

IN THE COURT OF APPEALS OF IOWA

No. 7-409 / 96-1189

Filed April 24, 1998

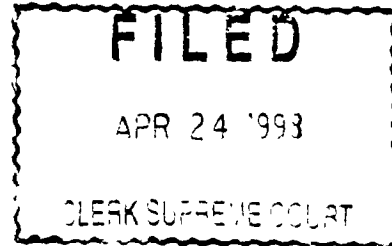
**IN RE THE MARRIAGE OF BARBARA L.
RIETZ AND JOHN E. RIETZ**

**Upon the Petition of
BARBARA L. RIETZ,**

Appellant,

**And Concerning
JOHN E. RIETZ,**

Appellee.



Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Petitioner appeals the district court's modification of the terms of the parties' original dissolution decree. **AFFIRMED AS MODIFIED.**

Rod Powell of The Rod Powell Law Firm, P.C., Norwalk, for appellant.

Dorothy K. Goodman of Barnhill & Goodman, P.C., West Des Moines, for appellee.

Decided en banc.

CADY, C. J.

Barbara Rietz appeals from a district court order modifying a prior decree of dissolution. She claims the reduction of the prior awards of alimony and child support was inequitable and unjustified under the circumstances. We modify the district court order on our review.

Barbara and John Rietz divorced in April 1995. John was required to pay monthly child support for their four minor children of \$4000, and monthly alimony to Barbara of \$4000 for twelve years.

John was employed as a stockbroker in Des Moines until just prior to the divorce. He was very successful, and earned a substantial income. In 1989, his income was \$221,000. His average income in 1990 and 1991 was \$165,000. In 1992, his adjusted gross income was \$537,000. In 1993, he earned nearly \$272,000.

John moved from one brokerage firm to another during his career. In 1994, however, he was asked to resign from a brokerage firm following a series of disputes. These disputes also resulted in an arbitration proceeding which concluded John owed the firm \$53,000. John claimed he could not pay the award, and his securities license was subsequently suspended or revoked.

Although John had not worked for nearly a year prior to the dissolution hearing, the district court based his child support and alimony obligations on his annual earning capacity. The district court determined this was between \$150,000 and \$200,000.

Several months following the divorce, John obtained employment as the manager of the car leasing department of a major automobile franchise in Des Moines. He obtained a raise of \$10,000 within the first few months and was making approximately \$55,000 at the time of the modification hearing. John did not believe he could return to his employment as a stockbroker due to the loss of his sales license, coupled with the prior problems he had with former employers. He was also tired of the stress level. He filed a petition to modify the child support and alimony provisions of the decree in October 1995.

John was paid on a commission basis in his employment as a stockbroker, and obtained much of his business from cold calling potential customers. Commissions are also a part of his compensation with the car dealership. He operated an intricate financial enterprise during the marriage, including foreign investments.

Barbara testified John told her prior to the dissolution he would try to destroy her financially. She claimed John failed to maintain the same level of income the parties enjoyed prior to the separation to avoid paying her a substantial amount of alimony and child support. She believed he could pay the arbitration award and resume his career as a stockbroker.

Following a hearing, the district court reduced the monthly child support to \$1330 and reduced the monthly alimony to \$1000. The district court did not believe John could resume his career as a stockbroker and no longer had the earning capacity he enjoyed at the time of the divorce.

I. Standard of Review

Our review of an order modifying a decree of dissolution is de novo. *In re Anderson*, 530 N.W.2d 741, 741 (Iowa App. 1995). However, we do give weight to the trial court findings of fact because it had the opportunity to personally hear and view the witnesses. We are not, however, bound to accept those findings. Iowa R. App. P. 14(f)(7).

II. Modification

Courts are generally permitted to modify a dissolution decree when there has been a substantial change in circumstances. Iowa Code § 598.21(8) (1995). The change must be more or less permanent or continuous, it must not have been within the contemplation of the original trial court, and continued enforcement of the original decree in light of the changed conditions must result in positive wrong or injustice. *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983). Furthermore, a change in financial conditions must be substantial. *Id.*

Courts are frequently required to determine whether support provisions of a decree for dissolution of marriage should be reduced based on a claim of reduced earning capacity of the payor. *Id.* In response, certain trends have emerged over the years from our efforts to resolve these disputes. They include: (1) a growing reluctance to modify decrees; (2) approaching the issue from the long-range capacity to earn money; and (3) any voluntariness in diminished earning capacity typically will

preclude modification. *Id.* at 763. It is this last trend which lies at the heart of this case.

The rule that a self-inflicted or voluntary reduction in earning capacity will not support a modification of a support order is based on equitable principles. *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993). It seeks to prevent divorced parents and spouses from gaining an advantage by reducing their earning capacity and ability to pay support through improper intent or reckless conduct. *Id.* The rule targets the obligor spouse who deliberately attempts to avoid family responsibilities. *See* 24 Am. Jur. 2d, *Divorce and Separation* § 662 (2d ed. 1983). Thus, the inquiry does not merely focus on the voluntariness of the conduct responsible for a reduced earning capacity, but, more importantly, the voluntariness or intent of the obligor to actually reduce income. *See Walters v. Walters*, ___ N.W.2d ___ (Iowa 1998). This perspective is important because the self-inflicted rule would not necessarily capture all parents who reduce their incomes, but only those who do so through improper intent or reckless disregard for those who depend on their support. *See In re Marriage of Swan*, 526 N.W.2d 320, 324 (Iowa 1995) (father did not voluntarily resign from job and his decision to return to school was not made with improper intent); *Foley*, 501 N.W.2d at 500 (although spouse was responsible for loss of job, there was no intent to deprive children of support or evidence of reckless disregard for welfare of children).

The self-inflicted rule is consistent with, and perhaps even a product of, two companion rules. The first is the long-standing principle that parents have an obligation to support their children according to their fair ability to contribute. *In re Marriage of Fleener*, 247 N.W.2d 219, 221 (Iowa 1976). This parental obligation remains constant throughout the years of minority, and may even extend into the college years of a child. *See* Iowa Code § 598.1(6) (1997). The second rule is the principle that child support may be based on earning capacity, as opposed to actual earnings. *See In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa App. 1995).

Although these principles emphasize parents have an obligation to provide necessary support for their children, divorce does not necessarily tie a parent to a particular level of income. Thus, when circumstances arise, beyond the control, in whole or in part, of the parent, which undermine the ability of a parent to maintain a particular level of income, a child support obligation may need to be adjusted. This concept was recently underscored in *Walters*. *See Walters*, ___ N.W.2d at ___.

In *Walters*, the court considered the pragmatic consequences of the convicted felon status which accompanied an obligor spouse who had been convicted of embezzlement from his former employer. *Id.* Although the conduct which caused the loss of employment was voluntary, it did not necessarily transpose into a willful reduction of his earning capacity. *Id.* There was no indication the obligor spouse engaged in the embezzlement for the purpose of ultimately depriving his children of the level of support set by the decree of dissolution of marriage. *Id.* Instead, the

reduction of his earning capacity was the inevitable result of his status as a convicted felon. *Id.* There was nothing the obligor spouse could foreseeably do to change his status, and it was unreasonable to expect him to maintain the same level of child support he had before his conviction. *Id.*; see *Wills v. Jones*, 667 A.2d 331, 338 (Md. App. 1995) (incarceration is voluntary only if it was the intended result).

The circumstances which will support a modification of child support following a reduction of earnings are not defined with exactness. Instead, each case hinges on those particular facts which bear on the issue whether income has been reduced through improper intent or reckless conduct. As in other areas of the law, this type of inquiry is seldom, if ever, supported by direct proof. See *State v. Rinehart*, 283 N.W.2d 319, 322-23 (Iowa 1979).

Due to the nature of our inquiry, our prior appellate decisions applying the self-inflicted rule have produced mixed results. See *Walters*, ___ N.W.2d at ___. Nevertheless, they have identified some important factors to help determine this intent. See *id.* (obligor spouse was unable to attain former level of income after voluntary convicted felon status necessarily relegated him to substantially lower paying jobs); *Swan*, 526 N.W.2d at 324 (spouse sought vocational retraining after work-related injury caused loss of job); *Foley*, 501 N.W.2d at 500 (diligent efforts by obligor spouse to obtain new job following termination); *In re Marriage of Dawson*, 467 N.W.2d 271, 275-276 (Iowa 1991) (spouse changed careers with knowledge that lower child support payments would cause problems for children); *Vetternack*, 336

N.W.2d at 763 (incarcerated spouse nevertheless had assets available to satisfy support obligation); *Ellis v. Ellis*, 262 N.W.2d 265, 267-68 (Iowa 1978) (reasons offered by obligor spouse for reducing income by taking early retirement while still having a substantial earning capacity related to self-interest); *Flattery*, 537 N.W.2d at 803 (failure of spouse to actively look for employment although many job opportunities were present was voluntary); *In re Marriage of Blum*, 526 N.W.2d 164, 165-166 (Iowa App. 1994) (taking lesser paying job because of poor job market in community following plant closing was not voluntary reduction in salary); *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa App. 1991) (obligor spouse discharged from military for failure to control problem with his weight was not a voluntary reduction in earning capacity); *In re Marriage of Fidone*, 462 N.W.2d 710, 712 (Iowa App. 1990) (failure to relocate to community where employer moved business was motivated by desire to remain close to family and lack of job security at new location, and was not a voluntary reduction in ability to pay child support); *In re Marriage of Bales*, 439 N.W.2d 228, 230 (Iowa App. 1989) (spouse intentionally reduced her income by earning approximately one-third less income at new job).

Extrapolating these factors from our cases, as well as others, we identify them as a useful guide in determining whether or not parents seeking modification of a child support obligation have voluntarily reduced their income:

1. Physical and mental condition of the obligor;
2. Level of education and employment skills of the obligor;
3. Past work history of the obligor;
4. Job market in area the parties reside;
5. Relationship between the change in employment or financial circumstances and divorce proceedings or other events in the life of the obligor;
6. Efforts to find and retain employment;
7. Relationship between obligor parent and obligee parent (or children);
8. History of withholding or providing support;
9. Efforts of obligor to secure any needed retraining or education;
10. Commitment of obligor to support during marriage and knowledge of support needs at time of changes in employment;
11. Difference in past and current levels of income of obligor;
12. Likelihood former earning capacity will return to a former level in light of reason for reduced earning capacity;
13. Amount of the support obligation sought to be changed;
14. Burden on obligor spouse if amount of support not changed and burden on obligee if amount of support changed;
15. Whether reasons for reduction in earning capacity relate to personal interests of obligor parent or considers interests of obligee parent.
16. Other relevant factors.

See Goldberger v. Goldberger, 624 A.2d 1328, 1335 (Md. Ct. Spec. App. 1993).

Applying the relevant factors to this case, the evidence reveals John was in good health. He was also a very resourceful, skillful salesman with a long and successful employment history. He enjoyed many years of financial success as a stockbroker and was adept at changing jobs within his profession with no financial sacrifices. Although John believed he was no longer marketable as a stockbroker in the Des Moines area, he produced little supporting evidence. He also made no effort to regain his license to sell stock.

John's behavior was largely responsible for his termination from his last brokerage firm. Although this is not pivotal in our inquiry, it is a consideration in our search for John's intent. Furthermore, the termination of his employment occurred during the parties' separation, and during the same time frame John threatened to hide assets and make life miserable for Barbara. John remained unemployed throughout the divorce proceedings and for several months following. He did not work for nearly one and one-half years.

Despite this evidence pointing to an improper intent or reckless disregard, we cannot ignore the rather obvious evidence that John has now secured employment at an annual income of nearly \$55,000. It is also likely this income will increase. Although this level of income is substantially less than he earned as a stockbroker, it is far from unsubstantial. It is clearly enough to provide a reasonable level of support for the children.

Nevertheless, John's prior level of income was three or four times more than he currently earns. Moreover, the issue we face is not whether John is able to provide an adequate level of support despite his reduced income. This is only a factor to consider. The issue, instead, centers on John's intent and motivation in reducing his level of income from the area of \$150,000-\$200,000 to \$55,000. Evidence that John may be able to reasonably support his children and former wife on his new level of income does not absolve his intent to voluntarily reduce his earnings.

Considering all of the relevant factors and evidence, we conclude John acted with reckless disregard to those who relied on his support by reducing his income, and intentionally reduced his income. The evidence reasonably points to the conclusion that John's reduced income was a result of factors arising from his divorce, not factors outside his control, or personal considerations compatible with the interests of those who require his support. Under these circumstances, equity will not allow a modification.

We modify the decision of the district court to deny the petition for modification. We affirm the district court's denial of attorney fees. Costs on appeal are assessed against John.

AFFIRMED AS MODIFIED.

All judges concur, except Sackett and Huitink, JJ., who dissent.

SACKETT, J. (dissenting)

I dissent. I would affirm. The dissolution court, in fixing child support, considered John's income as a stockbroker, although he had already lost his license to sell stock. This, coupled with his inability to pay an arbitration award to his former employer, supports the modification court's conclusion he was not able to return to his prior employment and supports a finding of a substantial change in circumstances. The modification court reduced his child support and alimony obligations from \$8000 monthly to \$2330 monthly.

The majority makes findings that John was motivated by vengeance or apathy. These findings go to credibility. There is nothing in the trial court's ruling or the record to support the majority's finding on this issue. The trial court, having the parties in front of it, is better able to weigh such factors than an appellate judge from a cold record. Mindful of hostilities and bitterness that are encompassed in a dissolution action, threats made during the course of a proceeding should be evaluated in that context.

John took time to find a job. While the majority has criticized him for that, I note the job he now has provides a decent income and enables him to pay reasonable support, though not at the level of the original award. I cannot on this record find that employment with the earnings John previously enjoyed is available to him or that John has operated in reckless disregard of his family in reducing his income.

Child support is for the support of children. It is not punitive and we should not make it so. We must acknowledge the reality of an obligor's situation. *Walters v. Walters*, ___ N.W.2d ___ (Iowa 1998). One must remember that if this family had stayed together and the same job loss had occurred, the family would have made reductions in their standard of living. I cannot find John has the current ability to pay the ordered child support or alimony.

We must be realistic. Our failure to do so only creates unfair expectations on Barbara's part and unpaid financial obligations for John. It also sets the groundwork for a bitterness that will flow to John's relationship with his children. Non-custodial fathers are important to children in many more ways than as a money machine. I would affirm.

Huitink, J., joins this dissent.

HUITINK, J. (dissenting)

I respectfully dissent. Although the circumstances cited by the majority justify a deviation from the child support guidelines, they do not justify imposition of support and alimony obligations exceeding John's net monthly income.

This is not a situation where John's employment decisions have deprived his children of their reasonable subsistence. Whether John can be faulted for his present circumstances, should not, in my view, exempt his family from the consequences of economic misfortune married couples and their children are required to endure.

Sackett, J., joins this dissent.