

IN THE COURT OF APPEALS OF IOWA

No. 2-449 / 92-108

FILED

OCT 27 1992

CLERK SUPREME COURT

STATE OF IOWA ex rel. ROBERT PAUL JUNCK, A Minor, By
JANIE D. JUNCK, His Mother and Next Friend,

Appellees,

vs.

KIRK BROOKS,

Appellant.

Appeal from the Iowa District Court for Marshall
County, Carl E. Peterson, Judge.

Kirk Brooks appeals a district court order establishing
child support for his son, Robert Paul Junck.

AFFIRMED.

Gail E. Boliver of Boliver Law Firm, Marshalltown, for
appellant.

Bonnie J. Campbell, Attorney General, John Parmeter,
Special Assistant Attorney General, Kay Delafield,
Assistant Attorney General, and Sandra Wagner, Assistant
County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett,
JJ.

HAYDEN, J.

On appeal we address whether the trial court properly determined the amount of child support Kirk Brooks must pay Janie Junck with regard to their child, Robert Paul Junck. The trial court fixed Brooks' support obligation at \$378 per month. Brooks appeals, contending the trial court should have applied the guidelines applicable to a parent with three children in fixing his child support. He further argues the trial court should have imputed an income to Janie Junck, who receives A.D.C. benefits, in determining his child support obligation. He maintains Janie is capable of earning a living and reliance on a zero income figure for Janie denies him due process and equal protection.

On December 27, 1989, the State filed a petition to establish paternity and for support alleging Kirk Brooks is the father of Robert Junck. After blood tests indicated Brooks was the natural father, he stipulated to paternity.

Trial commenced on November 14, 1991. Evidence revealed Brooks was the father of three children by three different mothers. All three children were born out of wedlock. Brooks did not reside with any of these mothers or children. This case involves the second of the three children, Robert Junck, who was born August 17, 1987. Pursuant to a court order Brooks was already paying \$225 per month in child support for the first child. He had also recently acknowledged paternity of the third child and

allegedly was making voluntary support payments for that child; however, no child support order existed at the time of trial. Brooks asked the trial court to base any child support obligation for Robert Junck on Iowa's Uniform Child Support Guidelines (guidelines), specifically the chart which applied to a parent with three children.

The trial court rejected Brooks' argument. On December 26, 1991, the trial court fixed Brooks' child support obligation for Robert Junck at \$378 per month. The court arrived at this figure by subtracting the \$225 in court-ordered child support for Brooks' first child from his net monthly income, which the court found to equal \$1463.85. The child's natural mother, Janie Junck, was unemployed. The court refused to impose an earning capacity upon Janie. The court then applied the percentage for one child, which was 25.8%, to Brooks' resultant net income. The resulting child support obligation equaled \$378 per month. The court also refused to consider any voluntary support payments by Brooks for his third child in determining the level of child support for Robert Junck.

This action was commenced under chapter 252A, thus our review is de novo. Gilley v. McCarthy, 469 N.W.2d 666, 667 (Iowa 1991).

I. The issue is whether the trial court erred in calculating Brooks' child support obligation for Robert Junck. Brooks argues the guidelines chart for three children should be applied rather than the chart for one

child. He contends the court should apply the three-children chart and then divide the total support obligation by three, thus awarding Robert Junck a one-third share. We disagree. We determine the proper chart under the circumstances is the one-child chart. We affirm the trial court's order fixing Brooks' support obligation for Robert at \$378 per month.

The guidelines do not specify the method to be used in determining a child support obligation where the three dependent children each live in separate households. "By adopting these guidelines [the Iowa Supreme Court] intended that trial courts select a chart consistent with the number of children who live in the custodial parent's household and can legally claim both parties as parents." Gilley, 469 N.W.2d at 668. In this case, there is only one child, Robert Junck, who lives in his mother's household and can legally claim Janie and Brooks as his parents. The chart for three children is inappropriate because three children do not live with Janie and cannot claim both parties as their parents. Id.

Our guidelines create a "rebuttable presumption that the amount of child support which would result from the application of the guidelines . . . is the correct amount of child support to be awarded." Iowa Code § 598.21(4)(a) (1991). A court may vary from the amount of child support required pursuant to the guidelines only if it finds "[a]djustments are necessary to provide for the needs of

the child or do to justice between the parties, payor, or payee under the special circumstances of the case." Gilley, 469 N.W.2d at 668 (quoting Supreme Court Order in the Matter of Child Support Guidelines (Sept. 29, 1989)); see Iowa Code § 598.21(4)(b) (1991). With regard to the circumstances of this case, the application of the one-child percentage to one of three serial children living in separate households does not result in a substantial injustice for the parties involved in this case. The fact the obligor has other children to support is not sufficient to establish the guidelines are inequitable. In re Marriage of Ladely, 469 N.W.2d 663, 665 (Iowa 1991). Brooks' support obligations for his first child and Robert represent forty-one percent of his net monthly income. We do not consider the third child referred to in this case because a court order for support did not exist. See id.; Iowa Code § 675.30 (1991).

We hold the application of the guidelines does not create an unjust or inappropriate result. The support ordered for the first child is unchanged by this appeal. We affirm the trial court on this issue.

II. Brooks contends the trial court erred in failing to impute an income upon the natural mother when determining child support. We disagree and determine an income should not be imputed upon Janie. The guidelines do not require such a deviation. Our case law states it is appropriate to consider the earning capacity of the parents

when determining a child support obligation. In re Marriage of Drury, 475 N.W.2d 668, 672 (Iowa App. 1991). Before using earning capacity rather than actual earnings, however, the trial court must find the use of actual earnings would result in a substantial injustice to the parties or child and was necessary to provide for the child's needs and to do justice between the parties. Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable, 474 N.W.2d 581, 583 (Iowa App. 1991). The trial court made no such finding. Although both parents are under the same legal duty to support their children, the obligation to support is not necessarily to be borne equally. In re Marriage of Wahl, 246 N.W.2d 268, 272 (Iowa 1972). The obligation should be apportioned according to the reasonable ability of each parent to contribute. Id. "Each case is peculiarly dependent on its facts." Id. (citing In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974)). Brooks has also failed to produce evidence Janie has voluntarily reduced her income. The use of actual earnings in this case did not create substantial injustice between the parties.

In addition Brooks argues failure to impose an income upon Janie constitutes a violation of equal protection and due process. Brooks failed to preserve these constitutional claims for appeal. An issue not presented in the trial court, including constitutional issues, may not be raised for the first time on appeal. State v. Lyon,

223 N.W.2d 193, 194 (Iowa 1974). We affirm the trial court.

AFFIRMED.

Sackett, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. I do not agree Brooks' support obligation should be calculated on a one-child chart and the voluntary payments Brooks has made to the third child should be disregarded.

The majority refused to consider the third child referred to in this case because a court order for support did not exist. As long as Brooks is making an effort to support the child, albeit voluntarily or court-ordered, we should make a moral recognition of his efforts and include that child in calculating the father's overall support obligation. We should encourage and public policy should encourage paternity and the payment of child support, and should not differentiate between court-ordered support and voluntary payments. To do so only discourages fathers from recognizing paternity and making voluntary support payments.

By not recognizing Brooks' voluntary payments to the third child, he is penalized by the majority's calculations based on a one-child chart. Accordingly, the court should apply the two-child chart, divide the total support obligation by two, and award Robert Junck that amount. Because the support of the first child has already been determined, it is not necessary to use a three-child chart, as Brooks has suggested.

Furthermore, if the record revealed the mother had an ability to work, I would find some income should be imputed

to the mother. While I agree the guidelines do not always require such a deviation, to use the mother's actual earnings (which is zero) would result in a substantial injustice to Brooks. See Iowa Dep't of Human Servs. ex rel. Gonzales v. Gable, 474 N.W.2d 581, 583 (Iowa App. 1991). Admittedly, Brooks has, with three different women, fathered three children out-of-wedlock and I concede he is responsible for the support of each child. Because the children are each in different households, his support obligations will inevitably consume a substantial portion of his income. However, as the record does not reveal any information about the mother's ability to work, I am unable to determine whether equity demands the use of an "earning capacity" in calculating the amount of support due under the guidelines.

I would modify the judgment of the district court as above.