120.00
	$47,459.00 (adjusted gross income)

He asserted an average farm loss over the years 2009, 2010, and 2011 of $5,457.54 per year. On his child support guidelines worksheet, Daniel claimed an annual income of $34,908.66, which would call for child support in the amount of $599.53 per month.

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[1] His tax preparer indicated that the loan was treated as income because,

> [i]f you didn't treat it as income, you would have had a 70—or $69,000.00 loss, on the Schedule S. That would have more than offset his wages. He would have lost his itemized deductions and his expenses and everything else. So rather than waste all of those deductions, we picked that up as income, to offset that depreciation, basically, and other expense of the farm.

[2] The transcript of the hearing states "$141,048," but references line 14 of schedule F of his tax return, which states $101,048.

The district court noted that Daniel's income as stated in his tax returns took full advantage of "a vast number of deductions permitted by the Federal authorities." The court found, however, it "does not deem it to be equitable to allow all of these deductions to reduce down the Respondent's income to the detriment of his children, who are his primary responsibility during their minority." The court determined it would allow one-half of the accelerated depreciation claimed for farm purchases. The court concluded:

> As Respondent's steady income is generated from his job as a mechanic, the Court will utilize this figure as wage income on the child support guidelines worksheets. Adding back in the depreciation over the last three years of the Respondent's employment, and averaging the three years' worth of reportable income, the Court hereby finds that applying the guidelines, self-employment earnings for farming are $49,379.00.

The court ordered Daniel to pay $1312.32 per month in child support.

The district court then granted Daniel's request to reopen the record "for further clarification of the accelerated depreciation and cost expenditures made by the Respondent as shown on his tax records, which were utilized by this Court for a determination of a child support enhancement." The court thereafter ruled:

> The Court received testimony from the Respondent's accountant. The Court fully agrees with the accountant that appropriate deductions for depreciation were made by the Respondent pursuant to the Internal Revenue Services' guidelines. However, the Court has reviewed once again the Court of Appeals case cited in its original ruling, to wit: *In Re Marriage of Starcevic*, 522 N.W.2d 855, 858 (Iowa Ct. App. 1994) to determine that the Court's analysis is appropriate. The *Starcevic* case says clearly, "It is unacceptable as a matter of public policy to allow a person in [respondent's] position to generate paper losses which are then deducted from his primary income in order to avoid paying child support as determined by the child support guidelines. We are not required to give any consideration to those 'business expenses reasonably necessary' to maintain a farming operation which is

> neither a business nor an occupation, but is instead a hobby or a tax shelter." *Starcevic*, [522 N.W.2d at] 856-57.
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> The Respondent has income from his regular place of employment as a full-time mechanic. This farming acreage is deemed to be a hobby farm and not one that is to sustain his regular living and/or sustenance. This Court agrees with the assessment as indicated in its previous ruling that the Respondent's income is appropriately reconfigured by adding back in the depreciation that he has shown on his tax records for the last three years so as to appropriately provide for the parties' children.

Daniel now appeals, arguing the district court erred in finding he was a "hobby farmer" and in its calculation of his income.

II. Scope and Standard of Review.

Our review in equity actions is de novo. Iowa R. App. P. 6.907. We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Discussion.

The child support provision of an original decree may be modified if there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (2011). "[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 . . . ." *Id.* § 598.21C(2)(a). The party seeking modification bears the burden of proof by a preponderance of the evidence. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992).

There is no dispute that Daniel's support obligation must be modified; the only question is to what extent. Even under Daniel's lowest claimed income,

which would call for a monthly child support payment of $599.23, a substantial change of circumstances exists pursuant to Iowa Code section 598.21C(2)(a).

Daniel argues strenuously that the district court erred in finding he was a "hobby farmer."[3] Daniel seeks to avoid the holding in *Starcevic* where this court wrote:

> In addition, [the supreme court has] recognized the allowance of "paper losses" may result in an unfair child support calculation. [*In re Marriage of Gaer*, 476 N.W.2d 324, 327 (Iowa 1991).]
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>> The fair approach, as adopted by the supreme court, is that: depreciation should not categorically either be deducted as an expense or treated as income, but rather that the extent of its inclusion, if any, should depend on the particular circumstances of each case.
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> *Id*. at 328. The circumstances in *Gaer* required a deduction for straight-line depreciation be allowed in order to obtain an equitable result. However, this case is factually distinguishable from *Gaer* and the line of cases following it which also allow a deduction for straight-line depreciation.
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> [Respondent] earns a net monthly income of $2067.84 from Maytag and $186 from his cattle farm operation. He does not engage in farming to sustain himself or his family. His farm is, at best, a hobby and, at worst, a tax shelter. If farming served as [respondent's] sole source of income, equity would require allowing deductions for depreciation in determining child support.
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> However, we find it unacceptable as a matter of public policy to allow a person in [respondent's] position to generate paper losses which are then deducted from his primary income in order to avoid paying child support as determined by the child support guidelines. We are not required to give any consideration to those "business expenses reasonably necessary" to maintain a farming operation which is neither a business nor an occupation, but is instead a hobby or a tax shelter. *See id*. at 329.
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> Under the factual circumstances of this case, it would be inequitable to allow [respondent] *any* deduction for depreciation in calculating his income for child support purposes.

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[3] We acknowledge that for some purposes, such a finding could have serious tax implications. *See* 26 U.S.C. § 183 (disallowing deductions where activity is not engaged in for profit, and providing that presumption is an activity engaged in for profit where gross income exceeds deductions in three out of five years). We emphasize that the court's role here is not to determine whether Daniel engaged in farming for profit.

522 N.W.2d at 856-57.

"The purpose of the child support guidelines is to provide for the best interests of the children after consideration of each parent's proportional income." *In re Marriage of McDermott*, 827 N.W.2d 671, 684 (Iowa 2013). In calculating child support, the court must first determine the parents' current monthly net income "from the most reliable evidence presented." *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 51 (Iowa 1999).

The child support guidelines define "net monthly income" as gross monthly income less specifically enumerated deductions. *See* Iowa Ct. R. 9.5. The guidelines do not specifically provide for a deduction for depreciation expenses. Our supreme court has determined "depreciation should not categorically either be deducted as an expense or treated as income, but rather that the extent of its inclusion, if any, should depend on the particular circumstances of each case." *Gaer*, 476 N.W.2d at 328. The court examined, at length, the various approaches to depreciation employed throughout the country and concluded that Iowa courts may deviate from the guidelines and consider the effect of depreciation when justice requires. *See id.* More specifically, the court recognized some allowance may be necessary to ensure the continued success of a business and a straight-line depreciation method may be employed when necessary. *Id.* at 329. The guidelines exception announced in *Gaer* was reaffirmed by our supreme court in *Knickerbocker*, 601 N.W.2d at 52, and *McDermott*, 827 N.W.2d at 685, where the court again rejected accelerated depreciation allowances and used a straight-line depreciation method. The

Knickerbocker court recognized that an accelerated depreciation method produces larger initial deductions during the early years of an asset's life, while straight-line depreciation deducts equal amounts over the years. 601 N.W.2d at 51 n.1. Whether depreciation is allowed at all depends upon all the available circumstances. *Gaer*, 476 N.W.2d at 328. The first consideration, however, is not the best interests of the business, but the best interests of the child. *See In re Marriage of McKenzie*, 709 N.W.2d 528, 533–34 (Iowa 2006).

Here, unlike the district court, we would not characterize Daniel's farming as a hobby. However, it is apparent that his earnings from that occupation are subject to his decisions in deciding when to sell grain and the use of various provisions of the Internal Revenue Code to reduce his tax obligation. Kenneth Keune, a certified public accountant and preparer of Daniel's tax returns, acknowledged that farmers "can manipulate their income." We note that in Daniel's 2011 tax return he expensed $54,300 of property under section 179 of Internal Revenue Code, 26 U.S.C. § 179, rather than depreciate the same under a term of years. In Daniel's 2010 tax return he expensed $45,000 under section 179. He also reduced his tax obligations by income averaging under 26 U.S.C. §1301 in both years.

Daniel's accountant recalculated Daniel's income based upon straight line depreciation as shown in exhibit Q. According to Daniel's exhibit Q, Daniel had adjusted gross income of $74,728 in 2011, and $72,806 in 2010. After deducting actual taxes paid by Daniel in lieu of the income taxes calculated by the guideline

method, he had net income of $68,251 in 2011, and $66,152 in 2010.[4] These figures are very near the district court's calculation of Daniel's net income of $68,496.86 using the child support worksheet.

Although we do not agree that Daniel is a hobby farmer, nor do we agree with the methodology used by the district court in calculating Daniel's income, the district court's determination of Daniel's income is not unreasonable or inequitable.

We decline Daniel's invitation to average his income for child support calculation purposes. We acknowledge that if a parent's income is subject to significant fluctuations over a period of time that income averaging may be appropriate and equitable. *In re Marriage of Powell,* 474 N.W.2d 531, 534 (Iowa 1991). However, when we view Daniel's farm loss in 2009 as compared to his income in 2010 and 2011, the loss appears as an anomaly. Although a loss in farming is not an anomaly, here Daniel reported a farming loss so large that it offset his entire annual wage from his off-farm employment. We have also considered averaging Daniel's income over a longer period of time. However, we note that before Daniel's two profitable years, he reported significant farming losses for a period of three years, in 2007, 2008, and 2009. These facts do not

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[4] Our calculations are very comparable using actual taxes paid as permitted by Iowa Court Rule 9.6(5), which states in part:

> If the amount of federal and/or state taxes income tax actually paid by the parent differs substantially from the amount(s) determined by the guideline method of computing taxes, the court may consider whether the difference is sufficient reason to adjust the child support under the criteria in rule 9.11.

Here, Daniel has had the benefit of income averaging in both 2011 and 2010 and thereby reduced the actual taxes he paid. We have considered rule 9.6(5) only as an aid to determine the reasonableness of the district court's calculations.

support the conclusion that he had "fluctuating income" from year to year, but rather a farming business that once was unprofitable and is now profitable. Under the circumstances presented here, we find no inequity in the district court's determination, and we affirm the modification of child support in the amount determined by the district court.

Marsha asks for an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Factors to be considered in determining whether to award attorney fees include "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal." *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). Marsha was obligated to defend the district court's decision and her income is less than Daniel's. We award Marsha $1000 in appellate attorney fees.

AFFIRMED.