

IN THE COURT OF APPEALS OF IOWA

000349

No. 7-337 / 96-708

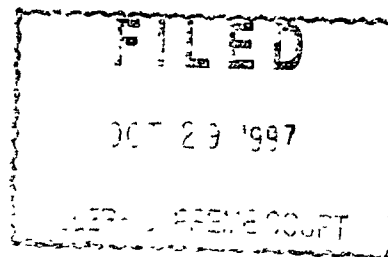
**IN RE THE MARRIAGE OF HELENA R. WALTERS
AND DOUGLAS L. WALTERS**

Upon the Petition of
HELENA R. WALTERS,

Appellee,

And Concerning
DOUGLAS L. WALTERS,

Appellant.



Appeal from the Iowa District Court for Buchanan County, Margaret L.
Lingreen, Judge.

Douglas Walters appeals the district court's denial of his application to modify
child support. **AFFIRMED.**

Gary F. McClintock of Hoeger & McClintock, Independence, for appellant.

Tom Jenk of Jenk & Goen, Dyersville, for appellee.

Considered en banc.

VOGEL, J.

Helena and Douglas Walters were married on June 2, 1972. They have four children. The parties' marriage was dissolved on May 4, 1992. Douglas was ordered to pay \$987.32 in child support for three of the children, which was decreased to \$845.52 for the two younger children in August 1993. At that time, he was employed as a postmaster, earning approximately \$42,000 per year.

Douglas was fired from his position for embezzling funds. He was subsequently convicted of embezzlement, and served a prison term from November 13, 1994 to November 7, 1995. After release from prison, he obtained a position at Kann Fab, Inc., netting approximately \$189 per week.

Douglas filed an application for modification of child support on November 10, 1994. At the time of the hearing on March 20, 1996, Douglas was forty-four years old, Helena was forty, Nicole was sixteen, and Caitlin was eight. Although Douglas had completed various course work, he did not have a college degree. He also owed approximately \$16,910 in back child support. Helena claimed net weekly earnings of approximately \$181.

The court denied Douglas's request to modify the child support obligation. The court additionally found him in contempt for failing to release his pension funds (\$31,087.87) for satisfaction of his accrued support obligation. The funds have now been released.

Douglas appeals. He argues the child support guidelines should be applied to his current income.

Scope of review. In this equity action, our review is de novo; we have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. Iowa R. App. P. 4. We give weight to the fact findings of the trial court but are not bound by them. Iowa R. App. P. 14(f)(7).

Modification of child support. The sole issue presented for our review is whether the district court erred in denying Douglas's application for modification of child support. A clear trend has been established in Iowa with regard to modification of child support orders: (1) a growing reluctance to modify decrees; (2) current inability to pay has become less a consideration and long range earning capacity has become more a consideration; and (3) any voluntariness in diminished earning capacity has become increasingly an impediment to modification. *See In re Marriage of Vetterneck*, 334 N.W.2d 761 (Iowa 1983).

The quintessential concern grounded in public policy is protecting the best interests of the children. *In re Marriage of Phillips*, 493 N.W.2d 872, 878 (Iowa App. 1992). Our supreme court in *Ellis v. Ellis*, 262 N.W.2d 265, 268 (Iowa 1978) recognized that "[a] defendant cannot voluntarily abandon his employment, reduce his wages, or by other [voluntary] conduct bring about a reduced income and thereby avoid, or cause the reduction of, a reasonable support order." *Id.* (quoting *Commonwealth ex rel. Mazon v. Mazon*, 63 A.2d 112, 114 (Pa. Super. Ct. 1949)).

Just as one cannot act to voluntarily reduce his income in an effort to reduce child support payments, one cannot engage in a voluntary criminal act resulting in a reduction in income, and expect a reduction in his child support obligation. The *Phillips* court cited with approval this position:

Criminal conduct of any nature cannot excuse the obligation to pay support. We see no reason to offer criminals reprieve from their child support obligation when we would not do the same for an obligor who voluntarily walks away from this job. Unlike the obligor who is unemployed or faced with a reduction in pay through no fault of his own, [the criminal offender] has control over his actions and should be held to the consequences.

Phillips, 493 N.W.2d at 878 (citing *In re Marriage of Willis*, 820 P.2d 858, 860 (Or. Ct. App. 1991)).

Douglas's decision to embezzle was the genesis of his current income situation; he was solely responsible for the loss of his job. This court addressed a similar situation in *In re Marriage of Hester*, 565 N.W.2d 351 (Iowa App. 1997) where a child support obligor embezzled funds at work resulting in a loss of employment. She then sought to reduce her child support payments because of her reduced income. *Id.* This court rejected her argument finding her criminal conduct rose to the level of reckless disregard for her child's well-being. *Id.* While we do not believe, in this case, Douglas intended to deprive his children of support, he did act with reckless disregard for his children's well-being by failing to consider the monetary ramifications of his actions. *See Id.* at 354.

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Douglas further argues he should be allowed to start over, having served his prison term and arguably unable to secure a similar financial position to what he had prior to his conviction. We should not allow a convicted felon with "unclean hands" to rehabilitate himself economically at the expense of his children. This is not the equivalent of a "fresh start" following discharge of debts in bankruptcy. Unlike bankruptcy where creditors must bear the cost of the debtor's poor judgment, in child support cases it is the children who must absorb the loss stemming from the obligor's misdeeds. We are aware that Douglas may have a difficult time staying current with his child support payments; however, to modify his obligation would be to reward him for his misdeed. *See Hester*, 565 N.W.2d at 354. The voluntary actions of an obligor resulting in a reduction in income should not deprive the children of the support. *See State ex rel. Lara v. Lara*, 495 N.W.2d 719, 722 (Iowa 1993). It is contrary to public policy and well-established case law. We accordingly affirm.

AFFIRMED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

I dissent.

The majority has held Douglas, who has a net monthly income for purposes of the child support guidelines of \$870, should have no relief from a child support order fixing his child support obligation at \$845.52 per month.

At the time child support was set, Douglas worked for the U. S. Postal Service. He embezzled and lost the job. The majority has found, and I agree, he did not embezzle for purposes of avoiding child support.

Douglas has sought better paying employment. He has not found it, and nothing in this record convinces me it is available to him.

I cannot subscribe to the majority's language that to modify Douglas's support obligation would reward him. He has been punished for his act. Should the family have remained together, they would have suffered a decrease in income as a result of Douglas's act. There comes a place where society is best served by allowing Douglas to rehabilitate himself.

The order in place is impossible for Douglas to meet. The place of a non-custodial parent in a child's life is to provide and supply more than money. If Douglas is left with no money for his own personal use, he will be seriously curtailed in any relationship with his children.

What Douglas did was very wrong. He cannot undo the wrong and continues to suffer for having committed it. Yet, the law must act with reason. I find no basis

in refusing to modify the child support award where the only conclusion that can be drawn from the record is payment of the ordered amount is not possible either now or in the future.