IN THE COURT OF APPEALS OF IOWA

No. 6-714 / 06-0066
Filed November 30, 2006

**IN RE THE MARRIAGE OF SARA E. GARL
AND BRIAN A. GARL**

**Upon the Petition of
SARA E. GARL, n/k/a SARA E. HARRIS,**
Petitioner-Appellee,

**And Concerning
BRIAN A. GARL,**
Respondent-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

The respondent appeals from the district court's order that denied his modification petition. **REVERSED AND REMANDED.**

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellant.

Normand Klemesrud of Klemesrud Law Office, Charles City, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

Brian Garl appeals from the district court's order that denied his petition to modify the child support provisions of his dissolution decree. Because the original decree deviated from the child support guidelines, with no findings to support the deviation, we find that Brian, as custodial parent, demonstrated a substantial change of circumstances based on current and actual income. We therefore reverse and remand

Brian and Sara Garl's (n/k/a Sara Harris) marriage was dissolved in July 2004. The decree incorporated a stipulation of the parties as to all terms, thus avoiding a trial of the issues. The stipulation provided, among other things, that Brian would be granted physical care of their son, three-year old Lucas, with liberal visitation to Sara. Sara would pay Brian monthly child support of $300, although her income at the time of the dissolution would require almost double that amount according to the Iowa Child Support Guidelines (the guidelines). At the time of the dissolution, Sara's gross earnings were approximately $48,700 per year. Sara was also paying one-half of Lucas's daycare expenses prior to the dissolution, however, neither the decree nor the stipulation address payment of daycare expenses.

In March 2005, Brian filed a petition to modify the child support provisions of the decree. Brian argued that Sara's failure to exercise visitation, her discontinuation of payments for Lucas's daycare, and a deviation under the guidelines of more than ten percent from Sara's child support obligation all demonstrated a substantial change in circumstances, requiring modification of the child support provision of the decree. The district court denied the petition to

modify, finding that Brian failed to carry his burden of proof that a substantial change in circumstances had occurred since the dissolution. Brian appeals, and we review the record on appeal in this modification action de novo. *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006).

Brian argues that the evidence he submitted at trial as to Sara's failure to exercise her visitation (and thereby increasing his expenses for Lucas), her failure to continue paying one-half of Lucas's daycare, and the level of child support required under the guidelines for Sara's current income all demonstrate a substantial change in circumstances. When there is a substantial change in circumstances not contemplated under the decree, the court may subsequently modify child support orders, by considering the following:

> a. Changes in the employment, earning capacity, income, or resources of a party.
> b. Receipt by a party of an inheritance, pension, or other gift.
> c. Changes in the medical expenses of a party.
> d. Changes in the number or needs of dependents of a party.
> e. Changes in the physical, mental, or emotional health of a party.
> f. Changes in the residence of a party.
> g. Remarriage of a party.
> h. Possible support of a party by another person.
> i. Changes in the physical, emotional, or educational needs of a child whose support is governed by the order.
> j. Contempt by a party of existing orders of court.
> k. Entry of a dispositional or permanency order in juvenile court pursuant to chapter 232 placing custody or physical care of a child with a party who is obligated to pay support for a child. Any filing fees or court costs for a modification filed or ordered pursuant to this paragraph are waived.
> l. Other factors the court determines to be relevant in an individual case.

Iowa Code § 598.21C(1) (2005).

For purposes of modifying a child support order, "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 established pursuant to section 598.21B." Iowa Code § 598.21C(2)(a).

Brian's testimony and other evidence submitted at trial shows that Sara's prior level of visitation with Lucas remained relatively similar both before and after the dissolution decree was final. Therefore, no significant change in circumstances regarding Sara's exercise of visitation has occurred since the entry of the decree. In addition, there was no agreement by the parties in the stipulation or order in the decree requiring additional payments for child care above Sara's obligation of $300 per month in child support. We agree with the district court that Brian had no basis to expect this continued, voluntary payment after the entry of the dissolution decree.

Lastly, Brian argues that the level of support required by the guidelines according to his and Sara's current incomes varies by ten percent or more from the original amount set at $300 per month. The record suggests that the parties originally negotiated a substantial downward deviation from the guidelines. Our case law includes the general principle that parents cannot lightly contract away or otherwise modify child support obligations; the court will give effect to such agreements only if they do not adversely affect the best interests of affected minor children. *In re Marriage of Zeliadt*, 390 N.W.2d 117, 119 (Iowa 1986). Stipulations that deviate from the guidelines should be approved and enforced only if the district court determines that the stipulated amount will not adversely affect the best interests of the parties' child. *Id*. In finalizing Brian and Sara's dissolution decree, which incorporated the terms of their stipulation the district

court did not state any reason why the deviation from the guidelines was in Lucas's best interests. In *In re Marriage of Guyer*, 522 N.W.2d 818 (Iowa 1994), on review of a modification action to change the stipulated child support obligation, our supreme court stated:

> When a court sets child support in an amount different from that required by the guidelines, the law requires "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." Iowa Code § 598.21(4)(a) (1993) (emphasis added). The decree entered in the dissolution case fell woefully short of this statutory requirement.

Guyer, 522 N.W.2d at 820 fn.1.

Here, at the time the decree was entered in July 2004, Sara earned over $48,700 per year and Brian earned over $29,600. Sara's child support obligation according to the guidelines at that time would have been $594.15 per month. Therefore, a downward deviation to $300 per month should have been accompanied by appropriate findings in the decree as to why the deviation was "necessary to provide for the needs of the child[ren] and to do justice between the parties under the special circumstances of the case." See Iowa Ct. R. 9.4. However, no such findings were made. At the time of the modification hearing, Sara's income had dropped to $36,000, and Brian's income appears to have decreased to $26,000, which would call for Sara's obligation under the guidelines to be raised to $435.17. This is more than a ten percent variance from the original stipulated support of $300.

Sara testified that she agreed to the reduced child support in the original stipulation after relinquishing any claim to the equity in the marital home. Brian disagreed and testified that any equity in the home that he retained was offset by

the assets Sara retained. Nonetheless, Sara asserts that because the parties negotiated the original support, the modification court was precluded from finding a subsequent substantial change of circumstances when considering the parties' actual incomes. There is some appeal to the argument that a party should not be able to agree to a reduced level of support and then later bring a modification action relying on actual income levels in order to demonstrate a substantial change in circumstances. *See In re Marriage of Nelson*, 570 N.W.2d 103, 107-08 (Iowa 1997). However, the guidelines were established to provide for the best interests of the affected children, not to accommodate novel financial arrangements between the parents. *Guyer*, 522 N.W.2d at 818, 821-822. Furthermore, the Iowa code requires, "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." Iowa Code § 598.21(4)(a). When the parties attempt to create other quid-pro-quos for child support, they run the risk that a later modification court, unable to discern the rational for the initial support award, will sweep their private financial arrangement aside in favor of the amount calculated under the guidelines. That is the case here. There was nothing in the stipulation or the original decree to explain why support was originally set so low. Although during the modification trial both parties presented reasons underlying the stipulation, none is incorporated into the original decree and remains a topic of dispute.

Moreover, to deny future modifications of child support based on an initial, unexplained side agreement would be tantamount to applying principles of issue preclusion to stipulated child support once it was fixed in a decree and contrary

to Iowa law. *See In re Marriage of Van Veen*, 545 N.W.2d 263, 266 (Iowa 1996) (holding that statutory law expressly makes a dissolution of marriage decree subject to modification as to *future* child support payments and any information in an income withholding order as to the amount of the accruing or accrued support which does not reflect the correct amount of support due is not conclusive for purposes of asserting issue preclusion on support owed); *Guyer*, 522 N.W.2d at 821-822 (concluding issue preclusion did not apply because parties' current level of income was substantially different from that at time of decree and therefore the issue in the modification proceeding was not identical to the issue in the original action). Being precluded in such a manner would only work to the detriment of the children and the physical-care parent providing for their needs.

In addition, the parties' own stipulation provides for annual exchanges of income tax returns and pay stubs, thereby implying that changes in their incomes were contemplated and may require a modification of child support. While Sara testified she believed that provision was included because, "Brian wanted to know what I was making every year," Brian testified that it was included so that child support could be modified based on changes in income. We conclude that Brian has proven a substantial change in circumstances warranting a modification of Sara's child support obligation. We reverse the modification ruling by the district court and remand for entry of a child support order, set according to the guidelines.

The parties both seek attorney fees on appeal. Such an award is discretionary and is determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced

to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We award attorney fees on appeal to Brian in the amount of $2000. Costs on appeal assessed to Sara.

REVERSED AND REMANDED.