IN THE COURT OF APPEALS OF IOWA

No. 2-604 / 92-104

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CLERK SUPREME COURT

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IN RE THE MARRIAGE OF RHONDA LEE ROBBINS AND ROBERT M. ROBBINS

Upon the Petition of
RHONDA LEE ROBBINS,
Petitioner-Appellee,

And Concerning
ROBERT M. ROBBINS,
Respondent-Appellant.

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

The former husband appeals an order of the district court modifying the parties' dissolution decree. **REVERSED AND DISMISSED.**

Teri Beyer of Hyland, Laden & Pearson, P.C., Des Moines, for appellant.

Phil Watson and Thomas J. Jackowski of Watson & Peterson, P.C., Des Moines, for appellee.

Considered by Oxberger, C.J., and Schlegel and Sackett, JJ.

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SACKETT, J.

Respondent-appellant Robert M. Robbins appeals from a decree modifying his child support obligation and increasing it from $42.50 per week per child to $135 per week. Robert contends petitioner-appellee Rhonda Lee Robbins did not show the required change of circumstances and the trial court incorrectly computed his net monthly income for child support purposes. We agree and reverse finding the modification petition should have been dismissed.

Robert and Rhonda were divorced in July 1981. There were two children born to the marriage, Bobbi Jean, born September 30, 1977, and Amy Jo, born August 29, 1980. The decree provided Robert was to pay $42.50 per week per child and one-third of all medical expenses not covered by insurance. When the marriage was dissolved, Robert earned $265 per week after deduction for taxes. This would translate to after tax earnings of $13,780 annually. In 1990, Robert had annual earnings before taxes of $15,572. Robert testified he expected his 1991 earnings to be similar to his 1990 earnings. However, at the time of the hearing in December 1991, Robert was employed at an hourly wage of $13.90. If he worked a forty hour week at this wage, his take home pay would be $450. The trial court found a change of circumstances had been shown and used the $450 a week amount to compute child support.

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Robert contends his current rate of pay should not have been used to compute child support because it does not reflect his annual earnings. He testified he expected to be laid off during part of the year. He has never maintained steady employment.

His argument as to computation of his income is determinative of both the question of whether support should be modified and, if modified, what the resulting figure should be.

We have recognized there are occasions when income should be averaged to compute a fair net monthly income. See In re Marriage of Cossel, 487 N.W.2d 679, 681 (Iowa App. 1992); In re Marriage of Mayfield, 477 N.W.2d 859, 862 (Iowa App. 1991).

When one has a fluctuating monthly income, it generally is best to use an average income from a period that accurately reflects the fluctuations in income. Cossel, 487 N.W.2d at 681; see also Mayfield, 477 N.W.2d at 862. For example, whether bonus and overtime pay should be considered for child support purposes require a consideration of fairness. See In re Marriage of Brown, 487 N.W.2d 331, 333-34 (Iowa 1992); In re Marriage of Lalone, 469 N.W.2d 695, 696 (Iowa 1991); In re Marriage of Pettit, 493 N.W.2d 865, 868 (Iowa App. 1992); In re Marriage of Close, 478 N.W.2d 852, 854 (Iowa App. 1991); In re Marriage of Heinemann, 309 N.W.2d 151, 152 (Iowa App. 1981). Fairness would dictate a seasonal employee's income

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should not be determined by only looking at his or her full employment months, but should generally be determined by looking at his or her income for a one year period.

Robert's job produces a fluctuating income. His income varies from week-to-week and from month-to-month. He goes for periods of time being unemployed. His work is subject to the economy, the building trade, and the weather. We agree with Robert that his income should be averaged.

The question we must, therefore, address is whether the record supports a finding Robert will continue to be employed on a full time basis at forty hours at $13.90 an hour.

Robert was not employed from Thanksgiving of 1990 until June 1991. During the first six months of 1991, Robert made about $3000. He also had to pay back some unemployment he had erroneously received. Robert earned about $5500 from June to September and earned $5557.13 from September 1991 to December 23, 1991. The result was his total income before tax deductions in 1991 was less than $15,000.

At the time of the decree, Rhonda had minimal employment. She currently has a net monthly income of about $1100.

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973). The trial court has

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reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is failure to do equity. In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987).

The principles enumerated in In re Marriage of Vetternack, 334 N.W.2d 761 (Iowa 1983), and applied in Kern are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been in the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

The most the record shows is Robert enjoyed a temporary increase in income.

Robert's 1991 income applied to the child support guidelines would result in a monthly child support amount of less than his current obligation. To show the required change in circumstances necessary to modify the child support obligation in a dissolution decree, it is necessary to show more than a temporary increase in income of a seasonal employee. Rhonda has failed to meet the burden necessary to modify Robert's support obligation. We reverse the order modifying and dismiss petition for modification.

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Costs on appeal are taxed to Rhonda.

REVERSED AND DISMISSED.

Schlegel, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would affirm the trial court. The respondent was earning $265.25 weekly take-home pay. Presently he is earning $450 net take home.

The respondent is a construction worker. His employment is seasonal. The majority applies an "average formula" we have used in situations where a self-employed person has fluctuating income year to year. I do not believe we should use the "average formula" for seasonal workers. However, if we are to use this principle we should, in modification cases, use it also on the original income to determine if there has been a substantial change in income. The majority did not do this.

In my judgment the approach for seasonal workers is to use the worker's weekly pay stub as the basis to apply the child support guidelines. I would place the burden on the worker to show the need for relief from the guidelines payment requirement. The majority's approach places the burden on the children to show what weeks the respondent worked.

Here the respondent testified, "I have three other kids now and I got to try to keep busy so I pick up a little bit of side work to supplement my being laid off." The majority has not computed respondent's "side jobs" nor his unemployment compensation funds.