IN THE COURT OF APPEALS OF IOWA

No. 9-696 / 08-1922
Filed September 17, 2009

IN RE THE INTEREST OF
BRADEN JAMES VASKE

Upon the Petition of

BRADLEY JAMES SMITH,
Petitioner-Appellant,

And Concerning

JENNIFER VASKE,
Respondent-Appellee.

Appeal from the Iowa District Court for Tama County, Fae Hoover-Grinde, Judge.

Bradley James Smith appeals from an order in a paternity action. **AFFIRMED AS MODIFIED.**

Kevin Engels of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellant.

Melissa Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Doyle, JJ.

SACKETT, C.J.

Bradley James Smith, determined to be the father of a son born in May of 2007, appeals from an order in a paternity action. He challenges the district court's decision to order that he pay child care and activity expenses for the child in addition to child support provided for under the child support guidelines. We affirm as modified.

BACKGROUND. Jennifer Vaske is the child's biological mother. On June 5, 2007, Bradley filed a petition asking that the paternity of the child be established and that if he be established as the child's biological father, the court make orders regarding custody and support. On March 4, 2008, the district court entered an order finding Bradley to be the child's father and providing the parties be joint custodians and that Jennifer have primary physical care and Bradley have visitation.

The district court established the parties' incomes for purpose of applying the child support guidelines. The district court fixed Bradley's support obligation at $446 a month and ordered him to maintain medical insurance for the child as long as it remained available for Bradley through his employer at a reasonable cost. Jennifer was ordered to pay the first twenty-five dollars of uninsured medical expenses and the balance of the medical expenses were allocated sixty percent to Bradley and forty percent to Jennifer.

The parties both filed motions pursuant to Iowa Rule of Civil Procedure 1.904(2) seeking to amend or enlarge the court's findings. That part of Jennifer's motions' relevant to this appeal requested that:

> [T]he court reconsider the child support obligation currently ordered. Petitioner [Bradley] should be attributed the income he could earn rather than allowing him to voluntarily reduce his income. At minimum, if the child support amount is going to remain as set pursuant to Petitioner's [Bradley's] current income (as opposed to the higher income he was earning from the employment he quit), Petitioner [Jennifer] requests the court to direct Petitioner [Bradley] to pay for half of the child's expenses, including activities and day care expenses.

In response to this portion of Jennifer's motion the district court expanded its original ruling to include the following provision:

> Bradley and Jennifer shall share the child's activity cost and daycare cost equally. Each party shall promptly supply to the other party receipts of any expenditure made on the child's behalf for activities or day care, and payment upon the receipt shall be made no less than thirty days thereafter.

The district did not change the income attributable to Bradley for purposes of applying the child support guidelines.

CHILD CARE AND ACTIVITY EXPENSES. Bradley contends the district court erred in ordering childcare and activity expenses that exceeded the guidelines support. He argues there is no evidence to support the additional expenses attributed to him and the district failed to make the specific findings necessary to justify exceeding the guidelines amount.

Jennifer responds that the increase in support is justified because the guidelines established Bradley's income at a reduced rate and she was not allowed a child care deduction. She contends if the record is not sufficient to support the district court's findings we should remand for a rehearing.

Adding child care and activity expenses to Bradley's support based on the income the district court attributed to him for purpose of applying the guidelines is

a variation from the guidelines. Iowa Court Rule 9.11 addresses variances and provides in applicable part:

> The court shall not vary from the amount of child support which would result from the application of the guidelines without a written finding that the guidelines would be unjust or inappropriate as determined under the following criteria:
>
> (1) Substantial injustice would result to the payor, payee or child.
>
> (2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case

The district court did not make the required findings. However, we review the record de novo to determine whether there is evidence to find that the guideline amount is unjust or inappropriate under the above criteria.

There is no evidence as to the amount expected to be expended for childcare and activity expenses. Jennifer admittedly did not testify to child care expense or enter an amount for child care expense[1] on her worksheet. There was no testimony as to anticipated activity expenses[2] or the amount of and what expenses are considered activity expenses. It is difficult to make a determination there should be a variance without evidence of the anticipated amount of the expenses.

Jennifer contends the additional award is supported by evidence that Bradley was voluntarily reducing his income.

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[1] Jennifer worked two twelve-hour days on weekends when apparently her family cared for her children.

[2] In *In re Marriage of Gordon*, 540 N.W.2d 289, 292 (Iowa Ct. App. 1995), we found that a parent's request for additional child support for clothes, school supplies, and summer recreation activities did not support a deviation from the guidelines amount, reasoning these expenses are considered under the guidelines.

At the time of the hearing Bradley was employed as a laborer at Tama Paperboard earning $18.28 an hour. The plant operated twenty-four hours a day and Bradley was required to work rotating shifts. This meant that he worked from midnight to eight in the morning for eight days. He had two days off before he worked seven days from four in the afternoon until midnight. He then had two days off before he worked seven days from eight in the morning until four in the afternoon. He then had four days off before the cycle repeated. Tama Paper provided him with health insurance. Bradley maintained a good status in this job and there was no evidence that job was in peril.

However, Bradley at the time of trial had been hired at Heartland Cooperative in Traer and was slated to begin the job in two weeks. The job at Heartland paid twelve dollars an hour and offered him an anticipated additional $5000 a year in overtime. Heartland offered essentially the same health insurance that Bradley had at Tama Paper.

The district court computed Bradley's income for purpose of applying the child support guidelines on his anticipated income at Heartland including, as it should, Bradley's overtime pay. *See Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997) (determining overtime pay should be included in gross income for purpose of applying the child support guidelines if it is consistent). In using the projected income from Heartland the district court found and the evidence supports that the job at Heartland would allow Bradley to use his college degree and allow him to work Monday through Friday from eight in the morning to five in the afternoon.

As noted above the district court, despite Jennifer's request that it do so, did not modify its order determining Bradley's income to increase Bradley's salary from what he would be earning at Heartland to what he was earning at Tama Paper. Jennifer has not cross-appealed from that ruling. Therefore, the question before us is not whether Bradley's income for purpose of applying the child support should be increased. The only argument we address is whether the fact that Bradley had earned and could continue to earn more money justifies a departure from the guidelines.

The Iowa courts have addressed the issue of whether a parent's claim of decreased income in an action seeking to modify child support supported a reduction. Some of the principles applied in these cases are instructive, though the question comes to us here as justification for a departure from the guidelines in an initial determination, not in a modification.

In *In re Marriage of Swan*, 526 N.W.2d 320, 323-24, the court opined that parents who reduce their income voluntarily with an intent to deprive their children of support or in a reckless disregard for their children's well-being are not entitled to a commensurate reduction in child support. We do not believe Bradley took the job at Heartland for the purpose of depriving his child of support or in a reckless disregard of the child's well-being. And we do not believe that the district court erred in using Bradley's projected salary at Heartland in determining his child support obligation. As the district court found, he is going into a job where he can use his college degree and work regular hours. The new job will provide him greater opportunities to interact with his son. Furthermore,

there is testimony from both Bradley and Jennifer that while working at Tama Paperboard Bradley has had difficulty sleeping and has taken a number of sleep aids as well medication for high blood pressure and to calm his nerves. He believes these problems will be relieved with his new job.

The district court made no finding that a failure to depart from the guidelines would render a substantial injustice to Jennifer or her child or that special circumstance make adjustment necessary in this case. We on our de novo review are unable to make such a finding, particularly where there is no showing as to the amount of the expenses the court has relied on in making the departure. We therefore modify to strike that provision that Bradley pay child care and activity expenses in addition to support.

We award no appellate attorney fees. Costs on appeal are taxed to Jennifer.

AFFIRMED AS MODIFIED.