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DEC 0 4 2000
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-619 / 99-1888

IN RE THE MARRIAGE OF DAVID EDWARD FUNK AND KATHLEEN DIANE FUNK

Upon the Petition of
DAVID EDWARD FUNK,
Appellant/Cross-Appellee,

And Concerning
KATHLEEN DIANE FUNK, a/k/a KATHLEEN DIANE CLEMENT,
Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge.

The petitioner appeals, and respondent cross-appeals, a district court order granting respondent's request to modify petitioner's child support obligation. **AFFIRMED.**

Stephen B. Jackson and Stephen B. Jackson, Jr., of Jackson Law Office, Cedar Rapids, for appellant.

Scott L. Hippen of Hippen Law Office, Ames, for appellee.

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

VOGEL, J.

David E. Funk appeals and Kathleen D. Clement cross-appeals a district court order granting Kathleen's request to modify David's child support obligation. We find the trial court did not abuse its discretion in ordering the modification be made retroactive to July 1, 1997, and the support obligation ordered was equitable and within the sound discretion of the trial court. We affirm.

Background facts. The marriage of David and Kathleen was dissolved in April 1988. The parties' share joint custody of their minor son, David, with Kathleen as the physical care provider. At the time of the dissolution, the district court set David's child support obligation at $500 per month. This amount was most recently adjusted to $614 per month in 1993 to reflect a cost of living increase.

On April 1, 1996, Kathleen filed for a modification of the dissolution decree as to the child support obligation, due to changed circumstances. No further action appears in the court file until Kathleen filed a motion for a trial setting conference in December 1998. In February 1999, David filed a motion to dismiss under Iowa Rule of Civil Procedure 215.1, due to a failure to prosecute, although no such notice was ever generated from the clerk of court. The trial court overruled this motion and the hearing on the modification was held on October 14, 1999. David now appeals the modification ruling and Kathleen cross appeals.

Scope of review. Our scope of review of a child support modification action is de novo. *In re Marriage of Walters,* 575 N.W.2d 739, 740-41 (Iowa 1998); Iowa R. App. P. 4. We give weight to the trial court's factual findings,

especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Bolick,* 539 N.W.2d 357, 359 (Iowa 1995). "Although our review of the trial court's award is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity." *In re Marriage of Rietz,* 585 N.W.2d 226, 229 (Iowa 1998).

Retroactive modification of the child support order. The trial court found a modification of child support was in order due to the change in the parties' incomes since the time of the original decree. On appeal, neither party has disputed this finding. In attempting to determine an annual and monthly salary for the parties, the trial court noted the "unusual circumstances in this case . . . make exact determinations impossible." Based on the record before it, the trial court attributed certain monthly incomes to both parties for the purpose of a child support calculation. We agree with these approximations, finding Kathleen's income to be between $2,001-$2,100 per month and David's income to be in excess of $6,000 per month. According to the child support guidelines, these incomes establish a minimum child support obligation of $1,056, subject to the trial court's discretion to make an appropriate deviation. The trial court set $1,100 per month as the appropriate amount of child support. The trial court also made this modification retroactive to July 1, 1997.

David does not contest the amount but alleges making the support retroactive was inappropriate. He asserts Kathleen, as the party filing this modification, had the sole responsibility to pursue her petition in a timely manner. Therefore, he contends the trial court abused its discretion by ordering a

retroactive modification, which put him immediately in arrears by approximately $14,000.

We agree David had no responsibility to pursue an action he did not file. *Sanchez v. Kilts,* 459 N.W.2d 646, 649 (Iowa App. 1990) (finding the defendant need not seek dismissal under Iowa Rule of Civil Procedure 215.1, but keeping a case alive must rest squarely on the shoulders of the party seeking to avoid dismissal). We recognize the duty did not fall to David to pursue Kathleen's petition. However, we find that has little bearing on the trial court's discretionary ruling as the ongoing need for child support remains regardless of the legal posture of the parties.

David next argues the retroactive child support order preceded a change in circumstances, making such an order inequitable. He alleges the trial court based the modified child support order on his 1999 income amount rather than his 1997 income amount, which was substantially lower. David testified his taxable income for 1997 was $159,377, with an unspecified portion attributable to his current wife's earnings. With this limited evidence, we find the modified child support was appropriately based on a net monthly income for David in excess of $6,000 per month from 1997. This income level puts the child support amount squarely within the sound discretion of the trial court. The child support guideline states, "In this range the appropriate figure is deemed to be within the sound discretion of the court or the agency fixing support by administrative order." *See In re Marriage of Beecher,* 582 N.W.2d 510, 513 (Iowa 1998). In addition, the

trial court noted the parties had not followed the cost of living adjustment that was originally ordered to be implemented on an annual basis.[1] Because the trial court has broad discretion in determining such issues, we will not disturb a ruling on appeal unless there is a failure to do equity. *In re Marriage of Wessels,* 542 N.W.2d 486, 490 (Iowa 1995). We find the retroactive modification order of the court to be equitable to both parties and affirm.

Cross-appeal. Kathleen cross-appeals, alleging the trial court should have made the modification retroactive to January of 1997 rather than only to July of 1997. She also asserts the modified child support fails to do equity between the parties and urges us to increase the amount. As discussed above, the trial court has great discretion in this area. In establishing $1,100 per month to be the appropriate child support obligation to impose, the court considered many factors, including the lack of a cost of living adjustment since 1993, the incomes of the parties, the disparity of earning capabilities between the parties, and other support obligations of David. The amount awarded is clearly within the discretionary range and the court made it effective retroactively more than two years. After reviewing the record on appeal, we find the amount of child support and the retroactive date set by the trial court to be within the trial court's discretion and equitable to the parties. Costs on appeal are assessed to Kathleen, and we award no attorney fees. Accordingly, we affirm the modification order of the trial court.

AFFIRMED.

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[1] The trial court went on to delete this provision from the original decree, finding it unnecessary under current case law and citing *In re Marriage of Maher*, 596 N.W.2d 561 (Iowa 1999).