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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 1-551 / 00-1662
Filed December 28, 2001

**IN RE THE MARRIAGE OF DENISE ANN BOYSEN AND RONALD JAY BOYSEN**

Upon the Petition of
**DENISE ANN YOUNG**, f/k/a **DENISE ANN BOYSEN**,
Appellee,

And Concerning
**RONALD JAY BOYSEN**,
Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

The respondent appeals the child support provisions of the district court's modification decree. **AFFIRMED AS MODIFIED.**

Michael J. Winter, Council Bluffs, for appellant.

David J. Larson of Hanson & Sulhoff, Avoca, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

**VOGEL, P.J.**

Ronald Boysen appeals the district court's modification order increasing his monthly child support obligation. We affirm the child support award, but modify the decision to address the division of uncovered medical expenses.

***Background Facts and Proceedings.*** When the eight-year marriage of Ronald and Denise was dissolved on July 10, 1992, Denise was awarded the physical care of the couple's three minor children. Ronald was ordered to pay $350 per month in child support and allowed to claim one child as a dependent on his state and federal income tax returns. Ronald was also directed to carry health insurance for the children, with all uncovered medical expenses to be divided equally between the parties. By stipulated modification of June 29, 1993, responsibility for health insurance coverage was transferred to Denise and Ronald's child support obligation was increased to $500 per month, to assist Denise in paying the resulting increase in her insurance premium.

Denise sought a further increase in support in 1998, based on a rise in Ronald's piece-work income from his position testing electric meters and installing automatic readers. During the August 2000 trial Ronald testified the escalation in income resulted from an average work week of sixty to seventy-five hours, the extra hours allowing him to complete a higher number of jobs per week. Ronald stated he had increased the number of hours worked during the preceding three years in order to recover from a 1995 bankruptcy and to help his new wife pay the two mortgages on his current residence. He urged the court to impute to him only that income he would earn if he worked forty hours per week.

The district court rejected his suggestion and averaged Ronald's gross annual income for the preceding three years[1] before arriving at a net monthly income of $2,431. Noting certain inaccuracies in Denise's self-reported income, the district court set her net monthly figure at $1,549. Based on the new financial information, the court increased Ronald's monthly child support obligation to $892. Ronald appeals.

***Scope of Review.*** Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we give them considerable weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 14(f)(7).

***Child Support Calculation.*** Ronald complains the district court erroneously included in the calculation of his net monthly income any pay he earned while working in excess of forty hours per week. He cites past decisions of this court that found inclusion of overtime pay to be unjust and inappropriate. *See In re Marriage of Close,* 478 N.W.2d 852, 854-55 (Iowa Ct. App.1991); *In re Marriage of Heinemann,* 309 N.W.2d 151, 152-53 (Iowa Ct. App.1981). Those cases do not, however, provide a blanket proscription against inclusion of overtime pay, bonuses or other non-regular income. *See In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). As earnings need not be guaranteed to fall within the definition of income under the child support guidelines, overtime and bonuses can be factored into a support calculation. *Seymour v. Hunter*, 603 N.W.2d 625, 626 (Iowa 1999); *Brown*, 487 N.W.2d at 333.

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[1] The court used Ronald's gross annual incomes of $45,034 for 1999, $39,382 for 1998 and $38,199 for 1997, to arrive at an average annual gross income of $40,872.

In deciding whether to deviate from the guidelines by excluding bonus or overtime pay, a court must determine whether the income is speculative or expected. *Seymour*, 603 N.W.2d at 626. Thus, deviation is appropriate when the income is uncertain or an anomaly. *In re Marriage of Geil,* 509 N.W.2d 738, 742 (Iowa 1993). Income should also be excluded where inclusion would result in a support amount so burdensome a parent is required to work overtime to meet the obligation. *Id.*

Here, Ronald consistently worked sixty to seventy-five hours per week for a three-year period and, as Ronald's work schedule is wholly within his own control, there is little danger the ability to work extended hours will dissipate. Nor do we perceive how basing Ronald's income on an average of the past three years is burdensome to him. Work Ronald willingly undertook to clear his own debt load cannot be fairly recharacterized as an onerous burden because part of the resulting income is now diverted to the benefit of his children. *See, e.g., Brown,* 487 N.W.2d. at 334 (finding overtime pay should be included where the obligor worked overtime to help pay off family debt, but where he was not required to work overtime to satisfy his child support obligation).

Moreover, it does not appear all hours worked over forty in each week can be necessarily analogized to overtime. The figure Ronald and his supervisor estimated to be fairly reflective of a forty-hour week is over $8,000 less than the income Ronald earned in 1996. By his own testimony, the 1996 income was earned prior to the point in time he assumed a weekly work load of sixty hours or more. This raises a logical inference that, even prior to efforts to recover from

bankruptcy and meet other debt obligations, Ronald's job was not one he typically performed for only forty hours per week.

Given all the foregoing, we find it appropriate to base Ronald's income on his actual salary. In recognition of the fact his salary is variable and partially weather-dependent, it is also appropriate to take an average of his income over the preceding three years. *See Seymour*, 603 N.W.2d at 626. This insures Ronald will not be penalized by the fact his most recent income information was reflective of a particularly lucrative year, while taking an equitable accounting of income for support purposes. To do otherwise "would be to invite manipulation of the guidelines . . . ." *Id.* We therefore affirm the district court's increase in Ronald's support amount.[2]

***Dependency Exemption.*** Ronald also contends it was inequitable to increase his support obligation while declining to modify the dependency exemption. He argues that if his child support obligation is going to be substantially increased, equity dictates he be allowed to claim an additional child as a dependent on his state and federal income tax. We do not agree.

Dissolution decrees are entered with an eye to ordinary and reasonable changes, and natural occurrences which could be foreseen by the court are not

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[2] Although Ronald also contends the district court underestimated Denise's net monthly income, we find the court's computation to be fairly accurate. While Ronald is correct in noting Denise should not receive a deduction for child care expenses for the two children from her marriage to her current husband, his calculation of Denise's income contains a counterbalancing inaccuracy. We limit our consideration of financial information to that directly related to the parties or the children of the marriage, and therefore do not credit Denise with dependency exemptions for the children of Denise and her second husband. When this adjustment is made, we arrive at a net income amount comparable to that assessed by the district court.

sufficient to justify modification. *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991). Even if we assume Ronald's increased support obligation is more than an ordinary, reasonable and foreseeable change, we must still find maintaining the current exemption allocation would work a positive wrong or injustice against Ronald. *Id.* Under the record in this case, we see no evidence the tax implications of the new support award are such that it is unjust to allow Ronald only one exemption.[3] *Cf. In re Marriage of Rolek*, 555 N.W.2d 675, 680 (Iowa 1996) (finding change in status of parent's income from taxed to tax-free required change in exemption distribution); *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991) (accord regarding change in federal tax laws). The district court has considerable discretion in determining whether to alter the allocation of dependency exemptions, *Chmelicek*, 480 N.W.2d at 574, and we find its decision to maintain the former allocation to be an appropriate one.

***Uncovered Medical Expenses***. The district court ordered each party to maintain medical insurance for the children and further ordered that any expenses not covered by insurance would be paid equally by the parties. Ronald asserts this is contrary to the recently amended guidelines. The child support guidelines as amended and effective August 1, 2000 include this provision:

> [T]he custodial parent shall pay the first $250 per year per child of uncovered medical expenses up to a maximum of $500 per year for all children. Uncovered medical expenses in excess of $250 per child or a maximum of $500 per year for all children shall be paid by the parents in proportion to their respective net incomes.

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[3] If Ronald were allocated an additional dependency exemption, the resulting decrease in his tax liability would be significantly offset by a corresponding increase in his child support obligation.

While the district court has the authority to vary from this payment scheme, it must provide written findings to support any variation. As no findings were made, we modify the decree to bring it in line with guideline requirements. Accordingly, Denise shall pay the first $250 per year per child of uncovered medical expenses, as defined in the Guidelines, but no more than $500 per year for all children. Uncovered medical expenses in excess of this amount shall be paid sixty-one percent by Ronald and thirty-nine percent by Denise.

***Appellate Attorney Fees.*** Denise requests attorney fees on appeal. An award of such fees is not a matter of right, but a decision within this court's discretion, made by weighing Denise's financial needs and Ronald's ability to pay. *In re Marriage of Will*, 602 N.W.2d 202, 206 (Iowa Ct. App. 1999). As we find each party has adequate resources for the payment of his or her individual fees, we deny Denise's request.

**AFFIRMED AS MODIFIED.**