IN THE COURT OF APPEALS OF IOWA

No. 2-848 / 12-0421
Filed October 31, 2012

IN RE THE MARRIAGE OF JENNIFER L. CLARK AND WILLIAM H. CLARK

Upon the Petition of

JENNIFER L. CLARK,
n/k/a JENNIFER L. BRADLEY,

Petitioner-Appellee,

And Concerning

WILLIAM H. CLARK,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

A father appeals the district court's refusal to modify child custody and the decision to impose child support obligations. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Kathlen Bailey of Coyle, Stengel, Bailey & Robertson, Rock Island, Illinois, for appellant.

Meghan K. Corbin and Paul J. Bieber of Gomez May, L.L.P., Davenport, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

William Clark appeals from a ruling denying his petition to modify the child physical care provisions of a divorce decree, contending a material and substantial change in circumstances warrant such modification. William also appeals the amount of a child support order, arguing the district court failed to properly include offsetting income. For the reasons set forth below, we affirm in part, reverse in part, and remand.

I. Background Facts & Proceedings

William and Jennifer have one child together, A.C. (born 1998). The parties dissolved their marriage on January 4, 2002. The divorce decree incorporated the parties' marital settlement agreement and joint parenting agreement. Under the terms of the parenting agreement, William and Jennifer enjoyed joint legal custody of A.C. Jennifer had physical care. William was entitled to reasonable visitation to include every other weekend and every other holiday. William was also obligated to pay child support.

In 2005 the parties resumed living together. On October 28, 2005, the parties agreed to terminate child support obligations because William was providing financial support for the family. In late 2006 or early 2007, Jennifer and A.C. moved out of William's home. Jennifer did not initiate proceedings to reinstate child support at that time. On February 18, 2007, the parties signed an agreement in which William transferred title of a 2005 Pontiac Grand Am to Jennifer "as payment for any current, outstanding and future child support payments for [A.C.]"

From 2008 through early 2010, William enjoyed substantially more visitation with A.C. than provided under the terms of the parenting agreement. In March 2010, Jennifer moved to Bettendorf. From August 2010 through November 2010, William cared for A.C. on Wednesdays and every other weekend. In late 2010, William moved to Bettendorf to be closer to A.C. Jennifer then reduced William's visitation to every other weekend, the visitation provided in the marital settlement agreement. William currently resides with his girlfriend, Jenny, and her daughter.

Jennifer married Mr. Bradley in June 2010. In 2011, Jennifer and Bradley had a child together. Jennifer currently lives with Bradley and their child, A.C., Bradley's father, and Bradley's two daughters from a prior marriage.

On January 19, 2011, William filed a petition for modification seeking custody of A.C. and alleging Jennifer unilaterally reduced William's care of A.C. and refused to communicate in a civil manner. Jennifer filed a counter application on February 3, 2011, requesting the court to deny a change in custody and petitioning for child support.

Jennifer works as a supply specialist for the federal government at the GS-9, step one pay level. Jennifer filed a financial status affidavit indicating she earns $1,819.20 bi-weekly, or $47,299.20 annually.

William works as a computer software programmer for a company that provides custom software applications to the credit union industry. He has a flexible work schedule. His gross income in 2010 was $60,411.

On January 17, 2012, the district court held a contested hearing for modification. William presented numerous messages and emails that Jennifer sent William from 2008 through 2011. In discussing the communication issues between the parties, the district court found

> Those communications portray [Jennifer] in an unflattering light. However, the Court gives little credence to that evidence, because it seemed cherry-picked and lacking in context. The entirety of the communication is missing. The Court cannot determine what [William's] part of the interaction was.

On January 25, 2012, the district court denied William's petition for modification of child custody. The court found Jennifer's base pay at the GS-9, step one compensation level was $41,563.00 and granted her request for child support. The court denied Jennifer's request to modify William's visitation schedule. William now appeals the district court's decision.

II. Standard of review

Our review of an action to modify child custody is de novo. Iowa R. App. P. 6.907; *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). We review a child support modification decision de novo. Iowa R. App. P. 6.907. In equity cases, although we give deference to the district court's factual findings, especially in determining the credibility of witnesses, we are not bound by those determinations. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986).

III. Analysis

A. Child Custody Modification

William contends the district court erred in failing to modify child custody. To modify a child custody provision incorporated in a dissolution decree, the party seeking modification must satisfy a two prong test. First, the petitioning party has the burden to show conditions "have so materially and substantially changed that that [the child's] best interest make it expedient to make the requested change." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Second, the parent seeking modification must carry the "heavy burden" of demonstrating "the ability to offer superior care." *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). Our review focuses on the long-term best interests of the child. *In re Marriage of Walton*, 577 N.W.2d 869, 870–71 (Iowa Ct. App. 1998).

William argues the breakdown in communication between the parties and Jennifer's unilateral decision to reduce William's visitation to every other weekend constitute material and substantial changes sufficient to warrant modification. We recognize and anticipate a certain amount of discord between divorced parents. *See In re Marriage of Ellis,* 705 N.W.2d 96, 103 (Iowa 2005), *overruled on other grounds by In re Marriage of Hansen,* 733 N.W.2d 683 (Iowa 2007) ("[W]hen a marriage is being dissolved we would find excellent communication and cooperation to be the exception and certain failures in cooperation and communication not to be surprising."). William's exhibits demonstrate a lack a civility in the communications between Jennifer and

William. As the district court found, however, those communications lack context. We are not persuaded the level of current communication issues between the parties rise to the level of a material and substantial change in circumstances sufficient to justify modification. Nor are we persuaded Jennifer has intentionally interfered with William's visitation rights.

A.C. is fortunate to have two capable and loving parents. Both parties maintain they are capable of setting aside their hostilities and animosities to maintain a cordial and cooperative environment for A.C. This court expects the parties will follow through with the current court-ordered parenting schedule and facilitate a healthy and nurturing environment for A.C. We find William has not carried his burden to show a material and substantial change in circumstances. *See Frederici*, 338 N.W.2d at 158. We therefore affirm the district court's refusal to modify custody.

B. Child Support Amount

William contends the district court erred in determining his child support obligations because it failed to account for Jennifer's financial affidavit in calculating her income. To determine the amount of child support, the district court is directed to apply our child support guidelines. *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). Upon our de novo review, we will reverse where the district court erred in inappropriately including or excluding income from its child support calculations. *Id.*

Jennifer argues this issue was not properly preserved for appellate review. To preserve an issue for appellate review, a party must generally present an

issue to the district court "at a time when corrective action can be taken." *Summy v. City of Des Moines*, 708 N.W.2d 333, 338 (Iowa 2006) (internal citations omitted). When the court fails to rule on an issue properly before it, the party raising the issue must ordinarily file a motion requesting a ruling on the issue in order to preserve error for appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

In this case, William raised the issue of child support to the district court. The district court decided the amount of child support. William now asserts error based on facts presented to the district court. We find the error properly preserved for our review.

Jennifer is employed with the federal government at the GS-9, step one compensation level. Jennifer testified she works for the federal government and makes "20 something dollars an hour." Her financial affidavit, however, indicates she earns $1819.20 bi-weekly, or $47,299.20 annually. There was no evidence to the contrary. The district court, however, concluded "the current base annual income for that [GS-9] classification is $41,563." The record before us clearly supports use of $47,299.20 for calculating child support; but we are unable to find the source for the $41,563 figure. We find based on the record before us the district court erred in failing to rely on Jennifer's financial affidavit in calculating her gross monthly income for child support calculation purposes.

IV. Conclusion

William has not shown a material and substantial change of circumstances to warrant modification of the custodial provisions of the parties' dissolution

decree. We therefore affirm the district court's ruling denying William's petition to modify the custodial provisions of the parties' decree. We find, however, that the district court's child support calculation should be based on Jennifer's income as shown on her financial affidavit. Accordingly, we reverse and remand the district court's child support order for a determination of child support consistent with this opinion.

Costs on appeal are assessed twenty-five percent to appellee, Jennifer Clark, and seventy-five percent to appellant, William J. Clark.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.