

IN THE COURT OF APPEALS OF IOWA

No. 7-770 / 97-0459

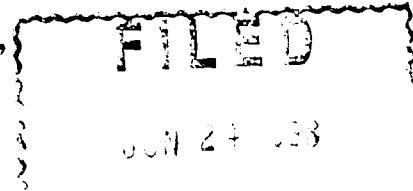
**STATE OF IOWA, ex rel. JILL OLBERTZ, IOWA
DEPARTMENT OF HUMAN SERVICES, and
MICHAEL JAMES OLBERTZ FELLER, A Minor,**

Petitioner-Appellee/Cross-Appellant,

vs.

MARK H. FELLER,

Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Crawford County, Richard J. Vipond,
Judge.

Respondent appeals, and petitioner cross-appeals, from a district court ruling
increasing respondent's child support obligation to his son from \$125 per month to
\$394 per month. **AFFIRMED.**

Thomas R. Eller of Eller, Brink & Sextro, Denison, for appellant.

Reed H. Reitz of Reimer, Lohman & Reitz, Denison, for appellee.

Considered by Sackett, P.J., and Huitink and Mahan, JJ.

MAHAN, J.

Mark Feller appeals the district court's modification of his child support obligation. He contends the district court erred because: (1) it incorrectly determined his income; (2) it did not take into account his spouse's income when analyzing his income; (3) it did not grant him dependant exemptions for his state and federal income taxes; and (4) it failed to take into account his state and federal income tax obligations. Jill Olbertz cross-appeals. She claims the district court erred when it: (1) failed to award her trial attorney fees; and (2) failed to order the increase in the child support retroactive to the date the petition was filed. We affirm.

Mark and Jill were never married. However, they have a son, Michael, born in 1985. In 1985, the district court ordered Mark to pay \$75 per month in child support. In 1988, the amount was increased to \$125. In May 1996, Jill petitioned the district court for an increase.

Mark owns his own roofing business and a couple of rental properties. Mark incorporated the business shortly before the modification hearing held in 1997. Through 1995, the business had gross receipts of \$74,000; \$93,000; \$139,000; \$170,000; and \$201,000. Mark estimated sales for 1996 would be \$204,000. Mark's income tax returns for 1994 and 1995 show he had a combined net business loss of \$5173 for the two years.

Mark draws a salary of \$300 per week from the corporation. He claims his income for the year will be approximately \$18,000. Jill contends Mark's income is

substantially higher and places his income near \$37,000. Mark's wife also works at a furniture store owned by the couple.

To obtain bonding for the corporation, Mark provided a financial statement to Merchants Mutual Bonding Company. The financial statement indicated Mark had income of \$37,000 per year.

In 1996, Mark bought a Harley Davidson motorcycle. He also has a replica of a 1929 Mercedes Benz, a 1969 Camaro, and sponsors a race car at the Crawford County Speedway at a cost of \$1400 to \$1500. In 1996, Mark took his family of six on an eight-day Disneyland-Bahamas trip and cruise. Mark also belongs to the Denison Country Club.

The trial court determined Mark's net annual income to be \$22,103 and ordered Mark to pay \$394 per month in child support. The trial court determined Jill's net annual income to be approximately \$28,541.

I. STANDARD OF REVIEW. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the 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).

II. CHILD SUPPORT. The child support guidelines are strictly followed in determining a parent's child support obligation. *State ex rel. Miles v. Minar*, 540

N.W.2d 462, 464 (Iowa App. 1995). “In applying the child support guidelines, the court must determine the parents' current monthly income from most reliable evidence presented.” *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996). “This often requires the court to carefully consider all of the circumstances relating to parents' income.” *Id.* All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation. *In re Marriage of Russell*, 511 N.W. 2d 890, 893 (Iowa App. 1993).

Generally in fixing child support, we consider as gross income what is referred to as “total taxable” income on the Federal 1040 and as “net income” on the IA 1040. *In re Marriage of McKamey*, 522 N.W.2d 95, 98 (Iowa App. 1994). When income is subject to fluctuation, an average income over a reasonable period of time should be used. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). The child support award may be based upon the party's earning capacity, as opposed to his or her actual earnings. *Id.* However, earning capacity may sometimes be best evidenced by present income. *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa App. 1991).

When it ordered the increase in child support, the district court stated:

[Mark] owns and operates a roofing business. Determining his income is very difficult. On February 15, 1995, he signed a bond application in which he said that his annual income from his business was approximately \$35,000 and that he had additional income from rentals. He now pays himself a salary of \$15,600 per year from a corporation which he has recently established. He says that prior to the

establishment of the corporation he was taking approximately \$12,000 per year out of his business. His income tax returns for 1994 and 1995 show that he had a combined net business loss of \$5173 for the two years.

[Mark's] income tax returns are of no value at all in determining his actual income. It may be that the returns were accurately prepared in compliance with income tax law, but the net business profit shown on the returns clearly has no relation to [Mark's] actual income from the business.

The statement of net business profit in the bond application was probably a substantial exaggeration. The evidence as to [Mark's] lifestyle and accumulation of property, however, show that his income has been much more than the \$15,600 per year which he is now paying to himself from the corporation. His present income cannot be determined with any high degree of precision, but the evidence indicates that he has a gross annual income of approximately \$25,000.

(Emphasis added.) In its ruling on Mark's 179(b) motion, the district court stated:

The court takes judicial notice of federal and Iowa income tax statutes and regulations, but it makes no judgment as to the accuracy of the respondent's income tax returns. He may have been able to manipulate his receipts and expenditures in ways which permit him to report much less income than he actually makes. He would certainly not be the first person to succeed in doing so. It is clear, however, that the net business income shown on his tax returns has no relation to his actual business income. He admits that the amount of money which he had been taking out of the business is much larger than the income shown on his tax returns.

We find nothing in the record to indicate the district court improperly considered or failed to consider the income of Mark's wife. We find it was equitable for the district court to look beyond the tax forms in this instance, as the district court specifically found they were not reliable. We also find no reason to modify a provision of the order for child support.

III. RETROACTIVE CHILD SUPPORT. The district court has discretion to decide whether child support payments should become effective from the date the action was filed or from the date of the modification order. *In re Marriage of Ober*, 538 N.W.2d 310, 313 (Iowa App. 1995). We find no reason to modify the effective date of the modification of child support.

IV. TRIAL ATTORNEY FEES. Iowa trial courts have considerable discretion in awarding attorney fees. *Gonzalez*, 561 N.W.2d at 99. To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* We find the district court did not abuse its discretion when it refused to award trial attorney fees.

V. APPELLATE ATTORNEY FEES. In determining whether to award attorney fees on appeal, our decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We also deny the request for appellate attorney fees.

For these reasons, we affirm the decision of district court.

AFFIRMED.