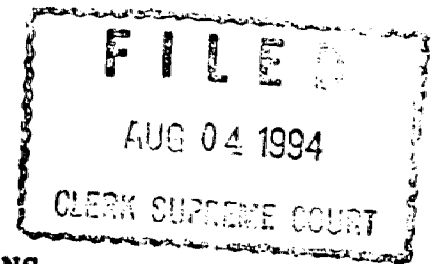


IN THE COURT OF APPEALS OF IOWA

No. 4-210 / 93-1169



JADE DESIREE AHRENS, A Minor By ANNE MARIE AHRENS,
Her Mother,

Appellant,

vs.

EDWARD LAPE BENBOW,

Appellee.

Appeal from the Iowa District Court for Boone County,
Ronald H. Schechtman, Judge.

Petitioner appeals an order of the district court
modifying respondent's child support obligation. **AFFIRMED.**

James R. Cook, West Des Moines, for appellant.

Steven K. Nalean of Nalean & Nalean, Boone, for
appellee.

Heard by Donielson, C.J., and Sackett and Huitink, JJ.

DONIELSON, C.J.

On June 16, 1983, Jade Desiree Ahrens was born to Anne Ahrens and Edward Benbow. In 1985, Anne brought an equity action against Edward, seeking custody of Jade and an order for child support. The district court subsequently entered a default order, requiring Edward to pay \$500 per month for Jade's support.

Edward had moved to Chicago prior to the entry of the 1985 decree. Edward is manager of maintenance operations for the Chicago Northwestern Railroad. Edward earned a gross income of \$65,468 in 1992. Anne was employed by U.S. Xpress as a truck driver, and earned a gross income of \$15,116 in 1991.

On February 19, 1992, Anne filed an application to modify Edward's child support obligation, requesting the court increase Jade's child support to reflect the mandatory child support guidelines. Edward filed his answer to the application, seeking dismissal and fees. Anne thereafter filed a motion for the production of documents and interrogatories. Before these documents could be produced, Edward's attorney filed an application for leave to withdraw, citing Edward's failure to cooperate with discovery matters. The district court allowed Edward's counsel to withdraw and ordered Edward to obtain new counsel or represent himself.

On January 4, 1993, Anne filed a motion to compel discovery, stating no attorney had filed an appearance in

Edward's behalf, no answers had been filed, and no response had been filed for the request for production. Following a hearing, the district court ordered Edward to comply with the discovery requests by February 3, 1993, and ordered sanctions of \$200 against Edward. Edward complied with the order for production on February 3, 1993.

At trial, Edward testified he did ignore his counsel's advice to respond quickly to the production requests, but did so because he was unsure of his counsel's loyalties, since his counsel knew his wife. He also testified he had accumulated over \$115,000 in his retirement programs with the railroad, but claimed these funds were accumulated pursuant to mandatory deductions from his income. The district court ordered Edward's child support obligation be raised to \$675 per month, retroactive to November 1, 1992. The district court also granted Edward's motion to be allowed to claim Jade as an exemption beginning in the 1994 tax year. The court further ordered Edward to pay \$510 towards Anne's attorney fees. Anne has appealed.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Anne first argues the district court did not order the proper amount of child support according to Edward's income. We disagree. Anne claims Edward's net income is \$4074.55 per month. She asserts his net income would be \$3527.43 even if retirement deductions are taken off this amount. Anne argues that pursuant to the child support guidelines, Edward should pay either \$916.77 per month, based on 22.5 percent of \$4074.55, or \$793.67, based on 22.5 percent of \$3527.43. Anne maintains the district court erred in limiting child support to the \$3000 income level. She argues the district court's ruling in effect holds income earned in excess of \$3000 per month is free from child support obligations, only being available when the custodial parent establishes special need. Anne argues the district court has discretion under the guidelines to order the noncustodial parent to pay a greater percentage than 22.5 percent if that parent's income is greater than \$3000 per month.

The guidelines do not provide for a specified amount of support for noncustodial parents who earn over \$3000 per month. They provide only that the amount be no less than that required to be paid by a person earning \$3000. Under the guidelines, the amount of support to be ordered in such cases is vested in the "sound discretion" of the court.

Mason v. Hall, 482 N.W.2d 919, 921 (Iowa 1992).

In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent

clearly unreasonable.'" State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 326 A.2d 138, 140 (Vt. 1974)). The district court evaluated the circumstances of the parties in this case and determined, in its sound discretion, an award of \$675, which equals 22.5 percent of \$3000, was reasonable and equitable. After review, we find the amount set by the district court is within the range allowed by the guidelines and is adequate to provide for Jade under the circumstances. We will not disturb the court's award on appeal.

Anne next asserts the district court should have made the modified support obligation retroactive to the date of filing the petition for modification. We disagree. The court has the authority to make a modification retroactive no earlier than "the date the notice of the pending petition for modification is served on the opposing party." Iowa Code § 598.21(8) (1993). Such retroactive application is not required. Id. Under the circumstances of this case, the court determined Edward's delaying tactics caused a delay of seven months in the proceeding and made the award retroactive by that amount. We conclude the court's decision resolved the issue of delay equitably within the bounds set by statute. We decline to overturn the court's decision on appeal.

The district court awarded Anne only a portion of her attorney fees for the modification. She argues she should have received all her attorney fees, since Edward's

delaying tactics increased the cost. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). The district court determined a reasonable hourly rate to be \$85.00. It then reasoned the award should be reduced because Edward prevailed on some issues. See Iowa Code § 598.36. We conclude on review the district court's award was not unreasonable, inequitable, or an abuse of discretion. We encourage district courts in the future, however, to set fees according to the unique circumstances of each case instead of generalizing that certain types of proceedings merit certain hourly rates.

The district court allowed Edward to amend his pleadings to add the issue of who should be allowed to take the income tax exemption for Jade. The court acted properly within its authority to permit the amendment under Iowa Rule of Civil Procedure 88. Anne argues the tax exemption is not subject to modification. We disagree. We determine In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977) is dispositive of this question. The court stated, "We conclude and hold, therefore, that since the awards of dependency deductions are directly related to the matter of child support allowances, such awards are subject

to modification." Id.; see In re Marriage of Wilhelm, 491 N.W.2d 171, 173 (Iowa App. 1992). The Internal Revenue Code section 152(e) states the general rule a custodial parent gets the exemption unless certain exceptions apply. I.R.C. § 152(e)(1)(A), (B). The general rule does not apply if the noncustodial parent provides over half the support for the child. I.R.C. § 152(e)(3). Federal Tax Regulation § 1.152-4(c) (1993) provides in part:

A noncustodial parent who provides \$1,200 or more support for the child . . . shall be treated as having provided more than half the support for the child (or children) notwithstanding any provision to the contrary contained in a decree of divorce or separation or in a written agreement, unless the custodial parent clearly established that the custodial parent provided, in fact, more for the support of the child during the calendar year than the noncustodial parent.

Id. at 1.152-4(d)(3). Edward has been paying \$6000 yearly support. The district court increased his obligation to \$8100 yearly. We find Edward should be treated as having provided more than half of Jade's support. Therefore he is entitled to the dependency exemption. See In re Marriage of Staton, 511 N.W.2d 418, 421-22 (Iowa App. 1993). The district court correctly awarded him the exemption and ordered Anne to sign the necessary documents.

Finally, Anne requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Edward is able to pay Anne's attorney fees, but Edward was obligated to defend the trial court's decision on appeal. We determine no award of attorney fees is appropriate under the circumstances of this case.

AFFIRMED.

Huitink, J., concurs; Sackett, J., specially concurs without opinion.