

**IN THE COURT OF APPEALS OF IOWA**

No. 1-392 / 10-1561

Filed June 29, 2011

**IN RE THE MARRIAGE OF MICHAEL ROSS ROBERTS  
AND TRACEY RICHTER ROBERTS**

**Upon the Petition of  
MICHAEL ROSS ROBERTS,**  
Petitioner-Appellant,

**And Concerning  
TRACEY RICHTER ROBERTS,**  
Respondent-Appellee.

---

Appeal from the Iowa District Court for Buena Vista County, John P. Duffy,  
Judge.

Michael Roberts appeals from the modification of a dissolution decree.

**AFFIRMED.**

Eric G. Borseth, Altoona, for appellant.

Tracey Richter Roberts, Omaha, Nebraska, pro se.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

**EISENHAUER, P.J.**

Michael and Tracey Roberts, the parents of two minor children, divorced in January 2008. Michael sought a modification to the dissolution decree, which the court granted in 2010. Michael appeals from the district court's decision decreasing his child support payments from \$1247 per month to \$840 per month. He seeks a further reduction of his child support obligation arguing the district court erred in using his earning capacity instead of actual income to calculate child support. In the alternative, Michael contends the district court improperly calculated the parties' earning capacities. We find the district court properly modified Michael's child support obligations based on his earning potential.

**I. Background Facts and Proceedings.**

The dissolution decree gave joint legal custody of the children to the parties, granted Tracey physical care, and ordered Michael to pay \$1247 per month in child support. The court attributed income to both parties finding Michael's earning capacity was \$6000 per month based on his potential for employment with his company, Mile2, or a similar company. The court placed Tracey's earning capacity at \$2000 per month based on her potential to work as a radiology technician or to find other gainful employment. Michael did not keep up with his child support payments and at the time of the modification trial maintained his permanent residence in Finland with his current wife.

In 2009, Michael filed a petition for modification seeking sole custody of the children or a reduction in his child support obligations. At the modification trial, both Michael and Tracey appeared pro se. The trial took place over two days in April and a later date in May 2009. Review of the entire transcript reveals

little evidence of the actual income and expenses of the parties. Michael claimed Tracey was interfering with his ability to find employment and his child support obligation should be reduced because of his inability to achieve his earning capacity of \$6000 per month. His reported income for the year 2008 was \$6860. When the trial commenced Tracey was employed at SC Consulting. On the last day of the trial, Tracey claimed to be unemployed. The court concluded Michael had established a substantial change in circumstances with regard to child support, but not to custody. In determining the earning capacities of the parties, the court found:

At the time of trial on the pending Petition for Modification, Michael testified that he is no longer involved with Mile 2, MKI. He did testify, though, that he was involved in another similar business. It is obvious to the Court that Michael is earning income. He travels from the United States to Finland and to other parts of the world. The Court finds that Michael has an earning capacity at this time of at least \$4,000 a month. Michael's net monthly income is the sum of \$2,979. Tracey contends that she is not gainfully employed. The Court finds, however, that she is capable of gainful employment. The court finds that she has an earning capacity of at least \$2,000 per month. Tracey's net monthly income is the sum of \$1,789. Child support under the guidelines is set at the sum of \$840 per month.

This was a deviation of more than ten percent from the amount of support set in the original dissolution decree. Michael appeals. Tracey did not submit a brief in response to Michael's appeal.

## **II. Standard of Review.**

We review modification proceedings de novo. Iowa R. App. P. 6.907. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). However, we give weight to the trial court's

findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.904(3)(g).

### **III. Discussion.**

To modify child support, Michael must “establish by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since the entry of the decree.” *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 332 (Iowa Ct. App. 2005). The district court agreed with Michael that there was a substantial change in circumstances with respect to his child support obligations. Michael contends the district court should have further decreased his obligations given his recent employment history and current prospects.

Michael first argues the court erred in using his earning capacity instead of actual income to calculate child support.

Our child support guidelines provide: “[t]here shall be a rebuttable presumption that the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded.” Iowa Ct. R. 9.4. The court may deviate from the guidelines if it finds that an adjustment is necessary to support the children and achieve a just result for the parties. *Id.* “The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.” Iowa Ct. R. 9.11(4). The court assesses employment history, present earnings, and reasons for the current employment

in making this judgment. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997).

Michael argues using his actual income in the child support guidelines would not result in substantial injustice. However, with a reported actual income of only \$6860 annually, and activities indicating obvious other income, it would be inequitable to require only \$50 per month in child support for two children. Michael regularly traveled between the United States and Finland and took other international trips. He testified and presented tax returns indicating his total income was only \$24,911 in the years since the parties' separation. However, he paid \$67,515 in child support during that time. Michael obviously has other sources of income. We also consider "whether the parent's inability to earn a greater income is self-inflicted or voluntary" in determining whether to use earning capacity or actual income. *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006). This rule keeps parents from purposely or recklessly decreasing their income to reduce their ability to pay to support their children. *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993).

Although the district court does not explicitly articulate its rationale for using earning capacity instead of actual income, we find there was adequate support for doing so. The modification court was disadvantaged because neither party presented credible evidence regarding his or her actual income. With such a limited record of relevant facts, we give deference to the district court's factual findings that both Michael and Tracey are capable of gainful employment. Using earning capacity to calculate child support is permitted in this case because using actual incomes would require adjustments to provide for the needs of the

children and to do justice between the parties. Iowa Ct. R. 9.11(4). Our supreme court established the child support guidelines to ensure both parents take responsibility for the support of their children. Iowa Ct. R. 9.3. A decrease in child support obligations to fifty dollars per month for two children would certainly have detrimental effects on the children's quality of life. The reported incomes of these parents do not reflect their abilities to provide financial support and to allow the use of these figures would result in a substantial injustice to their children.

Michael claims that his inability to find work is the result of Tracey's direct attacks on his reputation personally and professionally and this makes his failure to reach his earning potential involuntary.<sup>1</sup> He argues that when failure to achieve an earning potential is involuntary, the court must use actual income to calculate child support. The involuntary or voluntary nature of a parent's inability to earn an anticipated income is not the only factor applied in determining if the court will use actual income or earning capacity. *McKenzie*, 709 N.W.2d at 533. In this case, evidence Michael is earning more than he claims and that his failure to earn more is not completely involuntary is sufficient to allow the use of earning capacity in the child support guidelines.

Michael's next argues the earning capacities calculated by the district court are incorrect.

The court must ascertain the parent's current income from the most reliable evidence available. *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). However, income is "not limited to income that is reportable to the federal government as income." *In re Marriage of Hilmo*, 623 N.W.2d 809, 811 (Iowa

---

<sup>1</sup> Tracy created a web page called "michaelrobertsdeadbeatdad.org".

2001). “All income that is not anomalous, uncertain, or speculative should be included when determining a party’s child support obligations.” *Nelson*, 570 N.W.2d at 105. One of the most significant factors used to determine earning capacity is previous salary. *McKenzie*, 709 N.W.2d at 534.

Michael’s previous salaries and abilities with information technology establish he should be able to attain employment earning at least \$4000 per month. The decrease in earning capacity by \$2000 from the amount attributable in the original decree reflects the difficulties Michael has faced in a tough economy.

The district court found Tracey has the ability to be gainfully employed and to make \$2000 per month. This earning capacity is supported by evidence Tracey has training and experience as a radiation technician and she made close to \$2000 per month in her most recent position. At the end of a contentious three days of trial, both parties claimed to have little or no income. The trial court did the best it could with the evidence presented, and we find no reason to disagree.

#### **IV. Conclusion.**

In our de novo review, we affirm the modification of the dissolution decree. We conclude the district court’s use of earning capacity was justified given that a substantial injustice would result from the use of actual reported income. We further determine the district court properly calculated imputed earnings of \$4000 for Michael and \$2000 for Tracey given the record of their previous earnings and their potential for gainful employment.

Costs are taxed to Michael.

**AFFIRMED.**