

IN THE COURT OF APPEALS OF IOWA

No. 6-187 / 95-941

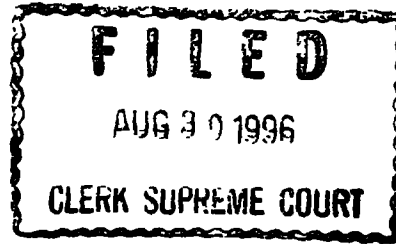
**IN RE THE MARRIAGE OF ANITA DOLORES
HUDSON AND RICKY DAVID HUDSON**

**Upon the Petition of
RICKY DAVID HUDSON,**

Petitioner-Appellant,

**And Concerning
ANITA DOLORES HUDSON,**

Respondent-Appellee.



Appeal from the Iowa District Court for Jefferson County, James D. Jenkins,
Judge.

Ricky Hudson appeals from the upward modification of his child support
obligation. **REVERSED.**

Timothy W. Dille of McGrath & McGrath, P.C., Keosauqua, for appellant.

Kenneth J. Ketterhagen of Kenneth J. Ketterhagen P.C., Fairfield, for appellee.

Considered by Habhab, P.J., and Huitink and Streit, JJ.

HABHAB, P.J.

This is an appeal from the modification of appellant's child support obligation. Upon our de novo review, we reverse.

I. Modification of Child Support. Ricky (Rick) and Anita Hudson were married in 1984. They have two children, Spencer, born in 1988, and Parker, born in 1991. Their marriage was dissolved October 8, 1993. The dissolution court determined Rick's gross annual income was \$40,000 and it found Anita's net monthly income was between \$800 and \$900. Rick was ordered to pay \$700 per month in child support for the parties' two children.

On May 27, 1994, Rick filed an application to modify the child support obligation. He contended his income had decreased and the amount of support ordered by the court varied by ten percent or more from the amount which would be due under the present guidelines. Iowa Code § 598.21(9) (1995). A modification hearing was held on May 2, 1995, and a modified decree was filed on May 4, 1995. The district court concluded the entire income paid to Rick's new wife from Rick's businesses was attributable to him and it increased Rick's support obligation to \$810.50 per month.

The record reveals Rick is the sole shareholder and president of two corporations, Hudson's Circle B and Hudson Family Corporation. Both he and his present wife, Kabrina, who he married in 1994, were employed by these companies. On appeal, Rick claims his present wife's income should not have been considered

when determining his net monthly income nor should any of her income be allocated to him.

Kabrina performs bookkeeping and managerial functions for Rick's businesses. Rick's gross income from the corporations for 1994 was \$13,120 and Kabrina's was \$22,135. Rick claimed he has never drawn any income from Circle B; and neither he nor Kabrina had recently drawn income from the Hudson Family Corporation. Rick admitted the decisions to pay his wife and the amounts she was paid were his decisions. He was aware her income from the corporations would not be considered in determining his income for support purposes. Rick claimed his net monthly income was \$822.

The district court found Rick completely controlled the corporations and the employees' remuneration. The court concluded "it is only just and right that Kabrina's income be considered for the purposes of setting child support." The court found Anita's net monthly income had decreased to \$494 per month. It found Rick's net monthly income was \$2363 and his child support obligation under current guidelines was \$810.50 per month. Since this amount was more than ten percent above his original obligation, the district court concluded a modification of Rick's support obligation was warranted.

Where a party is obligated to pay child support and he is the principal in a business that employs his spouse, we look to the salary paid to the spouse to determine whether the allocation is fair or if it results in a salary to the spouse that is

larger than average salaries for comparable employment. If the salary is in excess of salaries for comparable employment, then we will assume the portion of the salary that is in excess of comparable salaries is being paid in an attempt to show a reduced level of income for the obligor. Absent evidence showing a valid basis for the excess salary, we will attribute that portion of the salary that is excessive to the obligor spouse. *In re Marriage of McKamey*, 522 N.W.2d 95, 99 (Iowa App. 1994); *In re Marriage of Aronow*, 480 N.W.2d 87, 90 (Iowa App. 1991).

Rick appears to argue that because Kabrina worked for his businesses before the dissolution of his marriage to Anita, Kabrina's salary is presumably reasonable and not excessive. He asserts, through nonadmissible hearsay testimony, that if he were to hire someone to perform Kabrina's duties, the average salary for the position would be \$40,000 to \$60,000.

A review of the testimony reveals Kabrina's employment commenced in April 1993, approximately the same time Rick and Anita separated. There was no evidence about who, if anyone, previously performed the duties now done by Kabrina. No rational explanation was offered as to why Rick, the sole shareholder and president of the corporations, made only about one-half of the earnings received by his employee Kabrina. It was evident Rick knew his child support obligation was to be based on income he received and not the income paid to his spouse.

Rick's claimed monthly income of \$822 was not plausible given his acquisition of a new home, new furnishings, a new vehicle, and the many trips he and his wife

had taken. It was obvious he enjoyed a lifestyle resulting from a much higher level of income than \$822 per month. Rick's father agreed with this analysis.

We recognize "when the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines" that a substantial change of circumstances exists and a court order providing for child support may be modified. However, this section does not relieve the moving party from carrying the burden of proof necessary to substantiate a claim. That party, to prevail under this section, must yet come forward with competent and credible evidence establishing the ten percent variance.

We agree with the trial court that Rick has diverted his income from his businesses by paying his wife an amount substantially in excess of what he paid himself. Under the circumstances here, we conclude that Rick has failed to carry his burden of establishing by competent and credible evidence the ten percent variance required to warrant a reduction in his child support obligation.

As noted above, the trial court allocated all of Kabrina's income to Rick when it determined his child support obligation. We agree with the trial court that there is no competent evidence showing a valid basis for Kabrina's excessive salary. However, there is evidence that she did perform services for the two businesses. Under the circumstances, we must attribute only that portion of her salary that is excessive to Rick. *McKamey*, 522 N.W.2d at 99. In doing so, we conclude that Rick's net monthly income for the computation of child support is \$1850.

The trial court found that Anita's net monthly income was \$494. This amount is not challenged on appeal. The tables provide that Rick should pay 34.3 percent of his net monthly income, or \$634.55. Comparing this amount with the court order for child support, it is clear that it does not vary by ten percent or more. Thus, modification is not in order.

We reverse the trial court. Rick's petition to modify is denied. Rick's child support payments are to remain at \$700 per month.

II. Attorney Fees. Anita requests an award of trial and appellate attorney fees. In her brief, she concedes that due to oversight she did not request an award of attorney fees from the trial court. We cannot review an issue not presented to the trial court. *In re Marriage of Gulsvig*, 498 N.W.2d 725, 727 n.1 (Iowa 1993).

With respect to her request for appellate attorney fees, we note an award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* When we couple the circumstances of the parties in this action with our ruling, we find equity warrants an award of appellate attorney fees to Anita in the amount of \$500. Costs of appeal are assessed to Rick.

REVERSED.