IN THE COURT OF APPEALS OF IOWA

No. 6-849 / 06-0432
Filed November 30, 2006

IN RE THE MARRIAGE OF ANDREW R. ETNYRE AND JENNIFER A. ETNYRE

Upon the Petition of
ANDREW R. ETNYRE,
Petitioner-Appellant,

And Concerning
JENNIFER A. ETNYRE,
Respondent-Appellee.

Appeal from the Iowa District Court for Marion County, Dale B. Hagen, Judge.

Andrew R. Etnyre appeals following the district court's denial of his application to modify his child support obligation established in the decree dissolving his marriage to Jennifer A. Etnyre. **REVERSED AND REMANDED.**

Chad A. Boehlje of Boehlje Law Firm, P.L.C., Pella, for appellant.

Joel D. Yates of Clements, Pothoven, Stravers & Yates, Oskaloosa, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Andrew R. Etnyre appeals following the district court's denial of his application to modify his child support obligation established in the 2003 decree dissolving his marriage to Jennifer A. Etnyre. Andrew contends (1) a reduction in his earning capacity supported a reduction in his child support obligation and (2) the district court was not correct when it found he had an obligation to seek employment out of state. We reverse and remand.

I. Scope of Review. "Our scope of review of a child support modification action is de novo." *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). Although we give weight to the findings of fact made by the district court, especially as to the credibility of witnesses, we are not bound by those findings. *Id*. at 741. "We recognize that the district court 'has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity.'" *Id*.

II. Prior proceedings. The parties have three minor children born in 1995, 1997, and 2000. The dissolution decree provided they should have joint legal custody and Jennifer should have primary physical care. Andrew was provided reasonable and liberal visitation rights. He was ordered to pay child support of $1,326.83 a month beginning in March of 2003 until October of 2005 when the support was increased to $1,509.57[1] a month to be paid until a child no longer qualified for support, at which time the support for the remaining children was to be established by the child support guidelines then in effect. In addition, Andrew was to maintain hospital and medical insurance on the children and

[1] In the original decree Andrew was also ordered to pay alimony of $1,750 until September of 2005, which was the time the youngest child began kindergarten.

provision was made for the parties' allocation of expenses not covered by the insurance.[2]

At the time of the decree Andrew was working in Auburn, Nebraska at an annual salary of $95,000. Jennifer was not working outside the home, but in fixing child support, the district court determined she could earn $35,000 a year.

In May of 2005 Andrew filed an application for modification that led to this appeal. At the hearing on the modification in February of 2006 the facts were basically undisputed. They showed that following the dissolution Andrew found a job at Fisher Controls in Marshalltown, Iowa, paying the same $95,000 a year he earned in Nebraska. One reason for taking the job was it was closer to Pella where Jennifer and the children lived. The job at Fisher lasted until July of 2004 when the position was eliminated. Andrew, who had remarried and has another child, sought similar employment elsewhere in Iowa. He was offered a job in West Des Moines at a salary of $65,000, which he rejected because it would require substantial travel. Failing to find satisfactory employment Andrew opened his own business as an owner/manager of a Quiznos franchise in Pleasant Hill, Iowa. Since the business opened Andrew has spent considerable time working onsite, doing bookwork, hiring and firing help, and attending Quiznos corporate meetings in the Chicago area. He testified that pursuant to Quiznos corporate guidelines he set his initial annual salary at $27,300. He was unable to draw a full salary in 2005 but expects an increase in profits as the business becomes more established. He asked at trial that the district court

[2] Jennifer appealed seeking increased alimony and Andrew cross-appealed seeking a reduction in the alimony amount. This court affirmed. *In re Marriage of Etnyre*, No. 03-0591 (Iowa Ct. App. Dec. 24, 2003).

consider his annual income to be $27,300. He was current in his child support but testified he had used resources to pay the support that were no longer available to him. Jennifer was then employed and her annual income was $30,403.41.

The district court denied Andrew's application for modification, finding Andrew had not shown the changed circumstances are permanent and were not contemplated at the time of the dissolution of the marriage. The district court also found that Andrew had an obligation to support his children and to find and accept employment outside of Iowa similar to the jobs he had that provided an annual salary of $95,000.

III. Request for modification. Andrew contends the district court should have modified his support obligation. A dissolution court may modify child support and alimony provisions of a dissolution decree when there has been "a substantial change in circumstances." Iowa Code § 598.21(8) (2005). "The party seeking modification must prove the change in circumstances by a preponderance of the evidence." *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998). The following relevant principles may be considered when ruling on a petition for modification:

> (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

Id. Among other things, a court, in addressing a modification of child support, may also consider "changes in the employment, earning capacity, income or resources of a party." Iowa Code § 598.21(8).

Jennifer does not appear to dispute the fact that Andrew's income from Quiznos is substantially less than what he earned from prior employment. She argues his support should not be decreased because he had a responsibility to take a job similar to the one he lost in Marshalltown, and his salary, combined with the salary of his current spouse, gives him a greater household income than he had at the time of the dissolution while she is making $5,000 a year less than the dissolution court found could be her expected earnings.

The courts have consistently held, as Jennifer argues, that a noncustodial parent is not free to plan his or her future without regard to his or her obligation to his child. *See In re Marriage of McKenzie*, 709 N.W.2d 528, 534 (Iowa 2006). Furthermore, a primary factor to be considered in determining whether support obligations should be modified and lowered is whether the obligor's reduction in income and earning capacity is the result of activity, which, although voluntary, was done with an improper intent to deprive his or her dependents of support. *Id*. at 533-34. Equitable principles support preventing parents from gaining an advantage by reducing their earning capacity and ability to pay support through improper intent or reckless conduct. *See In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). There is authority to deny a party's claim of inability to pay child support when that inability is self-inflicted or voluntary. *Id*.

However, modification is not denied in all cases when the noncustodial parent's income decreases. In the case *In re Marriage of Walters*, 575 N.W.2d

739, 741 (Iowa 1998), the court found that a noncustodial parent's reduction in income and earning capacity that was the result of his voluntarily criminal activity was not done with an improper intent to deprive his children of support. Similar circumstances have also allowed for modification. *See In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993) (finding that an obligor's reduction in income due to termination of employment for insubordination was not voluntary or self-inflicted); *Boquette v. Boquette*, 215 Iowa 990, 992, 247 N.W. 255, 256 (1933) (determining an obligor's demotion with resulting lower salary justified reduction of support obligation); *Nicolls v. Nicolls*, 211 Iowa 1193, 1197, 235 N.W. 288, 289 (1931) (finding the discharge from employment and inability to obtain a job with comparable pay justified reduction of support obligation); *In re Marriage of Blum*, 526 N.W.2d 164, 166 (Iowa Ct. App. 1994), (finding where the noncustodial parent lost his job in Harlan, Iowa, and refused to move to Denison to take a higher paying job as he wanted to stay in Harlan where his children lived was not considered a self-inflicted or a voluntary reduction in salary); *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991) (finding an honorable discharge from military and concomitant loss of military pay for failure to comply with weight limits was not voluntary or self-inflicted); *In re Marriage of Fidone*, 462 N.W.2d 710, 712, (Iowa Ct. App. 1990) (holding a noncustodial parent's refusal to accept relocation as an alternative to discharge did not constitute a self-inflicted reduction in salary for purposes of determining whether child support provisions of divorce decree should be modified; where relocation would involve move of 1,200 miles, there was a possibility of further layoffs at new location, and he wanted to remain close to his family).

Following this line of cases it would be difficult to find that Andrew reduced his income with an improper intent or because of reckless conduct. He left a job in Nebraska for a job in Marshalltown paying the same annual salary because he wanted to be closer to his children. He lost his job in Marshalltown through no fault of his own, unlike the noncustodial parent in *McKenzie*, 709 N.W.2d at 524, who quit his job. Andrew contacted a head hunter and sought similar employment limiting his search to jobs in Iowa that did not involve extensive travel. He was unable to find such a job, although he did find one in West Des Moines that paid $30,000 a year less than he had been making. Andrew turned it down and made a decision to open a Quiznos, knowing the company suggested he initially take less than $28,000 in salary. Andrew is working hard in the job and hopes it will be more successful in the future. However, there is no evidence that the business will net him $95,000 a year in the near future. While we realize a decision to reduce Andrew's support obligation will impact the parties' children, we must base our decision on reality rather than an unattainable utopia. *Walters*, 575 N.W. 2d at 741. A business that is providing Andrew with a salary of less than $28,000 a year is not likely to provide him with an income of $95,000 in the immediate future.

At Andrew's current income he cannot afford to pay the child support ordered. We recognize his current wife has an annual salary of $75,000. We do consider the remarriage and possible support Andrew may receive from his wife. Iowa Code § 598.21(8)(h). Yet while his new wife has no obligation to support Andrew and Jennifer's children, it is proper to consider Andrew's overall financial

condition in fixing the amount he should pay. *Page v. Page*, 219 N.W.2d 556, 558 (Iowa 1974).

We are inclined to disagree with the district court that Andrew has an obligation to leave Iowa where he can enjoy a substantial relationship with his children to find a job that pays him an annual salary of $95,000. *See Fidone*, 462 N.W.2d at 12; *Blum*, 526 N.W. 2d at 166.

Andrew has shown a substantial change of circumstances and his child support obligation should be modified downward. However, we do not agree with him that his income for child support purposes should be based on an annual salary of $27,300. Andrew had an opportunity to take a job at an annual salary of $65,000 and we believe under these circumstances it is equitable to impute additional income to him for child support purposes or if his annual salary is used to warrant an upward departure from the guidelines.

We reverse the finding that Andrew has not shown the required change in circumstances and the finding that he has not shown the change to be permanent. We remand to the district court to determine Andrew's income in accordance with this opinion, to determine the income for the purposes of applying the child support guidelines, and to exercise its discretion applying the guidelines. We award no appellate attorney fees. We do not retain jurisdiction.

REVERSED AND REMANDED.