

IN THE COURT OF APPEALS OF IOWA

No. 7-780 / 97-740

IN RE THE MARRIAGE OF PEGGY ANNE ROSENER AND DENNIS B. ROSENER

Upon the Petition of
PEGGY ANNE MARTENS f/k/a **PEGGY ANNE ROSENER,**
Appellant,

And Concerning
DENNIS B. ROSENER,
Appellee.

Appeal from the Iowa District Court for Cass County, G. C. Abel, Judge.

The petitioner appeals the district court ruling on her application for modification to increase the respondent's child support obligations. **AFFIRMED AS MODIFIED.**

Joanne C. Lorence of Otto, Lorence & Barry, Atlantic, for appellant.

John W. Trewet and Terrance G. Rutherford of Rutherford, Trewet & Petersen, Atlantic, for appellee.

Considered by Cady, C.J., and Streit and Vogel, JJ.

VOGEL, J.

Peggy Martens (formerly Rosener) appeals the district court's ruling on her application for modification to increase Dennis Rosener's child support obligations. We find the district court should have ordered Dennis to pay a percentage of his annual bonus income as child support and affirm as modified.

Background facts. A decree dissolving the marriage of Dennis and Peggy Rosener was filed in February 1984. Peggy was granted physical care of their two children, Anne, born in 1980, and Jennifer, born 1982. Dennis was ordered to pay $270 per month in child support, to be automatically increased to $300 per month when the children entered school.

In August 1994, the decree was modified by stipulation of the parties, raising Dennis's child support obligation to $700 per month. In 1996, Peggy and Dennis filed applications to modify the child support and custody provisions. On November 21, 1996, the district court entered its modification decree and increased Dennis's child support payments to $860 per month. In calculating child support, the court declined to include in Dennis's income bonuses received in 1994 and 1995 and instead reserved the bonus issue for review until after the parties received their 1996 W-2 forms. After a hearing in February 1997, the court ruled that Dennis's bonuses were speculative and should not be included as income for purposes of calculating child support. The court further denied Peggy's request for attorney fees. Peggy appeals.

Scope of review. Our review of orders on applications to modify child support provisions is de novo. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996). We give weight to the district court's findings of fact but they do not bind us. *Id.* The trial court's discretion will not be disturbed on appeal unless there is failure to do equity. Iowa R. App. P. 4; *State ex rel. Pfister v. Larson*, 569 N.W.2d 512, 514 (Iowa App. 1997).

Bonus income. Peggy contends the district court erred in failing to include Dennis's bonus income when calculating child support. Dennis argues that his bonuses are too speculative to be taken into account.

All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation. *See In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993). When deciding whether bonuses are to be included in gross income, we examine the employment history of the payor over the past several years to determine whether the amount of money paid from year to year was consistent. *Id.* If so, the bonuses should be included in gross income. *Id.*

Dennis was offered and received a $19,600 bonus in 1994, and a $20,000 bonus in 1995. In 1996, Dennis was offered a $22,500 bonus, but initially refused it because of the scheduled review by the court of the bonus issue. Dennis testified that he was concerned that his monthly child support obligation would increase beyond his ability to pay if the bonuses were included in child support calculations.

The main reason for excluding speculative income is so that a parent's monthly child support obligation is not set beyond their capacity to pay when they do not receive that income in the future. *See In re Marriage of Heinemann*, 309 N.W.2d 151, 153 (Iowa App. 1981) (child support should be determined with reference to the amount of income the payor can actually expect to earn). In this case, we have only a short history of bonuses to examine and testimony from Dennis's employer that the bonuses have been speculative in the past and would be in the future. At the same time, we cannot ignore the $62,100 additional income provided to Dennis over the past three years.

Given the size of the bonuses relative to Dennis's annual salary, we believe it would be inequitable not to share these earnings for the benefit of the children. In such cases where bonuses are unpredictable, yet provide a substantial increase to income, an alternative to continual adjustments to the monthly child support obligation is to order that a percentage of any bonus received be paid as child support. *See In re Marriage of Allen*, 493 N.W.2d 273, 275-76 (Iowa App. 1992). We believe this method provides the most equitable solution for this case. It provides for the children to share in their father's substantial financial increases without saddling Dennis with a support obligation that he may not be able to sustain absent the bonus income.

We therefore order Dennis pay Peggy 30.4%[1] of any net bonus received during each year by April 30 of the following year. Dennis shall also provide to Peggy a copy of his federal and state income tax returns and all documentation from his employer showing bonuses offered and received during the course of the preceding year. Dennis is further ordered to pay Peggy 30.4% of the $22,500 net bonus he received for 1996 within thirty days from the date procedendo issues from this order. When only one child remains eligible for support, the percentage of bonus income shall be reduced to 20.7%.

Attorney fees. Peggy also contends the district court erred in failing to award her trial attorney fees and requests an award of appellate attorney fees.

Ordinarily, an award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Francis*, 442 N.W.2d 59, 67 (Iowa 1989); *see also* Iowa Code § 598.36 (1997).

The district court concluded that Peggy was not entitled to trial attorney fees because she would not speak to Dennis during the proceedings except through counsel. However, the court made no reference to the relative financial positions of Peggy and Dennis in making its decision. While the trial court's concerns are well taken, we find it was an abuse of discretion to not consider the well established

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[1] This is the same percentage offered on Dennis's financial affidavit, and appears to be the percentage the trial court used to calculate child support. There is no dispute as to these figures.

factors before denying fees. *See, e.g., In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993) (whether attorney fees should be awarded depends on the respective abilities of the parties to pay); *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 662-63 (Iowa 1989) (controlling factor is ability to pay the fees); *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977) (award of attorney fees must be fair and reasonable). In reviewing the denial of fees, we recognize that Iowa Code section 598.36 grants the trial court discretion to award attorney fees to the prevailing party in a modification proceeding. We also consider this factor as we are modifying the trial court's ruling in Peggy's favor.

After review of the financial affidavits and the testimony in regard to the financial needs of Peggy and the children, we find that Dennis's income, including bonuses, is approximately three times that of Peggy's. We find Peggy should be awarded $2,000 for trial attorney fees.

Peggy also requests an award of attorney fees on appeal. In a modification action the successful party may be awarded attorney fees on appeal. *See In re Marriage of Bolson*, 440 N.W.2d 380, 382 (Iowa 1989); *In re Marriage of Lawson*, 409 N.W.2d 181, 183-84 (Iowa 1987). We are to 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 district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa App.1997). We find Peggy should

be awarded an additional $2,000 in appellate attorney fees. Costs of this appeal are assessed to Dennis.

AFFIRMED AS MODIFIED.