IN THE COURT OF APPEALS OF IOWA

No. 3-554 / 12-1928
Filed August 21, 2013

**IN RE THE MARRIAGE OF MELISSA JO MIHM
AND SCOTT ANTHONY MIHM**

**Upon the Petition of
MELISSA JO MIHM,
n/k/a MELISSA JO WEBER,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
SCOTT ANTHONY MIHM,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Winneshiek County, David F. Staudt, Judge.

The petitioner appeals the district court's denial of her motion to modify the child custody provisions of the parties' dissolution decree. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun, White, L.L.P., Charles City, for appellant.

Dale L. Putnam of Putnam Law Office, Decorah, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

As part of a stipulation incorporated into their dissolution of marriage decree, Scott and Melissa Mihm agreed Scott would pay child support in an amount below the child support guidelines. One year later, Melissa sought modification of the child support award. She appeals the district court order denying her request.

Because Melissa has failed to show both a substantial change in the parties' circumstances since entry of the decree and injustice resulting from its continued enforcement, we affirm the order denying her motion to modify. We also find the district court was within its discretion to deny Scott's request for trial attorney fees, and we award no attorney fees on appeal.

I. Background Facts and Proceedings.

Melissa and Scott were married in 1997 and have three children. Melissa filed a petition to dissolve the marriage in 2008.

In January 2009, the parties entered a written stipulation resolving matters of child custody and support, spousal support, and property division. They agreed Melissa would be the children's physical caregiver, and the stipulation sets forth Scott's visitation schedule. As part of the property settlement, Scott agreed to pay Melissa $500,000 with $100,000 due one week after entry of the decree and the remaining $400,000 payable in eight annual installments of $50,000. The parties also agreed Scott would pay Melissa $500 per month in spousal support for a period of sixty months. For child support, the stipulation specifically states the parties "have considered all relevant factors and understand the current status of their financial condition" before setting Scott's

child support obligation at $1500 per month—considerably below the amount provided for in the child support guidelines. The court incorporated the stipulation into its decree.

On June 10, 2009, Scott filed a petition to modify the child custody provisions of the decree based on Melissa's move of sixty miles. Melissa counterclaimed for an increase in child support. Scott later added a claim to terminate the spousal support provision of the decree because Melissa had remarried.

The parties stipulated to a modification of child custody with Melissa retaining physical care of the two younger children, while placing the oldest child with Scott. The remaining matters of spousal and child support proceeded to a hearing on September 7, 2012. In its September 25, 2012 order, the court terminated the spousal support payments and credited Scott with payments made after Melissa's remarriage.

The district court denied Melissa's request to modify child support, finding the following:

> Testimony from the petitioner and by way of judicial notice reveals that the child support was agreed upon by the parties at the time of the stipulation in an amount that was not based on the child support guidelines. The $1500 per month sum was an agreed upon amount in conjunction with the entirety of the terms negotiated by the parties. The parties were aware that the guidelines support established by the court in a temporary order set the respondent's child support at $2495 per month. The court is further aware that the petitioner accepted a property settlement of $500,000. The petitioner testified that she had signed the agreement in January of 2009 because she felt harassed by the respondent and wanted the dissolution of marriage proceedings to come to an end. She admitted that she just wanted out as long as she had her children with her. It was of note that not until the respondent filed for a modification did the petitioner request any change in the child

> support obligation. Of further note was the testimony of the petitioner in which she agreed that she disregarded two different lawyers' advice at the time to not sign the stipulation. The petitioner further agreed that she wanted to change the child support obligation at this point because she had made a "bad deal."

The court concluded Melissa's belief she had made a "bad deal" did not constitute a substantial change in circumstances and Scott's occupation and income had not changed substantially. The court further found the evidence did not show the children would be adversely affected if the child support was not modified and "certainly" did not establish a positive wrong or injustice.

II. Scope of Review.

Our review of a proceeding to modify a dissolution decree is de novo. *In re Marriage of Lamertus*, 793 N.W.2d 395, 398 (Iowa 2010). We examine the entire record and adjudicate anew the issues properly before us. *In re Marriage of Briddle*, 756 N.W.2d 35, 39 (Iowa 2008). We give weight to the trial court's fact findings—especially with regard to witness credibility—but we are not bound by them. Iowa R. App. P. 6.904(3)(g).

III. Merits.

While the stipulation is a contract between the parties, it is interpreted and enforced as a final judgment of the court because it was accepted and merged with the decree. *See In re Marriage of Lawson*, 409 N.W.2d 181, 182 (Iowa 1987). The court may modify the amount of child support ordered in a dissolution decree only when there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (2009). In determining whether a substantial change in circumstances exists, we note the child support payments set forth in a decree are final "as to the circumstances then existing"—those circumstances that are

known or, through reasonable diligence, should have been known to the court when the original decree was entered. *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991).

Not every change in circumstances is sufficient to modify a decree. *Id.* In order to justify modification, the change must occur after entry of the decree, and must be permanent or continuous, rather than temporary. *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987). The change also must not have been within the trial court's contemplation at the time the original decree was entered. *Id.*

The evidence presented at the modification hearing does not establish a substantial change in circumstances sufficient to modify the decree. Although Melissa argues Scott's income has increased, her own net monthly income figures for Scott are as follows:

Scott's net montly income

2006 $15,583.16

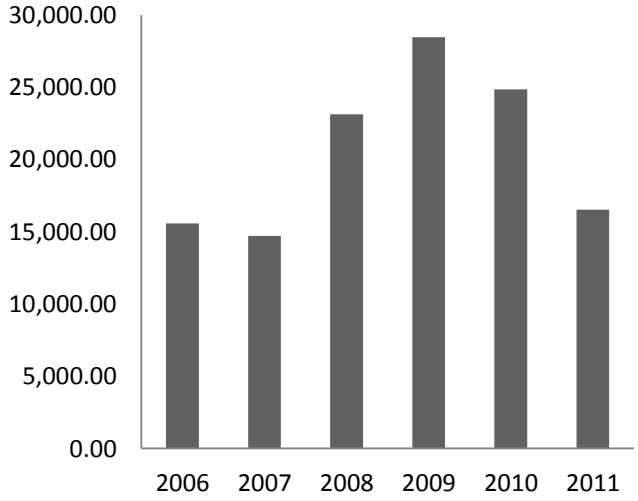
2007 $14,706.33

2008 $23,131.66

2009 $28,469.91

2010 $24,846.25

2011 $16,531.25



Scott's income peaked in 2009, the year of dissolution. In 2010, his income was close to what it had been in 2008. In 2011, his income returned to the level it

was at in 2006 and 2007. The evidence fails to show Scott's income increased significantly following the entry of the dissolution decree in a way not contemplated at the time the decree was entered or that any increase in income is permanent.

Melissa seeks modification based on the provisions of Iowa Code section 598.21C(2), which provides: "[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 . . . ." It is true the child support guidelines have changed since entry of the dissolution decree. If Scott's child support obligation was recalculated under the new guidelines, it is true his payments would increase by more than ten percent. But if the parties had followed the child support guidelines in place at the time of dissolution, Scott's child support payments would have been more than ten percent higher than what the parties stipulated to. To increase Scott's child support obligation solely on this mechanical application of section 598.21C(2) would be to second-guess the parties' stipulation. It would also isolate the child support issue from the other economic provisions of the original decree. We decline to do so.

We find there has been no material and substantial change in the parties' situation since entry of the decree to warrant an increase in the child support. There is one change in circumstances that typically leads to a modification of child support—a change in the child custody arrangement. But that change in custody would typically support lowering the amount of child support owed, not

increasing it; Scott's child support obligation should not be increased simply because he has assumed custody of one of the children.

Furthermore, even if a substantial change in circumstances is shown, the decree will only be modified if it appears "continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice." *Chmelicek*, 480 N.W.2d at 574. While Melissa feels she made a "bad deal" in entering the stipulation, the court may not modify the child support provisions set forth in the original decree simply because they were originally inequitable; the only relief from an inequitable dissolution decree is appeal. *See id*. We find no evidence continued enforcement of the parties' agreement would result in a positive wrong or injustice. Nor will enforcement adversely affect the children's best interests. *Cf. In re Marriage of Zeliadt*, 390 N.W.2d 117, 119 (Iowa 1986) (holding the court will only give effect to settlement agreements involving child support obligations if they do not adversely affect the best interests of affected minor children).

Because Melissa has failed to show a substantial change in circumstances warranting modification of the child support the parties agreed to at the time of dissolution, we affirm.

IV. Attorney Fees.

The district court declined to award either party trial attorney fees. On appeal, Scott argues that, as the prevailing party, he should be awarded some of the more than $21,000 he incurred in trial attorney fees. We review his claim for an abuse of discretion. *See In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006).

An award of trial attorney fees depends on the parties' respective abilities to pay. *Id.* Here, Melissa left the marriage with more than $700,000 in assets—$500,000 of which came in the form of an equalization payment. However, Scott earns a sizeable income in contrast to Melissa's negligible earnings. Under these facts, the district court was within its discretion to deny Scott an award of his trial attorney fees.

Scott also requests an award of his appellate attorney fees. Such an award is not a matter of right, but rests within our sound discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). "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 Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Considering the foregoing, we decline to award Scott appellate attorney fees.

Costs of the appeal are assessed to Melissa.

AFFIRMED.