IN THE COURT OF APPEALS OF IOWA

No. 3-941 / 13-0021
Filed November 6, 2013

**IN RE THE MARRIAGE OF MICHAEL A. ARPY
AND RENEE L. ARPY**

**Upon the Petition of
MICHAEL A. ARPY,**
Petitioner-Appellee,

**And Concerning
RENEE L. ARPY,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Lawrence P. McLellan, Judge.

Renee Arpy appeals from the district court's order granting Michael Arpy's request for a reduction of his child support obligation in an action initiated under Iowa Code chapter 252H (2011). **AFFIRMED.**

Michael D. Ensley of Dickinson, Mackaman, Tyler & Hagen, P.C., Des Moines, for appellant.

Bryan Webber of Carr & Wright, P.L.C., Des Moines, for appellee.

Thomas J. Miller, Attorney General, Christina F. Hansen, Assistant Attorney General Child Support Recovery Unit, and Wayne J. Bergman and Stephan A. Brannen, Assistant Attorneys General, for appellee State.

Considered by Vaitheswaran, P.J., and Doyle and Bower, JJ.

DOYLE, J.

Renee Arpy appeals from the district court's order granting Michael Arpy's request for a reduction of his child support obligation, as recommended by the Iowa Child Support Recovery Unit (CSRU), in an action initiated under Iowa Code chapter 252H (2011). Upon our de novo review, we affirm.

***I. Background Facts and Proceedings*.**

Michael and Renee Arpy's marriage was dissolved by decree in 2003. Michael is a self-employed home remodeler and repairman. Renee is presently employed part-time at a restaurant. Michael was awarded physical care of the parties' minor child, and Renee was ordered to pay child support.

At some point the child began living with Renee, and a stipulated temporary order suspending child support was entered in February 2010. In August 2010, a stipulated decree of modification of dissolution of marriage was entered awarding Renee physical care of the child. The parties were unable to agree upon a stipulated amount for child support, and, following litigation of the issue, a separate modification order was entered in September 2010 ordering Michael to pay Renee $270 per month for child support. Filed the same day as the order was a Child Support Guidelines Worksheet showing a gross annual taxable income of $20,000 for Michael and $14,430 for Renee. The worksheet also indicated a guideline amount of child support in the amount of $270. Nothing in the order or the worksheet indicated whether the parties' incomes were actual or imputed, but the court's order stated it "entered its findings and ruling on the record."

Michael did not appeal the support order. Instead, he later submitted a request for review and adjustment to the CSRU pursuant to Iowa Code section 252H.18A(1).[1] After its review, the CSRU issued a notice of intent to modify the child support obligation, as provided in section 252H.19, finding:

> There has been a substantial change in the financial circumstances of [Michael] in that [his] net income has changed by at least [fifty] percent and that change is due to financial circumstances that have existed for at least three months and can be reasonably expected to continue for at least an additional three months. A modification is *appropriate*.

(Emphasis in original.) The notice indicated the CSRU would seek an order from the court reducing Michael's support to $50 per month. Renee requested a court hearing to challenge the decision pursuant to section 252H.8(3).

A hearing was then held before the district court in October 2012. Thereafter, the court entered an order for adjustment of child support obligation reducing Michael's child support obligation from $270 to $50 per month. In its order, the district court noted:

> On September 1, 2010, the court entered an order modifying child support finding Michael obligated to pay $270 per month to Renee. This amount was determined after a trial, and the court imputed gross annual income to Michael of $20,000, and a gross annual income of $14,430 to Renee.[2] The court's order does not provide any explanation why the court imputed these amounts to the parties. This apparently was based upon the Child Support Guideline Worksheet submitted by Renee.

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[1] For purposes of review and adjustment under Iowa Code section 252H.18A, a substantial change in circumstances means there has been a change of fifty percent or more in the income of a parent, and the change is due to financial circumstances which have existed for a minimum period of three months and can reasonably be expected to exist for an additional three months.

[2] The court logically came to this conclusion as it had before it Michael's 2009 tax returns that showed an actual adjusted gross income of $233, not $20,000. Furthermore, it is clear from the parties' testimony at the 2013 hearing that the court utilized imputed incomes for the parties, not their actual incomes, in its 2010 order.

The court further observed that, based upon the record presented by the parties, the court in 2010 "utilized the earning capacity of the parties in establishing the child support obligation," though it was "not clear from the court's order why the court acted in this manner." Citing to Iowa Court Rule 9.11(4), the court utilized the current actual earnings of the parties. In doing so, the court concluded Michael had established that a substantial change in circumstances occurred between 2010 and 2012 because his actual income shown on his 2010 and 2011 tax returns did not approach the $20,000 imputed to him by the court in 2010.

Renee now appeals.

II. Scope and Standards of Review.

"Pursuant to section 252H.3, the district court shall review the matter as an original hearing before the court." Iowa Code § 252H.8(8). A petition for review and adjustment of a child support obligation is heard as an ordinary civil action in equity. *State ex rel. Weber v. Denniston,* 498 N.W.2d 689, 690 (Iowa 1993). Our review of an action in equity is de novo. Iowa R. App. P. 6.907.

III. Discussion.

A. 2010 Hearing Record.

The transcript of the 2010 hearing was not admitted into evidence or otherwise made available to the district court at the 2012 hearing. After this matter was appealed, a transcript of the 2010 hearing was made and filed with the Clerk of the Appellate Courts. In her appellate brief, Renee quotes at length from this transcript in which the district court explained its reasons for imputing $20,000 annual income to Michael. The transcript was also included in the parties' appendix. However, the transcript was not a part of the record before the

district court, and therefore is not a part of the record on appeal. Iowa R. App. P. 6.801. This court does not consider issues based on information outside the record, *Rasmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994), and consequently, we do not consider the transcript.

B. Error Preservation.

For the first time on appeal, Michael argues that because the 2010 order did not contain written findings as to the rationale for using imputed income as required by Iowa Court Rule 9.11(4), it cannot be utilized to determine whether a substantial change existed.[3] *See In re Marriage of Nelson*, 570 N.W.2d 103, 107-08 (Iowa 1997) (holding when a prior order fails to state reasons for varying from the guidelines, the order cannot serve as the baseline for determining whether a substantial change of circumstances exists). However, Michael did not raise this argument before the district court.

"Our error preservation rules provide that error is preserved for appellate review when a party raises an issue and the district court rules on it." *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 20-21 (Iowa 2013); *see also Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting we do not consider issues raised for the first time on appeal). Our error preservation rules are not designed

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[3] Iowa Court Rule 9.5(10), as amended effective July 1, 2009, provides, in part:

> To determine gross income, the court shall not impute income under Rule 9.11 except:
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> *a.* Pursuant to agreement of the parties, or
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> *b.* Upon request of a party, and a *written determination is made by the court* under Rule 9.11.

(Emphasis added.) Iowa Court Rule 9.11(4) similarly provides: "The court shall not use earning capacity rather than actual earnings unless *a written determination is made* that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties." (Emphasis added.)

to be hypertechnical. *See Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 695 (Iowa 2013). Rather, they exist to ensure that district courts have the opportunity to correct or avoid errors and to provide appellate courts with a record to review. *See State v. Pickett*, 671 N.W.2d 866, 869 (Iowa 2003). We find Michael has not preserved this issue for our review, and we therefore do not address it.

C. Substantial Change in Circumstances.

The CSRU determined Michael's gross annual income was $8802.48. This income is demonstrated by averaging Michael's total income shown on his 2010 and 2011 tax returns.[4] The district court found that while Michael's "business is increasing, his actual income has not approached the $20,000 imputed to him in 2010 by the court."

On appeal Renee argues, as she did before the district court, that there has not been a substantial change in circumstances warranting a reduction of Michael's child support obligation. To that end, she claims both parties "were performing the same type of jobs that they had been performing in 2010; that their ability to work was the same in 2010 and 2012; and, that [their child] continued to reside solely with Renee throughout the time period," "Michael further testified that he continued to live the same type of lifestyle as he had previously done." Renee claims the district court got it wrong when it "did not address that as a self-employed individual, Michael is in control of his ability to

[4] The CSRU indicated it arrived at this figure by averaging Michael's 2008, 2009, 2010, and 2011 income. The district court correctly pointed out the figure is an average of Michael's 2010 and 2011 income. Michael's income shown on his 2010 and 2011 tax returns is substantially higher than the income shown on his 2008 and 2009 returns.

earn income and that many of the expenses that he utilizes for reducing his taxable gross income are expenses that he also utilizes for personal use, including vehicle, tools, and materials." When adding these amounts back into his income, she asserts Michael's actual income is consistent with the earning capacity the court imputed to him in 2010 of $20,000. Michael asserted the expenses were properly taken.

In not adding those expenses back into Michael's income, the district court obviously found Michael's testimony more credible and that the expenses were legitimate. We credit the factual findings of the district court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(g). We recognize that determining income for self-employed individuals is sometimes difficult. In some cases, it is appropriate to increase income by the amounts a court determines were taken from the business for personal use but claimed as expenses. *See In re Marriage of McKamey*, 522 N.W.2d 95, 98-99 (Iowa Ct. App. 1994). Other than bald assertions, Renee presents us with no convincing evidence to support her allegation the expenses should be added back into Michael's income for child support calculation purposes. We therefore affirm the district court on this issue.

Like the district court found, we find Michael's present income to be significantly lower than the income imputed to him by the court in 2010. Although his actual income increased substantially in 2010 and 2011 from his actual income in 2008 and 2009, his actual income is not near the $20,000 amount imputed to him in 2010 by the court. A substantial change in income having

been established, as required by section 252H.18A, we affirm the district court's order for adjustment of child support obligation entered November 30, 2012.

D. Appellate Attorney Fees.

Michael requests 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 McDermott*, 827 N.W.2d 671, 686-87 (Iowa 2013) (internal quotation marks and citation omitted). We consider the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal, in determining whether to award appellate attorney fees. *Id.* at 687. After carefully considering each of these factors, we decline to award Michael appellate attorney fees.

IV. Conclusion.

For the foregoing reasons, we affirm the district court's order for adjustment of child support obligation entered November 30, 2012.

AFFIRMED.