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Court of Appeals of Nebraska.

Connie Jean KOCH, Appellee,
v.
Dennis Eugene KOCH, Appellant.

No. A-00-1115. | Feb. 12, 2002.

Appeal from the District Court for Kearney County:
Stephen Illingworth, Judge. Affirmed.

Attorneys and Law Firms

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Vikki S. Stamm, of Ross, Schroeder & Romatzke, and Steven R. Voigt, of Butler, Voigt & Stewart, P.C., for appellee.

HANNON, SIEVERS, and MOORE, Judges.

Opinion

INTRODUCTION

MOORE, Judge.

*1 Dennis Eugene Koch appeals the decision of the district court for Kearney County, Nebraska, overruling his motion for modification of the parties' divorce decree and finding no material change of circumstances which would warrant termination of his alimony obligation and termination of or a decrease in his child support obligation. The district court also found that the minor children of the marriage were not emancipated or self-supporting. For the reasons set forth herein, we affirm.

BACKGROUND

Connie Jean Koch and Dennis were divorced pursuant to a decree of dissolution filed in the district court for Kearney County on October 3, 1997. There are two children born of the marriage: Michelle Dawn, born January 11, 1982, and Kellyn Renee, born October 24, 1983. Connie was awarded custody of the children, subject to reasonable rights of visitation by Dennis. Dennis was ordered to pay child support in the amount of \$1,350 per month until each child marries, dies, is emancipated, becomes self-supporting, or reaches the age of majority under Nebraska law or until further order of the court. The amount of support for one child was ordered to be \$907 upon the happening of one of the above-mentioned events. Dennis was also ordered to pay alimony to Connie in the amount of \$750 per month for a period of 72 months.

Dennis' motion for modification requested that his alimony obligation be terminated because Connie was cohabiting with her boyfriend, which improved her overall financial condition, and because Dennis' income had substantially decreased since the entry of the decree. Dennis also requested that his child support and health insurance obligations be terminated or decreased based upon both of the children's having become self-supporting since the entry of the decree and, again, because of a substantial decrease in Dennis' income. At the beginning of the trial, Dennis withdrew his request that child support be decreased based upon a material change in his income, but he proceeded on the other aspects of the motion.

The trial was held on June 2, 2000. A brief history of the children, Connie, and Dennis at the time of trial is as follows:

Michelle Dawn Koch

Michelle is the eldest daughter of Connie and Dennis and was 18 years old at the time of trial. In October 1999, Michelle moved out of Connie's home in Minden, Nebraska, and moved to Kearney, Nebraska. On December 31, she gave birth to a child, after which time

she started living with her boyfriend, the father of her child. From January through May 2000, Michelle stayed home to take care of her child. In May 2000, Michelle graduated from high school and began a full-time job in Axtell, Nebraska, starting on May 30. Michelle was scheduled to work 80 hours every 2 weeks, earning \$7.75 per hour, but those hours were not guaranteed.

Just prior to the time of the hearing, Michelle's boyfriend became unemployed and was in the process of securing new employment. Michelle testified that she and her boyfriend each pay for half of their living expenses, but that they do not have a joint bank account. She stated that she and her boyfriend have discussed getting married, but that there are no definite or immediate plans.

*2 At the time Michelle lived with Connie, Michelle applied for and received Medicaid benefits which paid for her prenatal and hospital expenses. After her child was born, she also received "WIC" benefits, which are a form of public assistance for women to receive dietary formula for infant children.

Kellyn Renee Koch

Kellyn is the parties' youngest daughter and was 16 years old at the time of trial. When Kellyn turned 16 in October 1999, she dropped out of high school and moved out of Connie's home to live with a friend in Upland, Nebraska. At the time she moved out, she had a job, but quit shortly thereafter. She got another job, but quit it also about a month later. In February 2000, she started a part-time job in Minden and moved back in with Connie. Kellyn testified that she had problems managing her money and could not afford to live on her own. She also testified that Connie paid for her half of her bills when she lived in Upland, plus gave her additional money for her admittedly excessive spending habits. Kellyn also testified that Dennis gave her money while she lived in Upland because she had spent all of the money Connie had given her and could not afford to pay a gas bill. At the time of trial, Kellyn was still employed part time and starting to work toward her high school diploma through a GED program.

Connie Jean Koch

Connie testified that she was employed in Minden, earning \$7 per hour, plus that she received child support and alimony payments from Dennis each month that totaled \$2,100. The record also reflects that she earned interest income in the amount of \$5,376 for the 1999 tax year. Connie testified at trial that only Kellyn lived with her and that Connie's former boyfriend had moved out and was no longer living with her. She stated that her relationship with her former boyfriend had been on and off, but that there were no plans for him to return.

Connie's monthly expenses were reviewed at trial. Connie testified that she gives Michelle \$500 per month, makes Michelle's car payment in the amount of \$283.64, and pays for both Michelle's and Kellyn's car insurance. She also stated that she buys other things like diapers and groceries for Michelle and her child if they need them. The record reflects that Connie also pays all of Kellyn's clothing expenses and grocery expenses.

Dennis Eugene Koch

Dennis testified that he owned and operated an earthmoving business in Minden. Evidence was adduced regarding Dennis' income; however, we need not discuss this evidence, since Dennis does not appeal the denial of his motion to terminate alimony and he withdrew his request that child support be modified based upon a change in his income.

Ruling of District Court

The district court overruled Dennis' motion, finding that there had not been a material change of circumstances and that the children were not emancipated. It also ordered Dennis to pay \$1,000 toward Connie's attorney fees for defending in the action. Dennis subsequently filed a motion for new trial alleging that the district court erred in finding that the parties' eldest child, Michelle, was not emancipated or self-supporting and that it erred in awarding Connie \$1,000 for attorney fees. The motion for new trial was denied, and Dennis filed this appeal.

ASSIGNMENTS OF ERROR

*3 Dennis alleges that the district court erred in finding that the parties' eldest child, Michelle, had not become emancipated or self-supporting and that the trial court erred in awarding \$1,000 in attorney fees to Connie in order to reimburse her for defending against Dennis' motion to modify.

STANDARD OF REVIEW

Modification of a dissolution decree is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Id.*

A district court's award or denial of attorney fees in a proceeding to modify a divorce decree will be upheld absent an abuse of discretion. *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001).

ANALYSIS

Emancipation

Dennis alleges that the district court erred in finding that the parties' eldest daughter, Michelle, had not become emancipated or self-supporting, for the following reasons: (1) Michelle had given birth, (2) she graduated from high school and secured a full-time job, (3) she was living with and planned to wed her boyfriend, and (4) she independently applied for public assistance.

Whether a child is emancipated is a question of fact which, although reviewed de novo on the record, will be affirmed absent an abuse of discretion. *Palagi v. Palagi*, 10 Neb.App. 231, 627 N.W.2d 765 (2001). The emancipation of a child by a parent may be proved by circumstantial evidence or may be implied from the

conduct of the parties. *Id.* Emancipation means the freeing of the child for a portion of its minority from the care, custody, control, and service of its parents. *Id.* Emancipation occurs where the parent renounces all the legal duties and voluntarily surrenders all the legal rights of his or her position to the child or to others. *Id.* In determining whether a child has been emancipated, the intention of the parent governs. *Id.* Giving birth may be one factor to be considered in the determination of whether a minor has achieved a new status or position inconsistent with parental control, but should not alone be dispositive. *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993).

First, there is nothing in the record to lend itself to the notion or implication that Connie renounced any of her legal duties with regard to Michelle or voluntarily surrendered the legal rights of her position as a parent to Michelle. It is clear from the record that from the time Michelle moved out of Connie's home in October 1999, Connie willingly provided financial assistance to Michelle. She gave Michelle \$500 per month, made a \$283.64 monthly car payment for Michelle, and paid Michelle's car insurance of approximately \$206 per month. Connie also paid for Michelle's high school senior pictures and a celebration honoring Michelle's high school graduation, in addition to buying diapers and clothing for Michelle's child if they were needed. Thus, it does not appear that Connie has intended to free herself of Michelle even though Michelle moved out, gave birth, and secured full-time employment.

*4 We further disagree with Dennis' contention that the \$500 a month Connie gave Michelle was essentially an unconditional gift rather than money that was to be used for Michelle's daily subsistence. It is clear from the record that Michelle relies upon Connie for financial assistance, which fact is supported by Michelle's testimony that although she was going to be employed full time, she anticipated that Connie would continue to provide financial assistance because "we wouldn't be able to make it without it." Should Connie continue to provide financial support to Michelle after Michelle attains the age of majority, then it may be considered a voluntary gift. However, during Michelle's minority, Connie has a legal obligation to support Michelle, unless Michelle is emancipated. The payments that Connie makes to or on behalf of Michelle clearly exceed the portion of child support attributed to Michelle. Dennis does not dispute these payments.

Therefore, based upon the record, we do not see that the

district court erred in finding that Michelle was not emancipated or self-supporting.

Attorney Fees

Dennis next assigns error alleging that the district court abused its discretion in awarding \$1,000 in attorney fees to Connie for defending in this action. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). Customarily in dissolution cases, attorney fees and costs are awarded only to prevailing parties or assessed against those who file frivolous suits. *Id.*

The record includes an affidavit from Connie's attorney which recites the work performed, including discovery; the total time expended prior to trial; and the attorney's hourly fee. The affidavit shows a total fee of \$1,650.

At trial, Dennis made no objection to the evidence received pertaining to Connie's legal fees. Although Dennis withdrew a portion of his motion, it was not done until just prior to the beginning of trial, and was done without prior knowledge of Connie. The last-minute

withdrawal of the portion of his motion did not impact the pretrial preparation required. We further disagree with Dennis' argument that there was little disparity in the parties' income. Dennis has taken significant depreciation deductions over the past several years which, in essence, artificially decreased his income. Finally, Connie was the prevailing party. Therefore, we do not find that the trial court abused its discretion in awarding \$1,000 of attorney fees to Connie, and we therefore conclude that this assignment of error is without merit.

CONCLUSION

We conclude that the district court did not abuse its discretion in finding that Michelle was not emancipated or self-supporting. There was also no abuse of discretion in awarding Connie \$1,000 in attorney fees.

*5 Both parties filed motions for attorney fees with this court in the present appeal. Dennis' motion is overruled. Connie's motion is sustained, and we award her the sum of \$1,500 in attorney fees.

Affirmed.