IN THE COURT OF APPEALS OF IOWA

No. 8-700 / 07-0526
Filed November 13, 2008

Upon the Petition of

KIMBERLY S. PLUNKETT, n/k/a
KIMBERLY S. AUS,
Petitioner-Appellant/Cross-Appellee,

And Concerning

PAUL M. PLUNKETT,
Respondent-Appellee/Cross-Appellant,

Appeal from the Iowa District Court for Johnson County, Amanda Potterfield, Judge.

Kimberly Aus appeals a district court order modifying her ex-husband's child support obligation. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Lillian Lyons Davis of Kennedy, Cruise, Frey & Geiner, L.L.P., Iowa City, for appellant.

Paul M. Plunkett, Fort Riley, Kansas, pro se.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ. Potterfield, J. takes no part.

VAITHESWARAN, J.

Kimberly Aus appeals a district court order modifying her ex-husband's child support obligation. We affirm in part, reverse in part and remand.

I. Background Facts and Proceedings

Kimberly and Paul Plunkett married in 1989 and divorced in 1997. Paul was ordered to pay Kimberly $106.51 per month in child support for their two minor children. Four years later, Paul's child support obligation was increased to $577.04.

In 2005, Kimberly again applied to modify Paul's child support obligation.[1] She sought an order requiring Paul to pay $1123.10 per month, with a due date beginning in March 2006.

The district court found Kimberly's earning capacity was $15.00 per hour for fifty weeks per year and imputed $30,000.00 of gross annual income to her. In calculating her net monthly income, the court did not grant Kimberly a qualified additional dependent deduction for the three children she had with her current husband.

The court found Paul's gross annual income was $51,664.56. That sum included untaxed income of $15,927.36 for housing and food allowances he received as a member of the military. The court also found Paul did not pay Iowa state income tax. For purposes of calculating his net monthly income, the court nonetheless granted him a deduction for Iowa income tax liability.

[1] The dissolution decree and 2001 modification action were filed in Ohio. Kimberly subsequently moved to Iowa. Ohio relinquished jurisdiction and Iowa accepted jurisdiction of the 2005 action.

The court ordered Paul to pay $1057.00 per month in child support, effective November 1, 2006, and ruled that the child-support obligation would decrease to $695 per month in the event his housing allowance was no longer included in his salary.

On appeal, Kimberly contends (1) she is entitled to a greater amount of child support than the district court ordered, (2) the modified child-support obligation should have been made retroactive to an earlier date, (3) a judgment in her favor should have been entered for child support she claims she did not receive, and (4) this court should grant her request for appellate attorney fees.

II. Analysis

A. Amount of Child Support.

Kimberly first alleges the child support should have been set at $1167.74 per month instead of $1057 per month. She cites the following errors in the court's determination: (1) the absence of findings of fact to support a variation from the guidelines; (2) Paul's receipt of a deduction for Iowa income tax liability; (3) the court's failure to grant her a qualified additional dependent deduction; (4) the court's imputation of $30,000 in income to her; and (5) the court's decision to reduce Paul's child-support obligation if he stopped receiving military allowances.

1. Variation From the Guidelines. Kimberly argues the district court varied from the guidelines without making findings to support a variance. *See* Iowa Court Rule 9.11. On our de novo review of the record, we are convinced the district court applied the guidelines as written, adopting Paul's proposed guidelines worksheet which determined his child-support obligation to be $1056.91. Finding no variance from the guidelines, we reject this argument.

2. Tax. Kimberly next contends the district court should not have allowed Paul a deduction for state income tax liability. We agree. The record reflects that Paul did not pay Iowa income taxes. He testified he was in the military, presently lived in Kansas, and claimed Florida as his state of residence because Florida has no state income tax. He agreed that the deduction for state income tax liability shown on his proposed child-support guidelines worksheet was $1587.21 and should have been added back to arrive at his net income. Based on this evidence and the court's finding that Paul "does not pay state income tax, because he designated his residence as the state of Florida, which has no state income tax," we reverse the child-support calculation and remand for re-calculation of Paul's obligation without the deduction for state income tax liability.

3. Qualified Dependents. Kimberly also contends the court should have granted her a deduction for the three children she has with her current husband.

Iowa Court Rule 9.5(10) allows a deduction for qualified additional dependents. The qualified additional dependent deduction is considered a deduction for any child for whom parental responsibility has been established as defined in the guidelines. Iowa Admin. Code r. 441-99.2(8). The deduction applies to "dependents of the custodial or noncustodial father or mother, whether in or out of the parent's home." *Id.* at 99.2(8)(a)(1). The deduction may be used in an upward modification. *Id.* at 99.2(8)(a)(3).

There is no dispute that Kimberly was legally responsible for the three children. *See* Iowa Court Rule 9.7(4). Under Iowa Court Rule 9.8, the monthly deduction for the three additional children would be $279. Iowa Court R. 9.8(1)(*c*). The rule specifies that, after a threshold determination of eligibility is made, "the deduction shall be used in the determination of the net monthly income." Iowa Court R. 9.8(2); *State v. Klawonn*, 609 N.W.2d 515, 521–22 (2000) (stating use of the word "shall" by the legislature indicates a duty).

As it is undisputed that Kimberly has three children from her present marriage and is legally responsible for them, we reverse the denial of Kimberly's request for a qualified additional dependent deduction and remand for a recalculation of her net monthly income with that deduction and a recalculation of Paul's child-support obligation.

4. Kimberly's Income. Kimberly next contends the district court should not have imputed to her an annual income of $30,000.00.

When a parent voluntarily reduces his or her income or decides not to work, it may be appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guideline. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997).

Kimberly testified that prior to moving to Iowa, she held a part-time job earning $15.00 per hour. At the time of trial, she was not earning wages.

The district court imputed income which was the equivalent of a full-time position earning $15.00 per hour for fifty weeks of the year. Although there is no indication that Kimberly worked full-time when she was previously earning $15.00 per hour, we cannot conclude the court's decision to impute full-time income to

her amounted to a failure to do equity. The court found that Kimberly expressed an intent to return to the workforce after her youngest child began kindergarten. The record also indicates that Kimberly earned $12,500.00 of annual income several years earlier. It was not unreasonable for the court to conclude she could earn more with the passage of time.

5. Housing Allowance. Paul works as a military police officer in the United States Army. He testified that at the time of the modification hearing he was earning base pay of $35,000.00 plus a housing allowance.

As noted, the district court provided for the contingency that Paul would lose his housing allowance. The court stated, "[i]n the event Mr. Plunkett's housing allowance is no longer included in his salary, and he so documents the change to Ms. Aus, Mr. Plunkett's child support will reduce to $695 . . . ." Kimberly filed a motion to enlarge and amend, seeking the deletion of this portion of the decree. The district court denied the motion. On appeal, Kimberly contends there was insufficient evidence to make this reduction. We agree.

In *Morrison v. Morrison*, 208 Iowa 1384, 1388, 227 N.W. 330, 332 (1929), our supreme court said:

> Our duty is to determine this case upon the changed circumstances and conditions alleged in the petition and shown by the evidence to exist at this time, and not speculate as to the future. Should the future bring about changed conditions and circumstances, the same statute which the appellant now seeks to invoke in his behalf may then be used for relief.

Paul testified that the housing allowance is offered to soldiers who do not live in government-issued barracks. For the two years he was stationed in Kansas, Paul received a housing allowance. Paul stated he was hoping to remain in

Kansas but he might be reassigned to Germany. He testified that if he was stationed in Germany, he might get military housing or he might receive a housing allowance. Because a reassignment had yet to occur at the time of trial, he could not say with certainty which option would be exercised. For this reason, we strike that portion of the decree that provides for this contingency.

B. Effective Date for Modification.

Kimberly contends the district court should have made the modification effective as of March 2006 rather than November 2006.

Iowa Code section 598.21 (2005) states that child support "may be retroactively modified only from the date the notice of the pending petition for modification is served on the opposing party." The trial court has discretion in determining whether the modification should be made retroactive. *In re Marriage of Keopke*, 483 N.W.2d 612, 614 (Iowa Ct. App. 1992). While the district court could have selected an earlier effective date, the court was not required to do so. Given the abuse of discretion standard under which we review this aspect of the court's ruling, we affirm this part of the ruling.

C. April 2006 Payment.

Kimberly contends the district court should have granted judgment in her favor in the amount of $577.04 plus interest. This represents the amount of child support due in April 2006, which she claims was not paid. On this issue the district court found:

> Mr. Plunkett is current on his support, with the possible exception of support for April 2006, the transition month when his child-support obligation transferred from Ohio to Iowa. He paid that month's support, but received a reimbursement from the State of Ohio. Ms. Aus testified that she did not receive that month's payment. The

> court finds the record is insufficient to determine whether Mr. Plunkett still owes Ms. Aus for that month's child support.

Kimberly indeed testified she did not receive her April 2006 child support payment. Paul believed he was current on his payments but did not refute Kimberly's testimony of non-receipt. The payment record for Paul's child support payments through the State of Iowa shows his payment was credited on April 20, 2006, and processed on May 1, 2006, indicating it was for May 2006 rather than April 2006. Based on this record, we conclude Kimberly did not receive a child support payment for April 2006 and is entitled to judgment in her favor for the stated amount.

D. Appellate Attorney Fees.

Finally, Kimberly requests an award of her appellate attorney fees. An award is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We order Paul to pay $1000.00 towards Kimberly's appellate attorney fees.

III. Disposition

We affirm all aspects of the district court's modification decree except the following. We reverse the child-support determination and remand for a recalculation of child support with the inclusion of the qualified additional dependent deduction for three children in calculating Kimberly's net monthly income and the exclusion of the deduction for state income tax liability in calculating Paul's net monthly income. We strike the portion of the decree addressing the possible loss of Paul's housing allowance. We reverse the district court's denial of a judgment in favor of Kimberly for the April 2006 child support

payment and remand for entry of judgment for $577.04, plus interest. We order Paul to pay Kimberly $1000.00 toward her appellate attorney fee bill. Costs are taxed equally to both parties.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED