

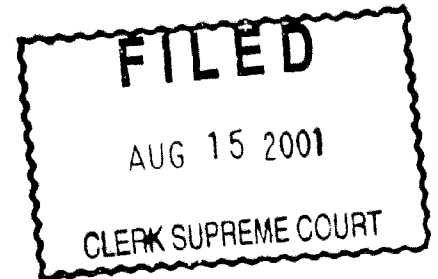
IN THE COURT OF APPEALS OF IOWA

No. 1-375 / 00-1573
Filed August 15, 2001

IN RE THE MARRIAGE OF DEBRA ANN BUFFINGTON
AND JEFFREY RAY BUFFINGTON

Upon the Petition of
DEBRA ANN BUFFINGTON,
Petitioner-Appellant,

And Concerning
JEFFREY RAY BUFFINGTON,
Respondent-Appellee.



Appeal from the Iowa District Court for Louisa County, William L. Dowell,
Judge.

The petitioner appeals a district court order granting the respondent's
petition to modify his child support obligation. **AFFIRMED.**

J. Bryan Schulte of Bauer, Schulte, Hahn, Swanson & Brown, Burlington,
for appellant.

Roger A. Huddle of Weaver & Huddle, Wapello, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

MILLER, J.

Debra Ann Buffington appeals the district court order granting Jeffrey Ray Buffington's petition to modify his child support obligation. Debra contends the district court erred in reducing Jeffrey's child support obligation because: (1) his termination from his employment was voluntary conduct constituting a reckless disregard of this obligation; and (2) his reduction in income was not permanent and he had significant assets from which to continue paying his obligation. Debra requests an award of trial and appellate attorney fees. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS

The parties' eleven-year marriage was dissolved by decree in April of 1993. The parties had two children, Andrew, born May 10, 1982 and Alex, born February 22, 1989. The decree awarded physical care of the parties' children to Debra and Jeffrey was ordered to pay weekly child support of \$217.93 for two children and \$155.66 for one child.

Jeffrey had been employed at Monsanto Company since 1974 and was so employed at the time the decree was entered. At the time of the parties' dissolution in 1993 Jeffrey was a boiler operator at Monsanto at a rate of approximately \$19 per hour. In March 1999 Jeffrey was terminated from his employment at Monsanto for being in an unauthorized area, unauthorized absence from his work area, and inappropriate use of the Internet. Jeffrey was apparently in his supervisor's office using the supervisor's computer to access the Internet for information for personal purposes. Although Jeffrey could access the Internet for business-related purposes, Monsanto policy, known to Jeffrey, prohibited use for personal purposes.

Jeffrey looked for substitute employment. He worked two days doing surveying, worked about ninety days in an envelope factory, and then obtained a job at Ag Co-op earning \$8.50 an hour.

Jeffrey remarried in June 1999. In May 2000 he and his wife Sandy moved to Ohio so Jeffrey could find better employment at a higher rate of pay and because Sandy had family there. He currently earns \$11 per hour at his job in Ohio.

In January of 2000 Jeffrey filed an application for modification of the dissolution decree requesting a reduction in his child support obligation. He asserted that since his termination from Monsanto he has been unable to obtain employment comparable to his former job with Monsanto and this had resulted in a material and substantial change in circumstances, a substantial reduction in his income. Debra responded to Jeffrey's application by alleging his termination was a result of his misconduct and therefore did not justify a modification of his support obligation because his reduced income was voluntary.

Between the time he lost his job at Monsanto and the time of the modification hearing Jeffrey had sold his home and some Monsanto stock in order to supplement his income and meet his financial obligations. Jeffrey continued to pay child support throughout this period and was current in his support payments at the time of hearing. He had also continued to provide medical insurance and pay for medical expenses for the children that were not paid by insurance, as ordered in the decree, at significant out-of-pocket expense to himself.

The district court granted Jeffrey's modification request, concluding that although his reduction in income was the result of inappropriate voluntary activity on his part, he did not act with an intent to deprive his children of support or with a reckless disregard of his support obligation. The court found the change in Jeffrey's financial situation was substantial, was not in the contemplation of the trial court when the original decree was entered, and was permanent or continuous. It also noted that Jeffrey had already used considerable assets in order to keep his child support and medical support payments current. The court ordered Jeffrey's support obligation reduced to \$77.25 per week for one child.¹ All other provisions of the original decree relating to support remained unchanged.

Debra appeals from the trial court's decision in the modification action alleging any change in Jeffrey's employment was a result of voluntary conduct constituting a reckless disregard for his support obligation and the change in his income and earning capacity is not permanent or substantial when he had sufficient assets from which to pay the pre-modification child support amount and possesses substantial earning capacity. Debra also seeks trial and appellate attorney fees.

II. SCOPE AND STANDARDS OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the

¹ The parties' older child had reached age eighteen and graduated from high school by the time of the modification order and under the terms of the decree Jeffrey no longer had any child support obligation with respect to that child.

fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, except to provide a framework for analysis, and our decision must be based on the particular facts and circumstances before us. *Id.*

III. MERITS

A court may modify an order of child support when a "substantial change in circumstances" has been shown to exist. Iowa Code §598.21(8) (1999); *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). The changed circumstances relied upon must be material and substantial, not trivial, more or less permanent or continuous, not temporary, and must be such as were not within the knowledge or contemplation of the court when the decree was entered. *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996); *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). When modifications of child support are made they should be in the best interest of the children. *Rolek*, 555 N.W.2d at 679.

"Changes in the employment, earning capacity, income or resources of a party" is one factor which may be considered by the court. Iowa Code §598.21(8)(a); *Walters*, 575 N.W.2d at 741. This is the factor relied upon by Jeffrey here in his request to have his support obligation reduced. The party seeking the modification must prove the change in circumstances by a preponderance of the evidence. *Walters*, 575 N.W.2d at 741.

Nevertheless, a parent may not rely on a claim of decreased income to obtain a modification of a support order if the parent's

reduced earning capacity and inability to pay support is self-inflicted or voluntary. Therefore, parents who reduce their income through an improper intent to deprive their children of support or in reckless disregard for their children's well-being are not entitled to a commensurate reduction in child support payments.

In re Marriage of Swan, 526 N.W.2d 320, 323-24 (Iowa 1995) (citations omitted).

A primary factor to be considered in determining whether support obligations should be modified is whether the obligor's reduction in income and earning capacity is the result of activity, which, although voluntary, was done with an improper intent to deprive his or her dependents of support. This is because we have held that an obligor's voluntary reduction in income or earning capacity may be a basis for refusing to modify support obligations.

In re Marriage of Rietz, 585 N.W.2d 226, 229 (Iowa 1998) (citations omitted).

Jeffrey was aware of Monsanto's company policies, as stated in the employee handbook he had received, against personal usage of the company computers, leaving one's work area without permission and being in unauthorized areas, as well as the fact that disciplinary action, even dismissal, could be taken based on violation of these policies. He knew what he was doing was a violation of company policy which could lead to discipline, even dismissal.

However, Jeffrey had seen other employees in the same area without authorization, and he had seen other employees in the same area using the computer just as he was when terminated. It was not unusual for him to be in that area and he had been on previous occasions without repercussion. Based on Monsanto's responses to such acts by himself and other employees in the past Jeffrey did not believe such acts would lead to his termination. The only disciplinary action which had ever been taken by Monsanto against Jeffrey in his twenty-five years with Monsanto was a "coaching letter" he had received six years prior to his termination, during his divorce, for being late to work. Jeffrey

did not believe his actions would lead to his termination and he did not want to be terminated from his long-standing employment at Monsanto.

Immediately after being terminated Jeffrey sought out new employment. He was unable to find a job with equivalent pay. However, he continued to search for a job and obtained employment shortly after being terminated, even though it paid substantially less per hour than his position at Monsanto. He worked as many hours as he could. As noted above, he has since moved out of state to secure even better employment. As of the time of the hearing he had obtained a higher paying job in Ohio, although still at substantially less pay than he was making at the time of his termination from Monsanto.

It is also noteworthy that Jeffrey met his support obligations, including child support, maintaining medical insurance on the children, and paying for any of the children's medical expenses not covered by the insurance, after his termination from Monsanto and did so even while earning less than one-half the income he earned while at Monsanto. Jeffrey used assets in order to maintain this support. These included his Monsanto stock options and some of the money he received from the sale of his home in Iowa.

We find that Jeffrey was responsible for the loss of his job at Monsanto. However, while his act which led to his termination was not commendable, we do not believe he acted with the intent to deprive his children of support or with a reckless disregard for their well-being. "Rather, he acted imprudently and lost his employment but was diligent in obtaining a new job." *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). We do not consider Jeffrey's act to have been done with a reckless disregard of his support obligation.

We thus distinguish this case from others where our courts have held that an intentional reduction in income or earning capacity will preclude modification of support obligations. This is not a situation where the obligor had *quit* his job to finish his education or take a job at significantly lower pay. Cf. *In re Marriage of Dawson*, 467 N.W.2d 271, 275-76 (Iowa 1991) (reversing reduction of child support for obligor who quit job to finish education and take job with lower pay); *Reed v. Reed*, 260 Iowa 1166, 1168-69, 152 N.W.2d 190, 191 (1967) (affirming refusal to modify support obligation when obligor voluntarily quit job to return to school). Nor is it a situation where an obligor *refused* to pursue a previous career. Cf. *Ellis v. Ellis*, 262 N.W.2d 265, 267-68 (Iowa 1978) (declining to terminate or reduce spousal support where obligor voluntarily retired at age sixty-two and had substantial earning capacity). Rather, this is a situation where Jeffrey was involuntarily terminated and then diligently tried to find employment at a rate of pay comparable to his previous rate of pay but was unable to do so. It seems clear from the record that Jeffrey took a lower paying job not to avoid his support obligation, but because it was the best one he could find.

Debra further argues that any change in Jeffrey's income is not permanent or substantial when he has assets from which to pay his pre-modification child support and possesses substantial earning capacity. Clearly a change in rate of pay from \$19 per hour to \$11 per hour would significantly affect one's ability to meet his or her financial obligations and is a substantial change in financial circumstances. Furthermore, it appears from the record that Jeffrey has consumed a substantial amount of his assets in order to remain current on his child support and medical support obligations. This is not a case in which no

support or only minimal support will be paid if Jeffrey is not required to consume remaining assets in order to pay support in an amount based on a higher level of income than he now has. Under the trial court's modification order he will be required to pay \$77.25 per week for one child, provide medical and dental insurance for the child, and pay the child's medical and dental expenses. *Cf. In re Marriage of Vetterlack*, 334 N.W.2d 761 (Iowa 1983) (declining to reduce support obligation of \$40 per week for each of two children while obligor incarcerated with income of \$40 per month – obligor had assets that could continue to provide support despite his lack of income).

We further conclude the change in Jeffrey's financial circumstances is more or less permanent and continuous, rather than temporary. At the time of the modification hearing he had searched for approximately sixteen months for employment at a level of pay commensurate with what he was receiving at Monsanto, to the point he was willing to move to a different state in order to find the best paying job he could. We note that after the modification Jeffrey was still paying a significant amount of child support, not merely a nominal amount, and continues to be responsible for medical and dental insurance and medical and dental expense for the parties' child despite the fact his current job was not providing insurance at the time of the modification hearing. Additionally, we recognize that Debra always has the right to file a petition to modify should Jeffrey's income significantly increase in the future.

We affirm the trial court's modification of child support.

IV. DEBRA'S REQUEST FOR ATTORNEY FEES

Debra seeks trial and appellate attorney fees. An award of trial attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award must be for a fair and reasonable amount, and based on the parties' respective abilities to pay. *In re Marriage of Coulter*, 502 N.W.2d 168, 172 (Iowa Ct. App. 1993). The district court determined that each party should be responsible for their own attorney fees. Debra does not raise as a separate issue or brief point the trial court's decision on this matter and does not claim the trial court abused its discretion or otherwise erred or failed to do equity in not awarding her trial attorney fees. We affirm the trial court's decision concerning trial attorney fees.

An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997; Iowa Code §598.36. We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). After considering the relevant factors, we conclude each party should be responsible for their own appellate attorney fees.

V. CONCLUSION

Based on our de novo review of the entire record we conclude the district court properly modified Jeffrey's child support obligation based on his current income. Jeffrey met his burden to prove there had been a material and substantial change in his financial circumstances since the entry of the

dissolution decree. We affirm the district court's order modifying Jeffrey's child support obligation. We deny Debra's request for trial and appellate attorney fees.

AFFIRMED.