IN THE COURT OF APPEALS OF IOWA

No. 3-841 / 13-0352
Filed September 18, 2013

**IN RE THE MARRIAGE OF DAVID CRAIG THOMS
AND ANGELA MARIE THOMS**

**Upon the Petition of
DAVID CRAIG THOMS,**
Petitioner-Appellee,

**And Concerning
ANGELA MARIE THOMS,**
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

Angela Thoms appeals from the physical care and child support provisions of the modification of the decree of dissolution of her marriage to David Thoms. **AFFIRMED.**

Bryan D. Swain of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellant.

Aimee L. Lowe of Telpner, Peterson, Smith, Ruesch, Thomas & Simpson, L.L.P., Council Bluffs, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

Angela Thoms appeals from the physical care and child support provisions of the modification of the decree of dissolution of her marriage to David Thoms. She argues the district court erred in giving David physical care of the children, in calculating her income for child support purposes, and in declining her request for attorney fees. We affirm, finding the court properly determined a substantial change in circumstances occurred and that David would provide superior care, the court properly used Angela's earning potential instead of actual income, and the court did not err in declining Angela's request for attorney fees.

I. Facts and Proceedings.

Angela and David Thoms were married in 1993; the marriage was dissolved in 2006. The parties have three children. The 2006 dissolution decree, in accordance with the stipulation of the parties, awarded Angela and David joint legal custody and joint physical care of the children.

David has been self-employed as a construction worker and remodeler of homes for sixteen years. At the time of the dissolution, Angela was employed as a certified nursing assistant making $28,000 a year. In April 2008, Angela injured her ankle at work and was unable to exercise her joint physical care. She was let go from her employment a few months later as the injury prevented her from working. David filed for modification of the decree in September 2008, requesting alteration of the child support provision of the original decree due to his increased care of the children and requesting physical care of the children. The court reduced David's child support payments according to the parties' agreement and did not modify the physical care arrangement. Because the

parties reached an agreement on the financial issues, and apparently agreed not to modify the physical care issues; no trial was held regarding the physical care arrangement.

Angela remained unemployed and declined to exercise her parenting time through 2009. In 2010 she underwent cancer surgery and continued not to take advantage of her joint physical care that year. That same year she did begin to work at a bar three to four nights a week, earning somewhere between $18,200 and $20,800 a year.

In January 2011, she left that employment and moved to another bar, working twice a week. At this point, Angela reports she began exercising her joint physical care again, taking the children three days one week and four days the next. David's calendar, in contrast, shows she had the children approximately three days a month from June 2011 to November 2011. After that time, the number of her visits as chronicled in David's log increased, but not by much. Angela admits David had actual physical care of the children (despite the joint physical care provision of the dissolution decree) for more than three years. The children's teachers recognize David as the parent to contact regarding the children; Angela has very limited interaction with the teachers.

Angela received her certificate in phlebotomy in May of 2012. That same month, Angela filed for modification of the decree. After the petition was filed, both parties agree she exercised regular visitation. She requested modification of the child support provisions and that the children not be exposed to a certain relative. Angela also filed an application for a rule to show cause regarding payments owed by David for back taxes. David filed a counterclaim requesting

physical care of the children. Angela filed an application for temporary hearing, requesting a court-ordered visitation schedule, alleging a denial of visitation by David since they had never followed the 2006 decree terms for custody and visitation. This application was denied. Trial was held in December of 2012.

Angela was unemployed at the time of trial; she planned on an increase in income in March after obtaining clinical training in phlebotomy. After that, she expected to make between eleven and thirteen dollars an hour. She also had an offer at the time of trial for ten dollars an hour for twelve hours a week as a part-time nursing assistant; she had not applied to full-time jobs, stating she needed to drop off the children at school at nine in the morning and pick them up at three in the afternoon.

The court concluded a material change in circumstances had occurred to warrant a change of the physical care provision of the divorce decree. The court granted David physical care and Angela liberal visitation. It cited David's actions as primary caregiver for several years, contrary to the provisions of the dissolution decree. The court ordered Angela to pay $406.30 a month in child support, using an annual income figure of $20,800. Angela appeals.

II. Analysis.

"A petition to modify a decree of dissolution of marriage is triable in equity. Our review, therefore, is de novo." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 331 (Iowa Ct. App. 2005) (internal citations omitted).

A. Modification of physical care.

> Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by

> the court when the decree was entered, which was more or less permanent, and relates to the welfare of the children. Additionally, the parent seeking custody must prove an ability to minister more effectively to the children's well-being. This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons. Moreover, as in all cases involving the question of custody, our first consideration in proceedings to modify custody is the best interest of the children.

Dale v. Pearson, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996) (internal citations omitted).

1. Change in circumstances.

Angela argues no substantial change in circumstances warranting modification of the physical care provision has occurred. She argues that because David requested modification of physical care in 2008 after her injury, and child support was modified but the parties agreed to leave other aspects of the original decree *in full force and effect*, he cannot now claim a substantial change in circumstances has occurred. We find this argument unpersuasive. Not only was the physical care arrangement of the original decree left undisturbed by the 2008 modification, but David also notes that at the time of the 2008 modification action, Angela was still involved in physical therapy for her ankle and she had not manifested any of the other issues that plagued her in the years between the first modification and this action. We agree with David. Angela's failure to exercise visitation coupled with David's actions as de facto primary caregiver since her 2008 ankle injury constitute a substantial change in circumstances from the original decree which is more or less permanent and pertains to the welfare of the children. *See id.*

2. Superior care.

The party seeking a change in the physical care arrangement must also show the ability to provide superior care; "[h]owever, in assessing this issue we look not only at [the moving party's] parenting ability, but also at the fact that the current joint physical care arrangement is not in [the child]'s interest." *Melchiori v. Kooi*, 644 N.W.2d 365, 369 (Iowa Ct. App. 2002). Angela and David both state the decree's physical care arrangement was unworkable. Instead, David shouldered the responsibilities as the primary caregiver for several years while Angela was less involved with the children. The children are thriving under this arrangement. We find he has met his burden to establish that he can provode superior care of the children.

B. Child support.

Angela argues the district court's determination of her income for child support purposes was improper, as she was unemployed at the time of the trial and the pending job offer was for part-time work which would result in earnings substantially less than the $20,800 used by the court. "Before applying the guidelines there needs to be a determination of the net monthly income of the custodial and noncustodial parent at the time of the hearing. Yet the translation of income to 'net monthly income' as defined by the guidelines is not an exact science." *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 332 (Iowa Ct. App. 2005) (internal citations omitted).

We may deviate from the child support guidelines' requirement to use a parent's actual income if an adjustment is necessary to provide for the children's needs and to do justice under the special circumstances of the case. *In re*

Marriage of McKenzie, 709 N.W.2d 528, 533 (Iowa 2006). Also of importance is whether the parent's reduction in income was voluntary or involuntary. *Id*.; *see also In re Marriage of Duggan*, 659 N.W.2d 556, 562 (Iowa 2003) (citation omitted) (stating "[u]nder our case law, 'a party may not claim inability to pay child support when that inability is self-inflicted or voluntary'"). "When a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guidelines." *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997).

First, we consider whether failure to use Angela's earning capacity instead of actual salary would result in a substantial injustice to the children.[1] *See id.* Angela states and the district court found she was unemployed at the time of trial. However, she argues an imputed income of $6240 is appropriate for calculation of her child support. We agree with Angela that using an imputed income is appropriate, because we find failure to do so would result in substantial injustice to the children. In evaluating whether a substantial injustice would occur, we look to her employment history, present earnings, and reasons for failing to work a regular work week. *See id.* Angela received an offer of ten

[1] We note that the district court did not make a written finding regarding whether failing to use Angela's actual salary would result in a substantial injustice to the children. *See* Iowa Code §§ 598.21B(2)(b)(2) (2011) (using parent's income for calculation of support under the child support guidelines); 598.21B(2)(d) ("A variation from the guidelines shall not be considered by a court without a record or written finding, based on stated reasons, that the guidelines would be unjust or inappropriate as determined under the criteria prescribed by the supreme court."). Because our review of facts and law in this equity action is de novo, we make this determination for the first time on appeal. *See Lessenger v. Lessenger*, 156 N.W.2d 845, 846 (Iowa 1968) ("We do not reverse an equity case upon such complaints as these but draw such conclusions from our review as we deem proper.").

dollars an hour for part-time work as a nursing assistant; she deliberately did not seek full-time work. As a bartender, when she worked full-time, she made almost $20,800 a year. She argues we should use the part-time work figure of $6240 for her annual income. She does not argue she cannot work full-time; instead she states she did not pursue full-time employment because she would have to be available to transport the children to and from school. We have already found David was properly granted physical care. Her arguments that part-time income should be used are unpersuasive. *See id.* (holding use of mother's part-time income was proper where she spent half of her working hours parenting the children).

Next, we evaluate what amount should be used for her earning capacity. Angela was offered a part-time job at ten dollars an hour; she previously made that much while working at a bar. The credible evidence shows she should make at least ten dollars an hour. *See In re Marriage of Hagerla*, 698 N.W.2d 329, 332 (Iowa Ct. App. 2005); *see also In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991) (holding the court should determine current income from the most reliable evidence presented). Though Angela has sought only part-time employment, she makes no argument that she could not work full-time. Failing to impute full-time wages to Angela would be to turn a blind eye to the needs of the children and place importance instead on her individual desire to work less. *See id.* The district court properly figured her earning capacity for child support purposes at $20,800 a year.

Angela also argues the district court erred in finding David's earnings to be $45,000 as he deducted expenses for his truck, home office, depreciation, meals,

and telephone. Angela refers us to no authority stating a self-employed parent cannot deduct his reasonable business expenses from his net earnings for the calculation of his income for child support purposes. We therefore find she has waived this argument. *See* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue.").

C. Attorney fees.

A party who wishes to disturb the trial court's award of attorney fees must show the court abused its discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). "Awards of attorney fees must be for fair and reasonable amounts, and based on the parties' respective abilities to pay." *Id.* (internal citations omitted). Trial courts are allowed considerable discretion in awarding attorney fees. *Id.* The award of trial attorney fees is not a matter of right. *In re Marriage of Grady-Woods*, 577 N.W.2d 851, 854 (Iowa Ct. App. 1998). We do not disturb the trial court's decision not to award Angela attorney fees.

D. Appellate Attorney Fees.

Both parties request appellate attorney fees. The award of appellate attorney fees is not a matter of right. *In re Marriage of Coulter*, 502 N.W.2d 168, 172–73 (Iowa 1993). "In determining an award of appellate attorney fees, we are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal." *Id.* at 172. Due to Angela's relative inability to pay and David's position in defending the trial court's decision on appeal, we decline to award appellate attorney fees. Costs on appeal are taxed to Angela.

AFFIRMED.