Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
02/09/2017 11:34 AM CST

the speedy trial clock was continuously tolled starting January 4, 2010, and has never begun to run again.

CONCLUSION

For the reasons outlined above, we find that the trial court correctly determined that as of the time of the filing of the motion for discharge on speedy trial grounds on October 25, 2010, only 68 days were chargeable to the State. All of the time since January 4, 2010, is chargeable to Mortensen and excluded from the speedy trial clock because of the waivers he filed. And, all of the time after the filing of the motion to discharge until such is finally resolved is chargeable to Mortensen. As a result, 112 days remain on the speedy trial clock, as determined by the district court.

AFFIRMED.

RYAN J. BRODRICK, APPELLEE, V. SARAH A. BAUMGARTEN, FORMERLY KNOWN AS SARAH A. BRODRICK, APPELLANT.

809 N.W.2d 799

Filed September 27, 2011. No. A-11-082.

1. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
2. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of an obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent.
3. ____: ____. Changes in the financial position of the parent obligated to pay support are a factor to be considered in determining whether a material change of circumstances has occurred.
4. **Modification of Decree: Child Support: Rules of the Supreme Court: Presumptions.** Application of the child support guidelines which would result in a variation by 10 percent or more of the current support obligation establishes a rebuttable presumption of a material change of circumstances.

Appeal from the District Court for Dawes County: BRIAN C. SILVERMAN, Judge. Reversed and remanded.

Amy L. Patras, of Crites, Shaffer, Connealy & Watson, P.C., L.L.O., for appellant.

Andrew W. Snyder, of Chaloupka, Holyoke, Snyder, Chaloupka, Longoria & Kishiyama, P.C., L.L.O., for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Sarah A. Baumgarten, formerly known as Sarah A. Brodrick (Sarah), appeals an order of the district court for Dawes County, Nebraska, which modified a prior custody and support order. On appeal, Sarah asserts that Ryan J. Brodrick (Ryan) failed to demonstrate a material change of circumstances had occurred since the entry of the prior order to warrant modification and that the district court erred in finding otherwise. We agree, and we reverse, and remand. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

II. BACKGROUND

On June 19, 2001, Sarah and Ryan were divorced pursuant to a dissolution decree. Pursuant to the dissolution decree, the parties had "split legal custody" of their two minor children.

On April 28, 2009, the parties filed a stipulation with the district court. The parties stipulated that a material change of circumstances had occurred since entry of the dissolution decree in that the parties had shared joint physical and legal custody of the children, rather than split custody. The parties stipulated that the court should order joint physical and legal custody. The parties also stipulated that Ryan would pay $200 per month for child support and that the child support amount constituted a deviation from the Nebraska Child Support Guidelines.

On May 5, 2009, the district court entered an order modifying the custody and child support provisions of the dissolution decree. The court found that the parties' stipulation was fair and adopted its provisions. The court ordered joint legal and physical custody of the children and set forth a physical custody schedule which would have resulted in each party having

physical custody approximately 50 percent of the time. The court also ordered Ryan to pay $200 per month in child support and ordered that the support amount constituted a deviation from the Nebraska Child Support Guidelines.

On October 1, 2009, less than 5 months after entry of the May 5 custody and support order, Ryan filed a complaint seeking modification. Ryan alleged, as material changes of circumstances occurring since entry of the prior order, that his employment and income had changed and that he had actually had physical custody of the children more than 50 percent of the time as was originally contemplated in the parties' stipulation and the court's prior order.

On September 16, 2010, the district court conducted a hearing on Ryan's complaint to modify. At the hearing, Ryan adduced evidence establishing that at the time of the May 5, 2009, stipulation and custody and support order, he had been employed full time in a drugstore warehouse and had been earning $10 per hour. He testified that in July or August 2009, he ceased his employment and enrolled in a school for massage therapy. He testified that he was working part time for his father and was earning $10 per hour. He testified that he was not asking the court to use part-time income for calculating child support and that he was willing to have the court impute income to him at $10 an hour for full-time employment.

Ryan also adduced evidence indicating that during some of the time after the May 5, 2009, custody and child support order was entered, he actually had physical custody of the parties' two minor children more than the 50 percent contemplated by the parties' stipulation and the court's order. He testified that in July, he had both children for 25 days; that in August, he had one child for 21 days and the other for 23 days; and that in September, he had both children for 17 days. He acknowledged that starting in October 2009, he "was only having the kids 50 percent of the time," as provided in the prior court order.

Sarah acknowledged that Ryan had physical custody of the children more than 50 percent of the time during June through September 2009. She testified that her employment at that time required her to travel "up to three times a month for two or three nights." She testified that she had conversations with

Ryan about switching days when she had to travel, but that Ryan refused and indicated that "that's not his problem." In late October 2009, Sarah resigned from her employment; she continued with the employer until finding new employment in November. She testified that she changed her employment because she "was worried that it would jeopardize [her] time with [her] kids" because the travel obligations were going to increase. Sarah earned $10.26 per hour at her new employment, which was less than her earnings at her prior employment.

On December 29, 2010, the district court signed an order modifying Ryan's child support obligation. The court noted that the evidence adduced at the hearing demonstrated that Ryan had more custody time than Sarah at one time, that Sarah had more custody time than Ryan prior to that, and that both parties had "about equal" custody time during some of the relevant time period. The court also noted that both parties had changed their employment situations voluntarily and that the changes resulted in Sarah's not having to travel and Ryan's furthering his education.

The court held:

> The Court believes that the best solution for the children, the parties, and in accord with the evidence and the law is the following:
>
> a. The Court will use [Sarah's] salary of $10.26 per hour and [Ryan's] salary at $10.00 per hour, both on a 40-hour basis. The obligation by [Ryan] to [Sarah] is $3.12 per month. . . . It would cost the payment center more to audit the payments and mail a check than it is worth, so the Court finds that . . . [Ryan's] child support payment to [Sarah] is terminated. The Court also finds that a material change of circumstances has occurred justifying this modification.

This appeal followed.

III. ASSIGNMENT OF ERROR

Sarah has assigned as error that the district court erred in finding a material change of circumstances had occurred warranting modification of Ryan's child support obligation.

IV. ANALYSIS

Sarah asserts that the district court erred in finding that Ryan demonstrated a material change of circumstances occurred since the May 5, 2009, custody and child support order warranting a modification of Ryan's support obligation. Sarah argues that the evidence adduced at the hearing demonstrated that Ryan's income was imputed to be exactly the same as it was at the time of the prior order and that physical custody of the children was being divided equally, as provided for in the court's prior order. We agree.

[1,2] A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). When evaluating a request for modification of child support, among the factors to be considered in determining whether a material change of circumstances has occurred are (1) changes in the financial position of the parent obligated to pay support, (2) the needs of the children for whom support is paid, (3) good or bad faith motive of an obligated parent in sustaining a reduction in income, and (4) whether the change is temporary or permanent. See *id.*

In the present case, the district court specifically held in its modification order that a material change of circumstances had occurred. The court did not, however, indicate what the material change of circumstances was. Our review of the record leaves us unable to discern what the district court believed constituted a material change of circumstances warranting modification of the prior order, and we find no material change of circumstances with respect to either of the grounds proffered by Ryan: change in his employment and income, or change in actual amounts of time each party had physical custody.

First, Ryan's asserted change in employment and income does not constitute a material change of circumstances warranting modification. Ryan asked the district court to impute income to him that was identical to his income at the time of the prior order. Additionally, the fact that application of the

Nebraska Child Support Guidelines using Ryan's income level would result in a different child support amount than the prior order, which was specifically indicated to be a deviation from the guidelines pursuant to stipulation of the parties, does not demonstrate that modification was warranted.

[3] Changes in the financial position of the parent obligated to pay support are a factor to be considered in determining whether a material change of circumstances has occurred. See *Incontro v. Jacobs, supra*. At the time of the court's prior child support order, Ryan was employed and was earning $10 per hour. Although Ryan voluntarily left his employment and enrolled in school, and although his earnings were reduced to $10 per hour for part-time work for his father, Ryan specifically asked the court to impute his income level as $10 per hour for full-time employment for purposes of his complaint to modify. As a result, Ryan's income level for purposes of modification was identical to his earning level at the time of the prior order; there was no material change of circumstances demonstrated concerning his income level because there was no change in his income level.

[4] Ryan argues on appeal that using his imputed income level and utilizing the Nebraska Child Support Guidelines resulted in a change in his support obligation of more than 10 percent, giving rise to a rebuttable presumption that a material change of circumstances occurred. See Neb. Ct. R. § 4-217. Although § 4-217 does provide that application of the guidelines which would result in a variation by 10 percent or more of the current obligation could establish a rebuttable presumption of a material change of circumstances, Ryan's argument ignores the circumstances of the present case. In this case, the existing support order was more than a 10-percent variation from the amount the guidelines would have required, specifically because the parties stipulated to an order of $200 per month and the court entered an order, which was not appealed from, establishing his support obligation to be $200 and indicating that the order was a deviation from the guidelines. If Ryan's argument in this case were valid, then parties would always be able to modify support orders which reflect a deviation from the guidelines merely by demonstrating that

application of the guidelines results in a different support amount than the deviation would impose. Moreover, we conclude that the evidence in this case establishing that Ryan's income level for purposes of the modification hearing was identical to his income level at the time of the prior order effectively rebuts any presumption that might be created. We find no merit to Ryan's assertion that his income level constituted a material change of circumstances.

We also find that the variation in the amount of time that the parties had physical custody of the children during July through September 2009 did not constitute a material change of circumstances warranting modification of the prior order. The evidence adduced at the hearing demonstrated that the situation had been only temporary, was no longer an issue at the time of the hearing, and was allegedly contributed to by Ryan's refusal to change dates with Sarah to accommodate her employment-related travel obligations during those months.

One factor to consider in determining whether a material change of circumstances has occurred is whether the change is temporary or permanent. See *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). The evidence in this case established that the court's prior custody and support order was entered in May 2009, providing that each party would have physical custody of the children approximately 50 percent of the time. Ryan testified that in July, August, and September 2009, he had physical custody of the children more than 50 percent of the time; Sarah did not dispute this. However, starting in October 2009 and continuing through the time of the hearing in September 2010, there is no dispute that the parties each generally had physical custody of the children approximately 50 percent of the time, exactly as ordered in the court's prior order.

Not only does the record demonstrate that Ryan's having physical custody more than 50 percent of the time was a temporary situation that had resolved itself at about the same time as he filed his complaint for modification, but the record also demonstrates that the issue is not likely to recur. Sarah testified the reason for Ryan's having physical custody of the children more than ordered in the court's prior order

was that her employment at the time required her to travel frequently, her travel dates coincided with dates she was to have physical custody, Ryan refused to switch dates with her to accommodate her travel, and she had ceased that employment to secure new employment which did not require her to travel. We find no merit to Ryan's assertion that this temporary period of increased physical custody was a material change of circumstances warranting permanent modification of child support.

V. CONCLUSION

The record presented in this case does not demonstrate a material change of circumstances occurring since the entry of the previous child support order. Ryan asked the court to impute income to him that was identical to his earnings at the time of the prior order, and the brief period of time during which Ryan had increased physical custody of the children was a temporary issue that had resolved itself and was not likely to recur. As such, we reverse the district court's order of modification and remand the matter.

REVERSED AND REMANDED.

IN RE INTEREST OF MELAYA F. AND MELYSSE F., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MINDY F., APPELLANT, AND YANKTON SIOUX TRIBE, INTERVENOR-APPELLEE.

810 N.W.2d 429

Filed September 27, 2011. No. A-11-200.

1. **Indian Child Welfare Act: Jurisdiction: Appeal and Error.** A denial of a transfer to tribal court is reviewed for an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** 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.
3. **Indian Child Welfare Act: Jurisdiction: Good Cause.** The party opposing a transfer of jurisdiction to the tribal courts has the burden of establishing that good cause not to transfer the matter exists.