IN THE COURT OF APPEALS OF IOWA

No. 9-395 / 08-1800
Filed June 17, 2009

IN RE THE MARRIAGE OF KIMBERLY PETERSON AND SCOTT PETERSON

Upon the Petition of

KIMBERLY PETERSON,
Petitioner-Appellee,

And Concerning

SCOTT PETERSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Chickasaw County, Bruce B. Zager, Judge.

Scott Peterson appeals from the decree dissolving his marriage to Kimberly Peterson. **AFFIRMED.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun & White, L.L.P., New Hampton, for appellant.

Nathaniel Schwickerath of Schwickerath, P.C., New Hampton, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Scott Peterson appeals from the decree dissolving his marriage to Kimberly Peterson, contending that the district court (1) should not have considered the fact he received overtime pay in the past in determining his child support obligation, and (2) did not have jurisdiction to enter a medical support order. We affirm.

SCOPE OF REVIEW. Because this case is an equitable proceeding, our review is de novo. Iowa R. App. P. 6.4. In such proceedings, we give weight to the district court's findings of fact, especially when considering the credibility of the witnesses. However, we are not bound by those findings. Iowa R. App. P. 6.14(6)(*g*).

BACKGROUND AND PROCEEDINGS. Scott and Kimberly were married in 2000. Twins were born to the marriage in January of 2004. To their credit the parties were able to resolve custodial and property division issue by stipulations that were approved by the district court in entering the decree dissolving the marriage on September 19, 2008. The decree noted that the parties were not able to agree on child support, and the court ordered that the matter be set for "hearing on affidavits on a court service day on the 30th day of September, 2008 at 10 o'clock a.m."

Certain stipulated provisions that the court approved are relevant to the issues raised. The children were placed in the parties' joint legal custody and the parties agreed to an extensive joint parenting plan that appears to find each parent having the children in his or her care about one-half of the time. Each

party was to take the dependent income tax exemption for a specified twin. There also was a provision for medical support, which provided that Scott should pay the first $250 of one twin's medical expenses and Kimberly should pay the first $250 of the second twin's medical expenses. The provision further provided that the party incurring the uncovered cost should submit a demand for payment of the other party's share but further allocation was made of the uncovered costs.

The parties submitted affidavits as to their financial status, and Scott submitted an affidavit of the plant manager of Golden Grain Energy in Mason City, where Scott was employed. The affidavit stated, "At this moment the ethanol business is running into a supply problem and there is no guarantee that from this point forward that Scott Peterson is going to have overtime work available to him."

After considering the affidavits on October 7, 2008, the district filed a supplemental decree and ordered that Scott pay Kimberly child support of $315.47 a month. The court stated that to arrive at this figure, it considered Scott's annual earnings to be $47,468 and Kimberly's to be $23,587.

On October 20, 2008, Kimberly filed an application for an order for mandatory income withholding, contending that Scott was delinquent in payment of his child support in the amount of $584.91, that medical support had not been set, and that based on the income used by the district court to calculate child support, the uncovered medical expenses for the child should be allocated thirty-three percent to Kimberly and sixty-seven percent to Scott. The application bore a certification of service stating, "the application was served on all parties to the

above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings". On October 28, 2008, the district court entered an order for mandatory income withholding and further entered a supplemental decree providing that Kimberly should contribute thirty-three percent of uncovered medical expenses and Scott should contribute sixty-seven percent. The court noted that payment of the first $250 was addressed in the stipulations and determined it should remain as agreed by the parties.

On November 7, 2008,[1] Scott filed a notice of appeal with the Chickasaw County Clerk of Court. It contained a proof of service indicating it was served on "all parties to the above cause to each of the attorneys of record herein at their respective address disclosed on the pleading on November 6, 2008." Scott contended that he was appealing from "the Supplemental Decree of Dissolution of Marriage filed October 7, 2008".

INCLUSION OF OVERTIME PAY IN CALCULATING CHILD SUPPORT. Scott contends the district court should not have considered overtime pay in determining his income for purposes of calculating child support. He contends, and we agree, that while overtime can be included, it should not be if it is merely speculative. *See Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). Scott contends the affidavit of the plant manager supports a finding that it is speculative. Kimberly argues the record reflects that he has received overtime in the past, his pay stubs as of the time of trial indicated he had continued to receive it, and it should be included.

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[1] This was a Friday.

We have some sympathy for Scott's claims, particularly in these tough economic times. However, as Kimberly argues, Scott has in the past earned more than his regular wage. We affirm on this issue.

MEDICAL SUPPORT. Scott contends the district court did not have jurisdiction to enter the medical support order. Kimberly filed some thirteen days after the decree was entered an application for an order setting medical support, and in granting Kimberly's request the district court entered a supplemental decree regarding medical support. Apparently, the only notice to Scott was a mailing of the application to Scott's lawyer.

Kimberly's application was not filed as an application for a nunc pro tunc order, nor did the district court in its order find it to be nunc pro tunc or address it as one. Kimberly now contends that it was a nunc pro tunc order because it was necessary to correct an oversight in the original support order as to medical expenses in excess of $250 a year.

The issue is not before us. Scott's notice of appeal served on November 6, 2008, indicates he was appealing from the decree filed October 7, 2008. No appeal was taken from the October 28, 2008 order. In *State v. Formaro*, 638 N.W.2d 720, 722-23 (Iowa 2002), Formaro filed a notice of appeal from judgment and sentence but never filed a separate notice of appeal from the ruling on the application to review bond. There the supreme court determined the issue of the additional terms imposed on the bail was not properly before them in the appeal. *Formaro*, 638 N.W.2d at 727. The court noted that rulings on collateral or independent issues after final judgment are separately appealable as final

judgments. *Id.* (citing *Board of Water Works Trs. v. Des Moines*, 469 N.W.2d 700, 702 (Iowa 1991)). The court found when a court addresses the issue of bail following the entry of a judgment and sentence, any appeal from a ruling on the issue must be separately appealed. *Id.* A defendant cannot rely on the notice of appeal from the judgment and sentence of the district court. *Id.* The court found it had no jurisdiction to address the bail issue. *Id.* Here, no appeal was taken from the later decision; consequently, we have no jurisdiction to address this issue.

AFFIRMED.