

IN THE COURT OF APPEALS OF IOWA

No. 5-164 / 94-910

**IN RE THE MARRIAGE OF JOSEPH PATRICK
BURDT AND CAROL JEAN BURDT**

Upon the Petition of

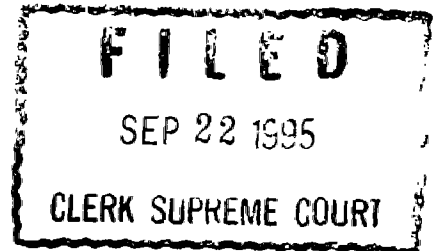
JOSEPH PATRICK BURDT,

Petitioner-Appellant,

And Concerning

CAROL JEAN BURDT,

Respondent-Appellee.



Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson
Judge.

Petitioner appeals from a district court judgment raising his child support
obligation pursuant to a petition to modify the original decree. **AFFIRMED AS
MODIFIED.**

Allison M. Heffern of White & Johnson, Cedar Rapids, for appellant.

Ann M. McDonough of Day, Beacham, McDonough & Faber, Dubuque, for
appellee.

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

CADY, J.

Joseph Burdt appeals from the district court judgment increasing his child support obligation following Carol Burdt's petition to modify the decree. We affirm as modified.

Joseph and Carol Burdt were married on July 1, 1977. They had two children: Joseph, Jr., born October 1, 1977, and Brian, born April 24, 1981. Joseph and Carol's marriage was dissolved by decree on April 3, 1984. The decree provided the children would be in Carol's sole custody. Joseph was ordered to pay child support of \$150 per month for each child and one-half of uncovered medical expenses.

In June 1985, Joseph remarried. He and his current wife, Cindy, have two children from this marriage. Carol also remarried but has no children from that marriage. In January 1990, Carol filed an application for modification seeking an increase in child support. The district court declined to increase the level of child support, but did extend Joseph's child support obligation to include the children's college years.

In January 1993, Carol again filed a petition to modify seeking an increase in child support. At the time of the hearing, both parties stipulated that the child support under the guidelines would deviate by more than ten percent from the current support obligation.

Carol works at CyCare and earns a net monthly income of \$1730.79. Her current husband is also employed. Their combined income in 1994 was approximately

\$50,000. Joseph is employed at A.Y. McDonald and earns net monthly income of \$1969.¹ Cindy, his new wife, is employed at Theisen's Supply and earns \$28,875 per year. Their combined gross income in 1993 was \$62,219.

The district court modified Joseph's child support obligation by increasing it to \$506 per month. The court declined to determine the parties' obligations for college expenses, holding the issue was premature given the ages of the children.

Joseph appealed. He maintains the district court should have deviated downward from the child support guidelines in light of his obligations to his new family. He claims Carol and her new husband enjoy a standard of living much higher than his family, and it would be unjust to fix his support obligation under the guidelines. Joseph also contends the district court erred in refusing to address the parties' obligations for their sons' college expenses.

I. Scope of Review

Our review of this equity action is de novo. *In re Marriage of Montgomery*, 521 N.W.2d 471, 473 (Iowa App. 1994). 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). Prior cases have little precedential value.

¹ The trial court used the parties' November 1993 affidavits of financial status to determine their net incomes and found Joseph had net income of \$1680.42. In the April 28, 1994 affidavit submitted the day of trial, Joseph claimed net income of \$1969.57. On appeal, both parties agree that this is the correct net income figure.

and we must base our decision primarily on the particular circumstances of the parties before us. *Montgomery*, 521 N.W.2d at 473.

II. Modification of Child Support

The district court increased Joseph's child support payment from \$300 to \$506 per month pursuant to the 1993 child support guidelines. On appeal, Joseph asserts the district court should have adjusted his child support downward considering his financial obligation to the two children of his second marriage. He presented evidence that his and Cindy's income falls short of the family's monthly expenses.

Our Supreme Court has recognized that the expenses for the support of children not subject to the action are relevant in determining the financial ability of the noncustodial parent to pay the child support specified by the guidelines. *In re Marriage of Gulsivg*, 498 N.W.2d 725, 727 (Iowa 1993); *Gilley v. McCarthy*, 469 N.W.2d 666, 668 (1991). The guidelines, however, have not previously specifically addressed the determination of the amount of child support in multiple family circumstances.

In April 1995, the Supreme Court completed its periodic review of the child support guidelines and filed their changes. These new guidelines are applicable to all cases pending on July 1, 1995. Child Support Guidelines Exhibit A at 1 (April 28, 1995).

Among the changes in the guidelines is a provision addressing the amount of child support payable in multiple family circumstances where children are born of a subsequent marriage. *Id.* at 4. The provision is a qualified dependent deduction and the deduction is used in determining the net income of the party requesting the deduction. *Id.* The monthly dependent deduction for two children is \$142. *Id.*

Applying the deduction to this case, we subtract \$142 from Joseph's current net monthly income (\$1969.57), leaving new net monthly income of \$1827.57. We apply this number and Carol's net income (\$1730.79) to the two children table. In this case, Joseph's net income is multiplied by thirty percent yielding a payment of \$548.27 per month.

There is a rebuttable presumption that the amount of child support which results from the application of the guidelines is the correct amount of child support to be awarded by the court. *State ex rel. Nielsen v. Nielsen*, 521 N.W.2d 735, 737 (Iowa 1994). The court may adjust the amount to provide for the children's needs and to do justice between the parties. *Id.* However, the court has no authority to vary from the guidelines without a written finding that the guideline amount would be unjust or inappropriate under the criteria contained in the guidelines. *Id.*

Because the new guidelines take into consideration Joseph's expenses for the support of his children not subject to this action, the record must reveal additional circumstances to support a deviation. Here, we find the record demonstrates that the application of the guideline support amount will result in a substantial injustice.

Joseph's monthly family expenses would exceed the combined family income by approximately \$250. Although Joseph can reduce some expenses and modify some savings plans, we conclude the monthly support should be set at \$490. This strikes a fair balance between all the competing interests.

III. College Tuition

Joseph asserts the trial court erred in refusing to address the parents' obligations for their sons' college expenses. At the time of trial, Joseph Jr. and Brian were sixteen and thirteen years old respectively. The trial court found the issue was not timely.

In assessing a party's obligation for support during college, we consider: the ability of the child for college; the age of the child; the financial conditions of the parents; and whether the child is self-sustaining. *In re Marriage of Linberg*, 462 N.W.2d 698, 702 (Iowa App. 1990). In this case, the parties presented no evidence regarding the cost of college, the children's ability for college, or the children's level of financial independence. Under these circumstances, the issue is not properly before the court and its resolution would be speculative. We encourage the parties to reach a mutual agreement on this issue in order to avoid future litigation.

IV. Attorney Fees

Carol requests appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the financial positions of the

parties. *In re Marriage of Cooper*, 524 N.W.2d 204, 206 (Iowa App. 1994). We 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. *Id.* A review of the parties' affidavits of financial status reveals Carol is in a stronger financial position than Joseph. We decline to award her appellate attorney fees. Costs are equally assessed to both parties.

AFFIRMED AS MODIFIED.