FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-262 / 92-1390

IN RE THE MARRIAGE OF KENLYN RENA WAHLERT AND JOEL LEN WAHLERT

Upon the Petition of
KENLYN RENA WAHLERT

Appellee,

And Concerning
JOEL LEN WAHLERT,

Appellant.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

The former husband appeals the district court's modification of the child support provision of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

C. R. Hannan of Perkins, Sacks, Hannan, Reilly & Petersen, Council Bluffs, for appellant.

No appearance for appellee.

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

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SCHLEGEL, J.

The former husband, Joel Wahlert, appeals the district court's modification of the child support provision of the parties' dissolution decree. He contends the court erred in finding a substantial change in circumstances and awarding the former wife $1500 in attorney fees.

Joel and Kenlyn Wahlert were divorced in 1982. The district court's decree was modified by the supreme court in In re Marriage of Wahlert, 400 N.W.2d 557 (Iowa 1987). Pursuant to this modification, Joel was ordered to pay $240 per month as child support for the parties' two minor children. On October 24, 1991, Kenlyn filed an application to modify the decree, alleging that Joel had purchased additional farmland and that his disposable income had increased substantially. Kenlyn also requested reasonable attorney fees.

At trial, Joel argued that while he had purchased additional farmland, his actual monthly income is approximately $500. Joel pointed out that at the time of the 1988 modification by the supreme court Kenlyn's earning capacity was $8400 per year. Joel points out that at the time of the present application, Kenlyn was earning $1374 per month, or $16,000 per year. Joel maintained, and Kenlyn admitted, that she received a tax refund in the amount of $1462. Joel maintained that his income had dropped substantially, from $16,234 in 1981 to a net loss in 1986. Joel's financial affidavit showed that he had a net worth of $39,369.83.

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The district court concluded that Joel's three-year net monthly income, after adjusting for straight-line depreciation and elimination of mortgage, would be $1049. Applying the same method of calculation for a two-year average, the district court concluded that Joel had an earning capacity of $1504 per month. The district court thus increased Joel's child support obligation from $240 per month to $350 per month and ordered him to pay $1500 towards Kenlyn's attorney fees. Joel appeals. We affirm as modified.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Joel contends the district court erred in finding a substantial change in circumstances not contemplated by the district court at the time of dissolution. The court found Joel's net worth had increased from zero to in excess of $39,000. The court further found Joel had purchased two tracts of farmland for which he was making payments of principal and interest. The trial court concluded that Joel had an income in 1990 of $18,316 and an income in 1991

of $17,782. These incomes were compared with much lower incomes in 1981 through 1985. The court concluded Joel's increased income constituted a substantial change in circumstances requiring a modification of his child support obligation.

Joel argues the principal and interest payments do not indicate an increased income, contending that funds used for payments of principal and interest should not be considered as income at all. However, while his actual cash flow may be improved by making interest payments rather than rental payments, he is clearly using current income to improve his capital holdings.

We encourage Joel in his efforts to improve his earning capacity. However, we cannot disregard the fact that his payment of these items indicates an ability to accumulate assets from earnings. It is upon those earnings that we must assess the level of child support due. We agree with the district court's conclusion that Joel's increased income constitutes a substantial change in circumstances, and we affirm the amount of the child support award as set by the district court. We also affirm the court's reduction of the child support obligation by the amount of medical expenses paid by Joel.

Next, Joel argues the district court erred in ordering him to pay $1500 toward Kenlyn's attorney fees. We agree. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties'

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financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). While Iowa trial courts have considerable discretion in awarding attorney fees, that discretion is not unlimited. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

In arriving at a reasonable determination of this issue, we consider Kenlyn's income of approximately $16,000 per year, Kenlyn's failure to comply with her obligation to pay travel expenses for the children, and the fact that the modification hearing in this case was neither extensive nor overly complex. We conclude justice will be served by requiring the parties to pay their own trial attorney fees.

The costs of this appeal are taxed to Joel.

AFFIRMED AS MODIFIED.