IN THE COURT OF APPEALS OF IOWA

No. 2-903 / 12-0299
Filed April 10, 2013

**IN RE THE MARRIAGE OF LISA JEAN LOONEY
AND GABRIEL GEORGE LOONEY**

**Upon the Petition of
LISA JEAN LOONEY,
n/k/a LISA JEAN SAWTELLE,**
Petitioner-Appellee,

**And Concerning
GABRIEL GEORGE LOONEY,**
Respondent-Appellant.

Appeal from the Iowa District Court for Union County, John D. Lloyd, Judge.

Gabriel Looney appeals the district court's modification of his child support obligation and award of trial attorney fees and court costs. **AFFIRMED.**

Andrew J. Tullar of Tullar Law Firm, P.L.C., Des Moines, for appellant.

David L. Jungmann of David L. Jungmann, P.C., Greenfield, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Gabriel Looney appeals the district court's modification of his child support obligation.

I. Background Facts and Proceedings

Gabriel and Lisa divorced in 2008 pursuant to a stipulated decree approved by the district court. The court granted the parties joint legal custody and joint physical care of their three children. The court also ordered Gabriel to pay $300 per month in child support.

Less than one year later, Lisa filed an application to modify the decree. She sought physical care of the children and a corresponding increase in child support. The district court granted her requests and ordered Gabriel to pay child support of $1071 per month. In calculating this figure, the court noted that Gabriel was a farmer, "making it difficult to determine his income." The court also stated:

> [Gabriel's] tax returns show that he elects to expense certain depreciable assets. . . . [I]t is proper to calculate that amount of expenses over a reasonable depreciation period. Moreover, due to fluctuating income, the Court shall determine [Gabriel's] income based on an average of several years. . . . Lisa has proven [Gabriel's] income is at least $45,000 per year.

Gabriel filed a post-trial motion. He did not challenge the court's estimation of his income but argued he was entitled to an extraordinary visitation credit of twenty percent. The court agreed and decreased his monthly child support obligation to $840.64.

Gabriel subsequently filed an application to modify the decree. He sought physical care of the children and a reduction of his child support obligation. Lisa

counterclaimed for sole custody. The district court did not alter the physical care arrangement but increased the child support to $952.40 per month. In calculating this figure, the court used the average of Gabriel's farm income for 2006 through 2010, after an adjustment for straight line depreciation. This method resulted in annual taxable income of $56,138.40. The court also ordered Gabriel to pay $10,000 towards Lisa's trial attorney fees and assessed costs against Gabriel. This appeal followed.

II. Analysis

A. Child Support

Pursuant to Iowa Code section 598.21C (2011), the district court may modify child support orders when there is a substantial change in circumstances. A substantial change exists when the court order for child support varies by ten percent or more from the amount that would be due pursuant to the most current child support guidelines. Iowa Code § 598.21C(2)(a).

Gabriel contends the district court acted inequitably in increasing his child support obligation. He asserts the court improperly calculated his net monthly income by (1) recalculating his depreciation deductions[1] and by (2) only averaging five rather than seven years of his farm income.

1. Depreciation. "Application of child support guidelines first involves determination of the 'net monthly income' of the custodial and noncustodial

[1] Lisa did not file a responsive brief. In such situations,

> the appellant is not entitled to a reversal as a matter of right, but the court may, within its discretion, handle the matter in a manner most consonant with justice and its own convenience. It will not search the record to find a theory upon which to affirm the judgment and may confine itself to the objections raised by the appellant.

Bowen v. Kaplan, 237 N.W.2d 799, 801 (Iowa 1976) (citation omitted); *see also* Iowa R. App. P. 6.903(3).

parent." *In re Marriage of Wade*, 780 N.W.2d 563, 566 (Iowa Ct. App. 2010). Where a person is self-employed, "*some* consideration must be given to business expenses reasonably necessary to maintain the business or occupation." *In re Marriage of Gaer*, 476 N.W.2d 324, 329 (Iowa 1991). "Depreciation is a valid cost of doing business." *In re Marriage of Cossel*, 487 N.W.2d 679, 682 (Iowa Ct. App. 679). "Depreciation deductions for farm machinery reflect a decrease in value of the equipment and have been established by the Internal Revenue Service and Congress to reflect the cost of doing business." *Id.*; *accord* 26 U.S.C. §167(a)(1) (authorizing "as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) . . . of property used in the trade or business."). Where warranted, a court "should adjust gross income before applying the guidelines" to avoid discrimination between wage earners and self-employed persons. *Gaer*, 476 N.W.2d at 329.

In calculating net farm income for federal income tax purposes, Gabriel subtracted his farm expenses from his gross income. Among the expenses on his Schedule F, "Profit or Loss from Farming" was "[d]epreciation and section 179 expense deduction not claimed elsewhere."[2] This provision allowed him to deduct the entire cost of a piece of equipment in the year of purchase, rather than depreciating the asset over a designated time period. For example, Gabriel

[2] 26 U.S.C. § 179(a) states, "A taxpayer may elect to treat the cost of any section 179 property as an expense which is not chargeable to capital account. Any cost so treated shall be allowed as a deduction for the taxable year in which the section 179 property is placed in service."

purchased a planter in 2009 and listed the entire purchase price of $51,000 as a depreciation expense deduction in 2009.

At trial, Lisa summarized the depreciation figures Gabriel reported on his 2006 through 2010 tax returns, together with his reported net farm income. Lisa also summarized what Gabriel's net farm income would have been had he instead used asset depreciation range (ADR) straight line depreciation. For example, she depreciated the $51,000 planter over a period of ten years, resulting in a 2009 depreciation deduction of only $2550 rather than $51,000. This method essentially doubled Gabriel's net farm income.

The district court elected to use the income figures presented by Lisa using straight-line depreciation instead of the income figures reported in the federal tax returns. The court reasoned as follows:

> The court has . . . carefully reviewed the evidence concerning [Gabriel's] use of depreciation as a tax deduction, particularly the accelerated methods of depreciation available under the income tax code and the full write-offs available under section 179 of the Internal Revenue Code. All methods of depreciation are at best guesses. No one knows for sure the useful life of a piece of equipment or a particular bull or cow except in hindsight. In re-computing [Gabriel's] depreciation, [Lisa] has used the useful life categories specified in the Internal Revenue Code for various classes of equipment, buildings and livestock. These are broad categories that necessarily lump together items of physical property, some of which may actually last less time than the category specifies and some of which may last longer. On average, they are useful as estimates, however, and are certainly more reflective of useful life than any declining balance method or complete write-off otherwise available for tax purposes.
>
> After carefully reviewing the exhibits in this case, including [Gabriel's] tax returns and the recalculations of depreciation from accelerated to straight line, the court concludes that [Gabriel's income] should be computed as an average over the five years from 2006 through 2010.

Gabriel "question[s]" the court's use of these recalculated figures but does not point to inaccuracies in Lisa's calculations or explicate flaws in the court's analysis. Our courts have expressed a preference for the straight-line depreciation method. *See In re Marriage of Knickerbocker*, 601 N.W.2d 48, 52 (Iowa 1999) (concluding "it was proper for the court of appeals to recalculate depreciation of [] personal property farming assets under a straight line method of depreciation"); *Gaer*, 476 N.W.2d at 329 (using straight line depreciation); *accord In re Marriage of McDermott*, ___ N.W.2d ___, ___ (Iowa 2013) (noting district court could have adjusted for straight-line depreciation). And the district court's determination that this method was more reflective of the items' useful life than other methods was borne out by the detailed list of depreciated items Lisa included with her exhibits. We conclude the court acted equitably in calculating Gabriel's farm income using straight line depreciation.

2. Averaging Years. To establish net monthly income for a self-employed person or person with fluctuating income, "it generally is best to use an average of income from a period that accurately reflects the fluctuations in income." *Cossel*, 487 N.W.2d at 681.

Gabriel concedes his income fluctuated and, for that reason, he does not question the court's decision to use a multiple-year average. He simply argues that the court should have included his projected income for 2011 and 2012 in addition to his income from 2006 through 2010.

Gabriel's argument is grounded in his testimony that two farms he rented were sold or were slated to be sold in 2011, thereby reducing the number of acres he could till. He recommended imputing no more than minimum wage

income of $16,640 per year for 2011 and 2012. In his view, expenses would outstrip this income, resulting in net losses for the two years which, when included in the average, would reduce his gross taxable income for child support purposes and, consequently, his child support obligation.

Gabriel provided scant documentation that his income was likely to decrease so substantially. Lisa countered this assertion by pointing out that, from January 1, 2011, through October 30, 2011, Gabriel's gross farm receipts increased by approximately $50,000 from the previous year and, in 2011, he continued to rent one of the farms he thought he would lose.

Despite this evidence that Gabriel's farm income for 2011 would likely be higher rather than lower than in previous years, the district court gave him the benefit of the doubt by not including the 2011 income. The court stated:

> Although 2011 income through the first ten months indicates that it was a better year than any of the preceding five, it would be unfair to [Gabriel] to use any 2011 figures that did not include his typical year-end purchases to be sure that the numbers were comparable to the prior years.

We agree with this reasoning.

As for Gabriel's projected income for 2012, the court stated:

> The court is also disinclined to rely on any projections for 2012. While [Gabriel] probably has most of his input costs for 2012 locked in as a part of his year-end tax planning for 2011, significant uncertainty on the income side exists, especially if the recent volatility in the commodities markets continues, coupled with the possibility that he will be farming fewer acres in 2012.

We concur in this reasoning. While a banker testified Gabriel's anticipated profits for 2012 were going "to be a little tighter than it has been previously" because "grain prices are lower than they have been in the past" and "[i]nput costs are

significantly higher than they have been in the past," this general testimony was too speculative to warrant inclusion of Gabriel's 2012 projected income in the average. *See In re Marriage of Hagerla*, 698 N.W.2d 329, 332-33 (Iowa Ct. App. 2005) (stating income that is speculative or uncertain should not be included when determining a party's child support obligations).

Notably, the five years used by the district court included one year with negative farm income, even after adjusting the figures for straight line depreciation. In our view, the five-year average was a realistic and properly-documented snapshot of Gabriel's income. We are persuaded that the district court acted equitably in declining to include 2011 and 2012 in the average.

B. Attorney Fees.

Iowa Code section 598.36, which governs awards of attorney fees in a modification proceeding, provides "the court *may* award attorney fees to the prevailing party in an amount deemed reasonable by the court." (Emphasis added.) This provision gives the district court considerable discretion in determining whether fees should be awarded. *See In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

Gabriel argues the district court abused its discretion in ordering him to pay Lisa $10,000 in trial attorney fees. We disagree.

Lisa made far less in her day care business than Gabriel did in his farming enterprise. While she lost her bid for sole legal custody, she succeeded in defeating Gabriel's request for physical care of the children and prevailed in her request for increased child support.

The district court carefully examined the proffered billing statement and only required Gabriel to pay a portion of Lisa's attorney fees. The court acted well within its discretion and we will not disturb that ruling.

C. Court Costs.

Gabriel finally contends the district court should not have ordered him to pay all the court costs. Again, the court was vested with discretion in taxing costs. *McNamara v. McNamara*, 181 N.W.2d 206, 211 (Iowa 1970) (stating that in an equity action where all costs were assessed against a partially successful party, the court's "discretionary determination is ordinarily dispositive"). The court did not abuse that discretion.

III. Disposition

We affirm the district court's modification of child support and the court's award of trial attorney fees and costs. Costs are taxed to Gabriel.

AFFIRMED.