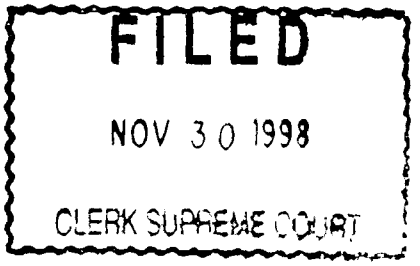
**IN THE COURT OF APPEALS OF IOWA**

No. 8-495 / 97-2259

**IN RE THE MARRIAGE OF LINDA K. REICH AND JOHN O. REICH,**




Upon the Petition of
**LINDA K. REICH,**
Petitioner-Appellee,

And Concerning
**JOHN O. REICH,**
Respondent-Appellant.

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Appeal from the Iowa District Court for Guthrie County, Larry J. Eisenhauer, Judge.

The respondent appeals a district court ruling denying his application for modification of the parties' dissolution decree. **REVERSED.**

Jonathon M. Kimple, Dallas Center, for appellant.

Dee Ann Wunschel of Wunschel Law Firm, P.C., Carroll, until withdrawal, then Linda K. Reich, pro se, Panora, for appellee.

Considered by Sackett, P.J., Mahan, J., and Hayden, S.J.* Streit, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

**PER CURIAM.**

Respondent-appellant John O. Reich appeals a district court ruling denying his application for modification of the parties' dissolution decree. We reverse.

On February 1, 1996, a decree of dissolution was entered in the Iowa District Court for Guthrie County upon the matter of Linda K. Reich and John O. Reich. That decree expressly adopted a stipulation and agreement entered into between the parties. Pursuant to this agreement, primary physical care and custody of their son Chad J. Reich was to be with petitioner during the school year and with respondent during summer school vacation. The agreement further provided respondent was to pay petitioner $650 per month for child support.

On February 28, 1997, John filed an application for modification of the dissolution decree. Respondent asserted since the date of the decree there had been a material change of circumstances in that Chad was residing with him as of February 23, 1997. John claimed the dissolution decree should be modified to grant primary physical care to him and to terminate his child support obligations as of the date of filing.

On August 22, 1997, Linda filed an application to set hearing for child support and custody in which she agreed to the change in custody. She further agreed to begin child support payments of $225 per month beginning September 1, 1997. A hearing was set for August 25, 1997.

The hearing began on August 25, 1997, and was continued for a second day on September 2, 1997. On September 2, however, Linda refused to accept her prior child support agreement, and testimony was taken on the matter.

During the hearing, Linda stated she had been receiving psychiatric care for approximately a year and a half. She further stated she was not prohibited from working by any doctor's order. Linda offered no expert testimony in this matter. Only the lay opinion of her fiancee, a freelance photographer with no medical background, was presented. No evidence was presented by John regarding Linda's ability to work.

The record shows Linda has had several jobs during 1995-1996. However, her affidavit of financial status for 1997 shows and the trial court found Linda's only income is from investments generating $595 per month. The trial court acknowledged the evidence was unrebutted Linda was under a doctor's care and unable to work. The district court refused to consider any additional earning capacity in determining child support. The trial court further found John has a net monthly income of $3,689.08. using the child support guidelines adopted by the Iowa Supreme Court, the district court ordered Linda to pay $49.39 per month in child support beginning retroactively on March 1, 1997. John's child support payments to Linda were terminated.

John filed a motion to reconsider alleging error in the district court's finding concerning Linda's income. Specifically, John alleged the evidence did not support the court's finding Linda is unable to work and consequently the court should have imputed income to her for purposes of determining her child support obligations. On

November 3, 1997, the district court denied John's motion to reconsider. This appeal follows.

**I.** The standard of review accorded applications to modify support orders is de novo. *In re Marriage of Robbins*, 510 N.W.2d 844, 844 (Iowa 1994). In our review we are not bound by the findings of the trial court, but give those findings some weight, especially as to the credibility of witnesses. Iowa R.App.P. 14(f)(7); *Id.*

**II.** It is well established that parents have a legal obligation to support their children. *In re Marriage of Fleener*, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. *In re Marriage of Bornstein*, 359 N.W.2d 500, 504 (Iowa App. 1984).

**III.** John contends the district court erred in failing to impute income to Linda for purposes of calculating her child support obligation. We agree.

There is a rebuttable presumption the amount of child support determined in accordance with the child support guidelines is the correct amount of support to be awarded. *State ex rel. Reaves by Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). The court shall not vary from the guidelines unless their application would lead to an unjust or inappropriate result. Iowa Code § 598.21(4)(a) (1997).

Determining child support under the child support guidelines is a two-step process. See *In re Marriage of Spears*, 529 N.W.2d 299, 303 (Iowa App. 1994). The first step is to apply the custodial and noncustodial parents' actual incomes to the child support guidelines. *Id.* Applying Mary's monthly income of $595 and John's

monthly income of $3,689.08 to the child support guidelines resulted in a child support obligation of $49.39 per month.

However, if a finding is made by the court that reliance on actual earnings alone would fail to do justice between the parties, then a court may consider the parents' earning capacity as well. See *id.*; *In re Marriage of Salmon*, 519 N.W.2d 94, 96 (Iowa App. 1994). Relevant factors to consider in determining earning capacity include employment history, present earnings, and reasons for failing to work a regular work week. *In re Marriage of Salmon*, 519 N.W.2d at 96.

The trial court did not make any documented findings regarding the equity of imputing income to Linda. The court simply stated that it would not impute income to her because she was unable to work. The issue is whether the trial court's refusal to impute income to Linda results in a substantial injustice to the child. We determine that it does.

Both parents have a legal obligation to support their children in accordance with each parent's ability to pay. *Iowa Dept. Of Human Services ex rel. Gonzales v. Gable*, 474 N.W.2d 581, 583 (Iowa App. 1991). In this case, while we recognize Linda has been receiving professional counseling and is under a doctor's care, the record reveals no reason why this prevents her from working to support her child, even if in a reduced capacity. No expert opinions were offered to substantiate Linda's claims that a medical disability prevents her from working. Moreover, Linda has a college degree and prior work experience. We can discern no valid reason why she cannot work a regular work week earning at least minimum wage.

We determine Linda has the capacity to earn at least the minimum wage of $5.00 per hour for forty hours per week.[1] With that capacity, her net monthly salary would be approximately $750. Coupled with her income from her investments, her total net monthly income would amount to $1345. Accordingly, we modify the trial court decree to require Linda to pay John $264 per month in child support.

We further note that even if Linda is currently unable to work, she should nevertheless have income imputed to her. In recent years we have focused less on a party's present inability to pay and more on a party's long-range earning capacity. See *In re Marriage of Spears*, 529 N.W.2d at 303 (Iowa App. 1994) (citing *In re Marriage of Wahlert*, 400 N.W.2d 557, 560 (Iowa 1987). We recognize the trial court's reluctance to impute income to Linda in light of her unemployment. However, the record indicates her inability to work is only short term. The ability to earn $1345 per month from minimum wage and investment income is supported by the evidence, thus warranting a child support obligation of $264 per month.

The district court erred in not determining Linda's earning capacity. That amount should have been imputed to her in calculating her child support obligations according to the guidelines. We reverse and order Linda to pay John $264 per month in child support.

**REVERSED.**

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[1] $5.00 per hour was the minimum wage at the time of the hearing on the petition to modify.