IN THE COURT OF APPEALS OF IOWA

No. 8-591 / 98-0397

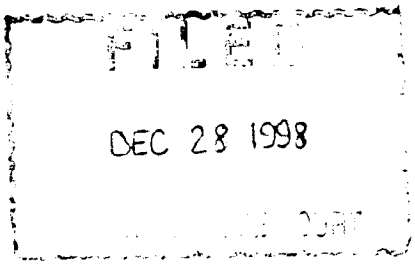
IN RE THE MARRIAGE OF VICKI BURNSIDE AND JAMES BURNSIDE

Upon the Petition of VICKI BURNSIDE,

Petitioner-Appellee,

And Concerning JAMES BURNSIDE,

Respondent-Appellant.



Appeal from the Iowa District Court for Monroe County, James P. Rielly, Judge.

Respondent appeals from the district court order modifying his child support obligation. **AFFIRMED AND REMANDED WITH DIRECTIONS.**

Sidney E. Drake, Centerville, for appellant.

Steven E. Goodlow of Sinclair and Associates, Albia, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

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MAHAN, J.

James Burnside appeals from the district court order modifying his child support obligation. James contends the district court should not have decided the child support issue. James argues the change in circumstances did not justify modification of his child support obligation. Finally, James asserts the district court used the wrong formula to calculate child support obligations in a shared physical custody arrangement. We affirm and remand with directions.

James and Vicki Burnside have one son, Andrew, born on October 7, 1990. The district court entered a dissolution decree on December 12, 1994. This decree placed Andrew in the shared joint primary physical care of his parents. James and Vicki were to alternate weeks with Andrew. Neither parent was ordered to pay child support to the other so long as this shared joint custodial arrangement remained in place. Each parent was obligated to pay half of Andrew's educational and activity expenses.

Vicki remarried and had a son, Brendon, with her new husband, Bill Caudill. Vicki was voluntarily unemployed; she quit her job to stay home with Brendon. Thereafter, Vicki petitioned for a modification of child custody. Vicki felt she should have primary physical care of Andrew now that she was a full-time homemaker.

Andrew was seven years old and in first grade at the time of the trial. The testimony showed Andrew was a happy, well-adjusted child. Andrew's teachers testified he had appropriate social skills and was performing above average

academically. Andrew reportedly had good relationships with both of his parents and his extended family.

At the time of trial, James was living in Moravia and working a day shift in Pella; Vicki was living in Albia, which is where Andrew was attending school. Vicki and James had never followed the custodial provisions of the dissolution decree. Instead, Andrew's typical schedule involved being with Vicki on Sunday night. Monday after school James would pick up Andrew at Medicap Pharmacy, which Vicki's parents own, and Andrew would spend Monday night with James; a babysitter would get Andrew up and dressed for school Tuesday morning because James had to leave so early for work, and James' mother would then pick up Andrew and drop him off at Vicki's where Andrew gets on the school bus. This would be repeated Tuesday and Wednesday nights. On Thursday and Friday, Andrew would stay at Vicki's. James would then have Andrew from Saturday morning until Sunday evening. The following week, Vicki would have Andrew on Monday, Tuesday, and Saturday, and James would have Andrew on Wednesday, Thursday, and Friday. Andrew was always with James on Wednesday nights; he was always with Vicki on Sunday nights and every weekday before and after school.

James and Vicki apparently have not had any problems with adjusting the custodial arrangement as needed. Both parents expressed a willingness to depart from the schedule to allow the other parent to take Andrew on vacation and to have Andrew on holidays such as Mother's Day or Father's Day or when the other parent has other commitments.

Both parents stated they wanted to encourage Andrew's relationship with the other parent. Vicki volunteered, and James consented, to have Andrew be with Vicki on James' days while James is at work, rather than have Andrew in day care. Vicki testified James always pays his half of the expenses when she notifies him of the bills. Andrew's teachers testified both Vicki and James were involved in Andrew's education: both parents attend parent-teacher conferences and other school functions; Vicki had volunteered in the classroom; and James had regularly visited or phoned Andrew's teacher to see how he was doing.

Vicki's petition for a modification of primary physical care was denied. The district court did, however, determine Vicki's unemployment was a material and substantial change which justified modification of the parties' child support obligations. Child support was ordered to be calculated using the child support guidelines. Vicki's actual earnings were used in the calculation; the district court refused to divide the result in half, as requested by James.

I. STANDARD OF REVIEW. Our review of child custody and support modifications is de novo. Iowa R. App. P. 4; *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *Fox*, 559 N.W.2d at 28.

II. CONSIDERATION OF THE CHILD SUPPORT ISSUE. James contends the district court should not have modified his child support obligation in

the absence of a change in custodial arrangements because the issue was not properly pled and tried. We disagree.

It is true the district court denied Vicki's petition for modification of the custodial arrangement. However, the district court then announced to the parties and their counsel there was a material and substantial change of circumstances with regard to the issue of child support. The district court requested that both parties submit child support guideline worksheets in order to determine the proper award of child support. James' counsel did not object to either the district court's finding or the request for submission of child support guideline worksheets. In addition, counsel submitted the requested worksheets to the district court. As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. *Conner v. State*, 362 N.W.2d 449, 457 (Iowa 1985); *State v. Lyon*, 223 N.W.2d 193, 194 (Iowa 1974). Since this issue was not objected to at the district court level, we decline to address it on appeal.

III. AWARD OF CHILD SUPPORT. James argues Vicki's unemployment did not justify modification of his child support obligation. We disagree.

In Iowa, a child support obligation may be modified under certain conditions:

> (1) There must be a material and substantial 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 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 within the contemplation of the trial court when the original Decree was entered.

State ex rel. Pfister v. Larson, 569 N.W.2d 512, 514 (Iowa App. 1997). The party seeking modification has the burden of proof. *Id.* Under the facts of this case, we agree with the district court that Vicki's unemployment constitutes a material and substantial change in circumstances regarding child support issues.

III. CHILD SUPPORT CALCULATION. James asserts the district court used the wrong formula to calculate child support obligations in a shared physical custody arrangement. James believes his child support obligation should have been halved because Andrew is with James half of the time. We disagree.

The Iowa Supreme Court has made clear that a shared parenting arrangement does not entitle a parent to a reduction of their child support obligation based on the percentage of time that parent is with the child. *Fox*, 559 N.W.2d at 29. We find the district court properly used the offset method to determine the amount of James' child support obligation. *Id.* at 28.

However, we also find the district court erred in using Vicki's actual earnings rather than her earning capacity in the child support calculations. Earning capacity may be used when substantial injustice would result from the use of actual earnings or when adjustments would be necessary to do justice between the parties. *Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa App. 1996).

James has been an involved father and has paid his half of Andrew's expenses whenever he has been requested to do so by Vicki. Vicki had been employed full

time and there is no evidence in the record she could not find employment; Vicki became unemployed because she chose to stay home with Brendon. While we respect Vicki's decision to stay home with her child, Brendon is not James' son. *See id.* We find, under the facts of this case, it would be a substantial injustice for James' child support obligation to Andrew to be calculated using Vicki's actual earnings instead of her earning capacity.

For these reasons, we affirm the district court's award of child support. We remand for a determination of Vicki's earning capacity and a re-calculation of James' child support obligation.

AFFIRMED AND REMANDED WITH DIRECTIONS.