

IN THE COURT OF APPEALS OF IOWA

No. 3-551 / 93-253

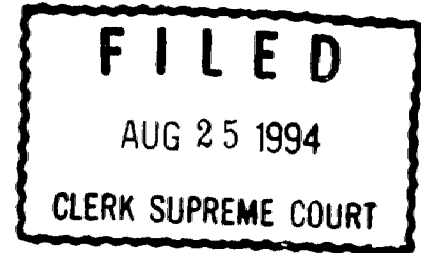
IN RE THE MARRIAGE OF PATRICIA LYNN JENSEN AND  
DARRELL ALLEN JENSEN

Upon the Petition of  
PATRICIA LYNN JENSEN,

Appellant,

And Concerning  
DARRELL ALLEN JENSEN,

Appellee.



---

Appeal from the Iowa District Court for Black Hawk  
County, Roger F. Peterson, Judge.

Patricia Jensen appeals from the district court's  
denial of her petition to modify the parties' dissolution  
decree. **AFFIRMED.**

Jeffrey C. Peterzalek and Thomas W. Langlas of  
Gallagher, Langlas & Gallagher, P.C., Waterloo, for  
appellant.

R. Allen Corzine of Pieters, Pieters & Corzine,  
Waterloo, for appellee.

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

**CADY, J.**

This is an appeal by Patricia from a decision by the district court denying her petition to modify the child support provisions of the prior modified decree for dissolution of marriage. We affirm.

Patricia and Darrell were divorced in 1983. They had one child, Robert Anthony (Anthony). He was born on March 28, 1982. Patricia is the custodial parent.

The dissolution decree was modified in 1985, and again in 1989. The 1989 modification increased Darrell's monthly child support obligation to \$375.

Darrell earned a gross income in 1989 between \$25,000 and \$30,000. In 1990, he moved to Denver, Colorado and began employment with Respond Industries, Inc. His gross income in 1990 was in excess of \$48,000. In 1991, his annual income grew to \$54,000. Darrell was the director of sales and marketing for the company.

Patricia moved to Waterloo following the 1989 modification proceedings. She worked at a nursing home as a nurses' assistant for a period of time and attended a trade school. In February 1991 Anthony was diagnosed with Burkitts Lymphoma, a form of cancer. He was forced to undergo surgery and chemotherapy. The cancer is currently in remission.

Patricia stayed home to care for Anthony during his cancer treatment. She was still unemployed at the time of trial, and was receiving public benefits in the form of

ADC. She planned to return to school and graduate with a degree in travel and tourism.

Patricia filed the present application for modification on November 14, 1991. The trial was not held until December 24, 1992.

In September 1992, while the action was pending, Darrell was terminated from his employment with Respond Industries, Inc. The termination was involuntary. Darrell subsequently accepted a monetary settlement from the company to avoid litigation over the termination. Darrell had received wages of \$35,720 from the company in 1992 prior to his termination. He had not secured new employment by the time of trial. He was receiving unemployment benefits of \$250 per week, and searching for employment. Darrell's share of the settlement proceeds after payment of fees and expenses, was less than \$30,000.

Patricia and Darrell are in their mid-thirties. They are high school graduates.

Patricia claimed in her petition for modification that Darrell's increase in income since 1989 constituted a substantial change of circumstances. She also argued that Anthony's cancer supported a modification. The district court denied the petition, and Patricia appealed.

Patricia argues modification is justified due to Darrell's combined 1992 earnings and settlement proceeds, his earning capacity, and Anthony's cancer. She also requests trial and appellate attorney fees.

## I.

Our review in actions seeking modification of the child support provisions of a decree for dissolution of marriage is de novo. In re Marriage of Bergfeld, 465 N.W.2d 865, 868 (Iowa 1991). Having reviewed the evidence anew, we affirm the decision of the trial court.

The party seeking modification has the burden to prove a substantial change in circumstances since the original or modified decree which makes it equitable and just that new terms be established. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). A decree is not modified unless its enforcement will produce positive wrong or injustice in view of the changed conditions. Id. The factors to consider in determining the existence of a substantial change are found in Iowa Code section 598.21(8) (1991).

The parties acknowledge that the existence of the child support guidelines alone does not constitute a substantial change in circumstances in this case. See In re Marriage of Bergfeld, 465 N.W.2d at 870. Instead, we must examine the circumstances urged by Patricia to determine whether modification is justified.

It is important to consider that the changed circumstances urged to support a modification must be "more or less permanent or continuous." Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). In this case, Darrell's income has risen steadily and dramatically since 1989, but the income source responsible for this steady increase is

no longer available to Darrell. Moreover, the evidence reveals that Darrell's loss of employment was not voluntary or self-inflicted. See Ellis, 262 N.W.2d at 268. Consequently, an income source that has been involuntarily eliminated cannot be used to support a modification of child support.

We also are unable to conclude that Darrell's earning capacity has substantially changed since 1989 to support modification. See Iowa Code, § 598.21(8)(a) (1991). Earning capacity considers a variety of factors, including age, employment history, education, present earnings, special training, health, and hours worked each week. See Iowa Dept. of Human Serv. ex. rel. Gonzales v. Gable, 474 N.W.2d 581, 583 (Iowa App. 1991). Most of the relevant factors which impact upon Darrell's earning capacity have not changed since 1989. The only circumstances which have changed are Darrell's re-location to Colorado and his work history with his former employer. In view of the evidence that Darrell remained unemployed at the time of trial, despite his attempts to gain employment, we are unable to conclude that his two-year Colorado work history has enhanced his earning capacity to the point that an increase in his child support obligation is warranted. Darrell's employment future is uncertain. We do not base modifications of child support on uncertainty or speculation.

Finally, Anthony's history of cancer treatment fails to support modification. It is a new circumstance, but the evidence does not establish that new support terms are necessary because of this changed circumstance. Anthony has no unpaid medical bills, and any future expenses and needs are speculative. Anthony has basically returned to the life style he followed before his cancer diagnosis.

The trial court properly declined to award attorney fees, and we decline to award attorney fees on appeal.

**AFFIRMED.**