

IN THE COURT OF APPEALS OF IOWA

No. 9-502 / 09-0115
Filed July 22, 2009

IN RE THE MARRIAGE OF RYAN MILLER AND JESSICA MILLER

**Upon the Petition of
RYAN MILLER,**
Petitioner-Appellant,

**And Concerning,
JESSICA MILLER n/k/a JESSICA
OVERHAKE,**
Respondent-Appellee.

Appeal from the Iowa District Court for Des Moines County, John G. Linn,
Judge.

Appeal from the order modifying the child custody provision of the parties'
dissolution decree. **AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED.**

Michael J. Koury, Jr. of Bush, Motto, Creen, Koury & Halligan, P.L.C.,
Davenport, for appellant.

Marlis J. Robberts of Robberts Law Office, Burlington, for appellee.

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

SACKETT, C.J.

Ryan Miller appeals, challenging an order modifying the custodial provision of his dissolution decree and awarding primary physical care of the parties' children to his former wife, Jessica. He contends Jessica failed to meet the burden necessary for modification and that the district court improperly computed his child support. We affirm in part, reverse in part, and remand.

SCOPE OF REVIEW. As an equitable action, we review modification proceedings de novo. Iowa R. App. P. 6.907; *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them. Iowa R. App. P. 6.904(3)(g).

BACKGROUND AND PROCEEDINGS. Ryan and Jessica were married in February of 1996. They had three children, a daughter born in October of 1996, a son born in December of 1997, and a son born in January of 1999. The parties' marriage was dissolved in October of 1999. The dissolution court awarded the parties joint custody and joint physical care of the children. The parties at the time lived in Burlington, Iowa. They shared care by dividing the week between them. Ryan was ordered to pay Jessica child support of \$23.08 a week.

In November of 2002, the parties consented to the modification of the custody order granting Ryan primary physical care, but providing the parties retain joint legal custody. Jessica, who was moving to Springfield, Illinois, was ordered to pay Ryan child support of \$46.19 a week and Ryan's obligation to

Jessica for child support was terminated. Jessica was given visitation three weekends a month.

Prior to this voluntary modification, Ryan had established a relationship with Heather, and she and her son, who at the time of the hearing on the present petition for modification, was nine years of age, moved in with Ryan. Heather assisted Ryan with the care of the children during Jessica's absence. By the time of the modification hearing the couple had been in an eight-year relationship.

Jessica lived in Springfield about six months, moved to Davenport, Iowa, for three months, and moved back to Burlington in June of 2003. During this period she apparently was in an abusive relationship, suffered some mental problems, and had minimal involvement with the children's care. However, by agreement after she returned to Burlington, the parties shared care of the children on a substantially equal basis although there was no formal modification of the custody order. They attempted to work things out according to the children's needs and at times the children would not be together in the same household. Ryan and Heather meanwhile had a child in 2003 and in 2004. They had a child born in 2000 who died when an infant.

In February of 2008, Jessica sought modification of the order modifying custody, asking either that the court modify the order so that she have primary physical care of the children or that the parties have joint physical care. Ryan requested the court to deny Jessica's request to modify the existing order, but in the alternative was open to shared physical care.

In April of 2008, Jessica married Russell, a man she had lived with for two-and-a-half years. Russell apparently adopted Jessica's fourth child whose biological father's parental rights had been terminated. Russell had two children from a prior relationship who were four and three at the time of the modification hearing. The children visit in Jessica and Russell's home every other weekend.

The modification came on for hearing in late September of 2008. In early January of 2009, the district court entered an order modifying the decree, finding shared care was not in the children's interest and awarding Jessica primary physical care. Ryan was granted visitation. He was ordered to pay child support for the three children in the amount of \$797.28 a month. The court made provision for medical insurance and uncovered medical expenses. The district court denied both parties' applications for attorney fees and divided the court costs between the parties equally.

MODIFICATION OF CUSTODY. Ryan contends Jessica should not have been awarded primary physical care. A party seeking a change in custody must establish that "conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change." *In re Marriage of Smiley*, 518 N.W.2d 376, 379 (Iowa 1994). The parent wishing to modify custody must demonstrate superior care-taking abilities. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). The court can modify custody only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870

(Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the child. *Id.* Additionally, the parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons. *Id.*

There have been changed circumstances since the modified order. The parties have had additional children. Jessica has remarried. The most substantial change is that the parties established their own shared care arrangement which appears to have met the children's needs in a number of ways, including supervision during their parents' working hours, and providing the children with substantial involvement with each of their parents. It has also allowed both of the parents to be substantially involved with their children's care.

The parents and children are not without problems. Each has complicated his or her life and those of their children in establishing new relationships and in bringing new children into their homes. Both parents have made mistakes in parenting and yet we agree with the district court that they are both fit parents. They disagree about some issues concerning the children. They each attempt to overplay the deficiencies of the other. Both of them put too many child care responsibilities on their oldest child.

However, they have quite successfully been sharing the care of the children. First, they shared care by an agreed-upon decree and then, on Jessica's return to the Burlington area, the parties again shared care by an

informal agreement where Ryan allowed Jessica to become a bigger part of their children's lives than the modified decree naming him the primary custodian provided. The district court found, "As a practical matter, the parties have evolved to a status quo in which they share physical care of the three children. This has been the informal arrangement the past four years." The children appear to have a satisfactory relationship with Jessica's husband and Ryan's girlfriend, and both persons assist with child care responsibilities.

In finding that Jessica could render superior care the court considered that, (1) Ryan and Heather separated for two months in late 2007, (2) Ryan and Heather lived in a moderately sized three-bedroom home but Jessica had a larger home, (3) the older child preferred to live with Jessica, (4) Jessica's home is in a good neighborhood while Ryan's is in an isolated area, and (5) Ryan has allowed Jessica, since her return, to assume most if not all of the responsibilities for the children's medical care, education, and extracurricular activities.

This is a difficult case. These children, except for the period when Jessica left the area, have lived in a shared care arrangement either by court order or by parental agreement. The parties, while having some minor disagreements, have worked well together. At times they have assumed different responsibilities and collectively have provided for the children.

The record clearly supports a modification to provide for shared care, an arrangement that the parties both would have been willing to accept, and which de facto they have been doing. The question of whether the children will have superior care with Jessica as their primary custodian is more troublesome.

Things have worked well because the parties have cooperated with child care and have assumed different responsibilities for the children. Giving the required deference to the district court findings we affirm.

CHILD SUPPORT. Ryan contends the district court erred in determining his child support obligation. He argues that the district court should not have considered a monthly payout on a confidential settlement of a wrongful death claim. The wrongful death settlement stemmed from the death of Ryan and Heather’s infant born in 2000. The district court determined the payout should be treated as income for purposes of determining Ryan’s child support obligation based on the definitions contained in Iowa Code sections 252K.101(5)¹ and 252D.16(1)² (2007). Ryan contends it should not be treated as income for purposes of determining his child support obligation.

Ryan and Heather had a child born in October of 2000 that died a month later from asphyxiation due to the obstruction of his nose and mouth caused by the defective design and configuration of a portable crib. The matter was settled

¹ Iowa Code chapter 252K, the Uniform Interstate Family Support Act, provides at section 252K.101(5), as follows: “In this chapter (5) ‘*Income*’ includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under the law of this state.”

² Iowa Code chapter 252D, titled Support Payments—Income Withholding, provides at section 252D.16(1) as follows:

As used in this chapter, unless the context otherwise requires:

1. “*Income*” means all of the following:

a. Any periodic form of payment due an individual, regardless of source, including but not limited to wages, salaries, commissions, bonuses, workers’ compensation, disability payments, payments pursuant to a pension or retirement program, and interest.

b. A sole payment or lump sum as provided in section 252D.18C, including but not limited to payment from an estate including inheritance, or payment for personal injury or property damage.

c. Irregular income as defined in section 252D.18B.

prior to the modification hearing for a sum certain that Ryan and Heather were to receive partly in an immediate cash payment and the balance of the settlement was to be paid out in periodic payments. At the time of the modification hearing Ryan and Heather continued to receive periodic payments. The payments were an alternative to an immediate lump sum settlement and are non-taxable.

Ryan recognizes that certain monies received, though not subject to federal taxation, are considered in determining income for child support purposes. But, he argues that these, including veteran's disability, social security disability, retirement benefits, and workers' compensation benefits, are properly considered because they clearly replace lost income or supplemental income in case of disability or lost earning capacity. He advances, and the record reflects, that the payments he receives based on a sum already determined, does not replace his lost earnings or compensate him for a loss of earning capacity.

Unlike the district court, we do not determine the definitions of income for the purpose of applying the child support guidelines to be the definitions found in chapters 252K and 252D. Both definitions are specific to the chapter where they appear and there are no claims made here under either chapter. The support to be paid here is established under the child support guidelines.

Iowa Code section 598.21B provides that the Iowa Supreme Court shall maintain uniform child support guidelines and section 598.21B(2)(c) provides in applicable part:

Rebuttable presumption in favor of guide-lines. There shall be a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded.

The legislative intent in establishing child support guidelines is to provide for the best interests of the child by determining an adequate level of support for children commensurate with the parents' income and resources. *In re Marriage of Belger*, 654 N.W.2d 902, 906 (Iowa 2002); *In re Marriage of Beecher*, 582 N.W.2d 510, 513 (Iowa 1998).

The guidelines use "net monthly income" to determine support. Iowa Ct. R. 9.14 (2009) (stating that to compute the guideline amount, first compute the adjusted net monthly income); *Beecher*, 583 N.W.2d at 513. Income of a party refers to net income as defined in the guidelines. See *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 332 (Iowa Ct. App. 2005). Net income is gross income less certain allowable deductions. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992); *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991); *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991). Rule 9.5 defines "net monthly income" as follows: "In the guidelines the term 'net monthly income' means gross monthly income less deductions for the following: Gross monthly income does not include public assistance payments or the earned income tax credits."

The guidelines do not limit the definition of gross income to that income reportable for federal income tax purposes. *Lee*, 486 N.W.2d at 305.

As gross income is not specifically defined in the guidelines, we first look to the common meaning of the word. See Iowa Code § 4.1(38); *Mason v. Schweizer Aircraft Corp.*, 653 N.W.2d 543, 548 (Iowa 2002). Income has been defined as "undeniable accessions to wealth, clearly realized, and over which the

taxpayers have complete dominion.” *Comm’r of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S. Ct. 473, 477, 99 L. Ed. 483, 490 (1955). The standard definition of “income” is simply “a gain or recurrent benefit that is usually measured in money and for a given period of time, derives from capital, labor, or a combination of both.” *In re Marriage of Alter*, 89 Cal. Rptr. 3d 849, 861 (Cal. Ct. App. 2009). The traditional understanding of “income” is the gain or recurrent benefit that is derived from labor, business, or property, or from any other investment of capital. *In re Marriage of Scheppers*, 103 Cal. Rptr. 2d 529, 532 (Cal. Ct. App. 2001). Income is something that comes in as an increment or addition, a gain or profit that is usually measured in money and increases the recipient’s wealth. *In re Marriage of Sharp*, 860 N.E.2d 539, 548 (Ill. App. Ct. 2006).

There is no evidence that the payments are a replacement for Ryan’s earnings or for an injury that decreased his earnings. The payments are not derived from investment of capital, labor, or a combination of both. The settlement sum and payment schedule were established before the modification was ordered and, at that time, became an asset of Ryan’s. No part of the payments is interest, nor do they represent earnings from assets. Nor can we assume that any of the amount was reimbursement for Ryan’s disability or lost earnings.³

³ In determining a settlement for the personal injury of a parent a Louisiana court concluded that lump sum personal injury payments were not income, but periodic payments were. *Kelly v. Kelly*, 775 So. 2d 1237, 1243-44 (La. Ct. App. 2000) *overruled in part on other grounds by Salles v. Salles*, 928 So. 2d 1, 7-8 (La. Ct. App. 2005); see

What Ryan receives is a payout of an asset. It does not meet the definition of income. While a party's assets may be utilized for the purpose of collecting delinquent support, assets are not included as income for calculating prospective child support obligations under the guidelines. The present scenario is akin to a parent having \$100,000 in a savings account and receiving a payout of the principal every month. Interest earned on the account would be income, yet the principal amount distributed would not be income. The payments should not have been considered income for the purpose of applying the guidelines. We reverse the district court on this issue and remand for a new determination of child support. We award no appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

also S.G. v. D.M., 653 N.Y.S.2d 525, 526 (N.Y. Fam. Ct. 1996). We do not find this case relevant because the settlement was for a personal injury to a parent.