FILED
OCT 2 8 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF MARGARET A. BIRCHETTE AND ROBERT M. BIRCHETTE

Upon the Petition of	)	27
MARGARET A. BIRCHETTE,	)	Filed October 28, 1987
Petitioner-Appellee,	)	
And Concerning	)	
ROBERT M. BIRCHETTE,	)	7-484 / 87-80
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Polk County (CD 31-18586), Gene *Needles*, Judge.

Respondent husband appeals from the trial court's modification of the decree of dissolution of marriage. **AFFIRMED AS MODIFIED.**

Michael W. O'Malley of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for respondent-appellant.

Tom Hyland of Hyland, Laden & Pearson, Des Moines, for petitioner-appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ. Snell, J. takes no part.

PER CURIAM 28

The parties' marriage was dissolved in 1981. Margaret was awarded custody of their three minor children. Robert was directed to pay $120 per week child support until Timothy reached 18 years of age. Timothy has had cerebral palsy since birth and will remain mentally and physically severely disabled. He was born in 1966. Michelle, their daughter, now a student in Simpson College, was born in 1968. Charles, born in 1964, is in the Navy. The decree of dissolution provided for the court to review the child support obligation when Timothy reached age 18.

The trial court reviewed and modified the child support after an evidentiary hearing was held. Robert was ordered to pay $60 per week child support for Timothy until further order of court. Robert was also ordered to pay $60 per week child support for Michelle until she reaches age 22 or ceases to be a full time student in a college, university, or area school.

The trial court determined Robert's earning capacity was $1,800 per month and Margaret's earning capacity was $900 per month.

Our review of this equity appeal is de novo. Iowa R. App. P. 4.

Robert's income for 1985 is as follows: Backstage lounge, $7,599 or $633 per month average; $68 per month military disability payment; $358 per month received on an installment real estate contract; and $2 per month interest. Robert must pay the sum of $190 per month for self-employment tax and federal and state income taxes. In addition he has not filed or paid his 1982, 1983 and 1984 state and federal income tax. It is clearly shown Robert's monthly income capacity is $871 and not $1,800 as determined by the trial court. A thorough review of this record fails to disclose any concrete evidence Robert's earning capacity is greater than $871 per month. Robert suggests to us the trial court based his determination upon Robert's predecree income. We are inclined to

agree. Robert's monthly expenses for bare necessities equals or exceeds the sum of $871.

We do not disagree with the trial court's determination of Margaret's earning capacity.

We modify the trial court's modification order to require Robert to pay $150 per month toward Michelle's college costs for the same term and upon the same condition, and he shall pay $100 per month towards Timothy's support.

Each party shall pay their own attorney fees on appeal. Costs of appeal are assessed one-half to Robert and one-half to Margaret.

AFFIRMED AS MODIFIED.