IN THE COURT OF APPEALS OF IOWA

No. 8-180 / 07-1111
Filed April 9, 2008

IN RE THE MARRIAGE OF LEVONNE ALICE HUBER AND DAVID AUGUSTINE HUBER

Upon the Petition of
LEVONNE ALICE HUBER,
Petitioner-Appellee,

And Concerning
DAVID AUGUSTINE HUBER,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

David Huber appeals the trial court's modification ruling increasing his support obligation for the parties' minor children. **AFFIRMED AS MODIFIED.**

Ryan P. Tang of Law Office of Ryan P. Tang, P.C., Cedar Rapids, for appellant.

Carolyn J. Beyer of White & Johnson, P.C., Cedar Rapids, for appellee.

Considered by Huitink, P.J., and Mahan and Miller, JJ.

HUITINK, P.J.

David Huber appeals the trial court's modification ruling increasing his support obligation for the parties' minor children. We affirm as modified.

I. Background Facts and Proceedings

The June 27, 2003 decree dissolving the parties' marriage awarded Levonne Huber physical care of the parties' two minor children. David was ordered to pay Levonne $603.62 monthly child support. At that time, David was employed as a chiropractor, earning $40,000 per year. Levonne's annual earnings were approximately $18,000. The amount of child support awarded was calculated based on the parties' stated incomes and adjusted for a twenty-five percent extraordinary visitation credit.

In 2004 David incorporated Huber Chiropractic, P.C. and opened his own clinic in Cedar Rapids. Huber Chiropractic, P.C. is a Subchapter S corporation. David is the corporation's only shareholder.

On September 5, 2006, the Child Support Recovery Unit (CSRU) filed a petition to modify the child support provisions of the June 2003 decree. CSRU cited David's increased earnings as a substantial change of circumstances justifying an increase in his child support obligation. On May 25, 2006, CSRU submitted a revised child support guidelines worksheet based solely on the parties' 2006 individual income tax returns (Form 1040). CSRU's worksheet indicated David's 2006 gross taxable income was $74,389, including wages of $46,258 (Form 1040 line 7) and business income of $25,697 (Form 1040 line 17) from Huber Chiropractic, P.C. CSRU's worksheet also indicated Levonne's 2006

gross taxable income was $18,379 (Form 1040 line 22). CSRU's resulting child support calculations indicated David's child support should be $899 per month after an adjustment for a twenty-five percent extraordinary visitation credit.

For reasons not entirely clear in the record, Levonne retained her own attorney to represent her in the modification proceedings. Levonne's attorney requested production of Huber Chiropractic, P.C.'s corporate tax returns, bank records, and other financial information relevant to David's income and financial condition. The trial court granted Levonne's motion to compel David's compliance with her requested discovery and awarded Levonne related attorney fees in an amount to be determined in the final modification decree.

In a separately-submitted child support guidelines worksheet, Levonne claimed David's 2006 annual gross taxable income was $111,949. Levonne arrived at this amount by adding $48,692, the amount Huber Chiropractic, P.C. deducted on its 2006 corporate tax return for compensation of officers (Form 1120S line 7), and a $63,257 loan to shareholder (Form 1120S Schedule 1 line 7). Levonne's worksheet also indicated her 2006 annual gross taxable income was $18,379. Levonne's resulting calculation indicated David's monthly child support obligation should be $1227.71 after adjustment for an extraordinary visitation credit.

David's child support guidelines worksheet indicated his gross taxable income was $46,258 as reported on his 2006 personal income tax return. His worksheet also indicated Levonne's 2006 gross annual taxable income was

$18,683. David's resulting calculations indicated his child support obligation should be $679.60 after an adjustment for an extraordinary visitation credit.

The fighting issues at trial concerned David's actual income and his financial condition. According to Levonne's version of the evidence, David's standard of living exceeded his income and he was understating or otherwise concealing his income and financial condition. Levonne also offered expert testimony from a certified public accountant to support her contention that the earlier-mentioned $63,257 loan should be treated as David's personal income.

Although David denied Levonne's claims concerning his income and financial condition, he testified that he agreed with the "figures" CSRU used to compute his child support as well as the amount of child support ($899 per month) requested by CSRU. David denied receiving any loans from Huber Chiropractic, P.C. and could not explain why the loan to shareholder appeared on Huber Chiropractic, P.C.'s 2006 corporate tax return. The record also includes bank records indicating David deposited $82,584 in his personal checking account, including income tax refunds totaling $7538. Based on the foregoing evidence, the trial court found:

> CPA Epping testified that tax returns show the $63,257 as a loan to the shareholder would have been money to David. Mr. Epping testified as to the tax reasons why such a distribution made to the sole owner of the corporation might be designated as a loan rather than as salary, on which income tax and FICA (15.3%) would be due, or as business income on which taxes would have to be paid. Based on his extensive experience with returns for professional S corporations, Mr. Epping noted it was unusual to designate the money as a loan to David when the corporate return reflects a loan from David of $69,394. Mr. Epping acknowledged that if, indeed, the amount was paid as a loan, it would be an indebtedness owed

> by David – yet the balance sheet reflects the corporation owes David $69,394.
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> David denies receiving this amount. The Court finds David's testimony concerning his income not to be credible and looks to other evidence including documents and expert testimony for assistance in determining David's income for purposes of calculating child support.
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> CPA Gordon Epping testified. Mr. Epping had reviewed the corporate and individual returns for David for three years. Mr. Epping received check registers and check stubs, however, he received much of that information so late that he was unable to review it thoroughly. Mr. Epping's expert opinion is that David's gross annual income for 2006 was $111,949. He testified that David is building his practice and has shown financial growth in each of its first two and a half years of its existence. In his opinion based on an examination of the records, David's income should continue to increase.
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> The Court has reviewed the opinion of CPA Gordon Epping and the documents received into evidence. The Court finds the testimony of the CPA to be credible. The Court, therefore, adopts it and the Petitioner's guideline support worksheet. The Court finds David's income to be $111,949.

The trial court accordingly modified the June 2003 decree by increasing David's child support obligation from $603.32 per month to $1227.71 per month after an adjustment for a twenty-five percent extraordinary visitation credit. The trial court also awarded Levonne $4403 for attorney fees, noting David's reluctance to provide his financial records and that he had "not been forthcoming about his income."

On appeal, David claims the trial court erred by (1) including a corporate loan in his income and/or failing to average his income over a number of years in determining his child support obligation and (2) awarding Levonne trial attorney fees. Levonne requests appellate attorney fees.

II. Standard of Review

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Modification

The child support provision of an original decree may be modified if there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (Supp. 2005). The court may consider changes in a party's income. *Id.* § 598.21C(1)(a). "[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. . . ." *Id.* § 598.21C(2)(a). The party seeking modification bears the burden of proof by a preponderance of the evidence. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992).

"In determining child support, the court must first look to the child support guidelines." *In re Marriage of Hilmo*, 623 N.W.2d 809, 811 (Iowa 2001). A

rebuttable presumption exists that "the amount of child support which would result from the application of the guidelines . . . is the correct amount of child support to be awarded." Iowa Code § 598.21B(2)(c); Iowa Ct. R. 9.4.

Before applying the guidelines, the net monthly income of both parents must be deduced. *In re Marriage of Huisman*, 532 N.W.2d 157, 159 (Iowa Ct. App. 1995). Although determining a net income of a parent employed by a wholly owned Subchapter S corporation can be difficult, it is not a sufficient justification for failing to make the computation. *See In re Marriage of Titterington*, 488 N.W.2d 176, 178 (Iowa Ct. App. 1992). Under the guidelines, "net monthly income" means gross monthly income minus enumerated deductions. Iowa Ct. R. 9.5. "Gross monthly income" is not defined in the guidelines; nonetheless, we have stated it is the "total taxable" income on the Federal 1040 and "net income" on the IA 1040. *In re Marriage of Cossel*, 487 N.W.2d 679, 683 (Iowa Ct. App. 1992). Gross monthly income can also include such items as overtime, incentive pay, bonuses, commissions, and corporate distributions to shareholders. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005).

As noted earlier, Levonne's claim that David's actual 2006 income was $111,949 is based, in part, on David's receipt of a $63,257 loan from Huber Chiropractic, P.C. in 2006. Although Levonne correctly argues that a compensation-related loan by a corporation to a shareholder may be treated as personal income, the evidence indicating David received a loan is at best ambiguous and incomplete. David denied receiving the loan from Huber Chiropractic, P.C. The records for David's only known personal bank account

disclose no single or series of deposits equal to the amount of the disputed loan. Additionally, our review of the relevant corporate tax returns indicates that Huber Chiropractic, P.C. did not have sufficient retained earnings, business income, or other cash assets from which to make a $63,257 loan to David. Epping's failure to address the source of the loan funds based on his review of the same tax returns diminishes the probative value of his testimony and, unlike the trial court, we decline to assign significant weight to his opinions concerning David's 2006 income. Neither Eppings's opinion nor the trial judge's incredulity provides a reasonable basis from which we can determine David's income. *See In re Marriage of Powell*, 474 N.W.2d 531, 534 (1991) (stating we determine the parties' incomes based on the most reliable evidence).

Levonne also argues David's income should be increased by the amount of David's personal expenses paid by the corporation. *See In re Marriage of Titterington*, 488 N.W.2d at 178-79. She, however, cites no evidence indicating David's personal expenses were deducted from corporate income or were paid from unreported corporate income. In the absence of such evidence, the amount of David's personal expenses paid by the corporation are presumably included in his taxable share of the corporation's business income in the year in which those expenses were paid.

Based on our de novo review of the record, we believe CSRU correctly determined that David's 2006 gross taxable income for purposes of calculating his child support was $74,389 and his resulting child support should be $899 per month. CRSU's version of David's income is more reliable than Levonne's

because it was based on the parties' 2006 individual income tax returns, which included their undisputed wages, as well as David's taxable share of corporate income.

Because the June 27, 2003 order for child support ($602.32) varies by ten percent or more from the amount due ($899) pursuant to the most current guidelines, we conclude Levonne has met her burden of proof in establishing a substantial change in circumstances justifying modification of David's child support obligation. For the foregoing reasons, we modify the trial court's modification decree by reducing David's child support obligation from $1227.71 to $899 per month.

IV. Trial Attorney Fees

An award of trial attorney fees rests in the trial court's discretion and, therefore, will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). An award of attorney fees must be fair and reasonable and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994).

Like the trial court, we find the award of trial attorney fees is warranted in this case. David delayed providing the corporation's financial records for months pending trial. As a result, court intervention was required; trial was delayed; and Levonne incurred significant attorney fees. The trial judge did not abuse her discretion in awarding Levonne trial attorney fees. We affirm on this issue.

V. Appellate Attorney Fees

Levonne requests attorney fees on appeal. The award of attorney fees is discretionary and is not a matter of right. *In re Marriage of Sprague*, 545 N.W.2d 325, 328 (Iowa Ct. App. 1996). We must consider "the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal." *Id*. We decline to award Levonne appellate attorney fees. Costs are taxed equally to the parties.

We have carefully considered the remaining issues on appeal and conclude they have no merit or are controlled by the foregoing.

AFFIRMED AS MODIFIED.