

**IN THE COURT OF APPEALS OF IOWA**

No. 6-490 / 05-1223  
Filed October 11, 2006

**IN RE THE MARRIAGE OF DONNA J. JENSEN  
AND TIMOTHY M. JENSEN**

**Upon the Petition of  
DONNA J. JENSEN,**  
Petitioner-Appellee,

**And Concerning  
TIMOTHY M. JENSEN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,  
Judge.

The respondent appeals from various economic provisions of the district  
court's decree dissolving his marriage to the petitioner. **AFFIRMED AS  
MODIFIED.**

David G. Thinnest of Thinnest & Liesveld, Cedar Rapids, for appellant.

Donna J. Jensen, n/k/a Donna J. Roetemeyer, Columbia, Missouri, pro se.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ.

**VOGEL, J.**

Timothy Jensen appeals from the economic provisions of the district court's decree dissolving his marriage to Donna Jensen. Fourteen months passed from the trial until the final decree was entered, allowing critical financial information to become a moving target. Nonetheless, we review the final decree de novo, with our goal to assess whether equity has been achieved between the parties. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We conclude the amount of child support Donna was ordered to pay Timothy does not comport with the Child Support Guidelines and does not do justice between the parties. In addition, we modify the spousal support and attorney fees awarded to Donna.

Timothy and Donna married in July 1986 and have two children, Katlyn, born in 1988, and Tanner born in 1992. Timothy has a bachelor's of science degree in electrical engineering, which he completed after the parties married. For seventeen years, Timothy was employed with Rockwell Collins in Cedar Rapids, where his last annual salary was \$64,000. In September 2002, he was laid off from Rockwell, but found employment at Prudential Financial, earning \$37,200. He left that employment in December 2003 and, at the time of trial, he was fifty years old and had been unemployed for four months.

Donna has a high school diploma. During the marriage, she worked in retail sales for J.C. Penney's and Wal-Mart, as a teller at a credit union or bank, and also in bookkeeping/payroll positions at Tuffy Automotive and Actually Clean Carpet Cleaning with her highest annual salary at \$30,500. She has had no formal or specialized training for any of her jobs. She was age forty-five and

working for Actually Clean earning \$500 per week (or \$26,000 annually) at the time of trial.

Donna filed a petition for dissolution of the marriage in November 2002. During the trial, in April 2004, Donna requested: Physical care of the two minor children; \$708.35 child support from Timothy (based upon his earning capacity of \$35,000); \$1.00 per month of spousal support with the intent to increase this award in a modification action, after Timothy found employment; and that Timothy pay \$2000 of Donna's attorney fees. Timothy requested: Physical care of the children; \$484.47 in child support from Donna based upon her \$26,000 salary; no spousal support to Donna; and that each party pay their own attorney fees and share equally in the court costs.

Nearly six months passed with no decree forthcoming. On October 14, Donna filed a post-trial motion seeking to reopen the record. She alleged changes in the parties financial circumstances, as both her and Timothy's employment had changed since trial. With physical care of the children yet undecided, Donna sought to have Timothy submit evidence of his current earnings for purposes of establishing child support. The district court granted the motion on October 18.

On November 15, 2004, Timothy filed a motion to reconsider the reopening of the record, which had been granted without giving him an opportunity to respond. He argued that Donna's motion only sought new information on "financial matters that impacted child support," but the scope of the district court's order broadened the request to include new evidence as to

any change of circumstances.<sup>1</sup> Timothy further submitted it was inappropriate to reopen the record simply “upon mere passage of time prior to Decree,” asserting new information was more suited for a modification action. He also argued that allowing additions to the record by affidavit alone, without the opportunity for cross-examination, was prejudicial. Although he requested an opportunity for cross examining Donna on her submitted affidavit, neither his request nor his motion to reconsider reopening the record appear to have been ruled upon.

Both Donna and Timothy heeded the district court’s order and submitted new affidavits regarding their most current employment, financial situations as well as other changes in circumstances since the time of trial. Timothy explained that he had moved to Grand Rapids, Michigan, in August 2004 after obtaining a systems engineering position with Smiths Aerospace at an annual salary of \$80,516. Donna’s affidavit stated that she had lost her job in May 2004, and now worked part-time at Kohl’s and Goldpoint Gym for \$7.00 per hour (or \$14,560 annually). Donna also requested a division of transportation costs for visitation with the parties new job situations, and she increased her spousal support request from \$1.00 to \$1000 a month for five years.

In April 2005, a full year after the trial, the district court entered a

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<sup>1</sup> The order stated in part:

Based upon matters raised in the motion, I grant the motion. I grant each party until November 18, 2004, to supplement the record of the trial. The supplements are to be in the form of affidavits from the parties only and are to cover the change in circumstances occurring from the original trial of this case until the date of the affidavit. I also order each party to submit by November 18, 2004, an amended child support guideline worksheet showing the change in financial circumstances.

dissolution decree.<sup>2</sup> The decree awarded Timothy physical care of the children with liberal visitation to Donna. Donna was ordered to pay \$50.00 per month per child to Timothy, while the court ordered Timothy to pay Donna \$1.00 a month in spousal support. Timothy was also ordered to pay \$5000 towards Donna's attorney fees.

Both parties filed motions to enlarge pursuant to Iowa Rule of Civil Procedure 1.904(2) asserting that the evidence submitted when the record was reopened did not appear to have been considered by the district court. Donna requested the court correct the decree: to show Timothy's residence is in Michigan; to address both parties' new job situations and earnings; to rule on Donna's most recent request for \$1000 per month spousal support; to change physical care of the children to Donna; to set a holiday visitation schedule; and to divide the cars, pension and annuity between the parties. Timothy asked that Donna's spousal support be held to the \$1.00 per month she requested at trial; and to reduce the attorney fees awarded to Donna.

An amended and substituted decree was entered by the court in June 2005. The court noted the parties' changed employment circumstances and living arrangements as detailed by their post-trial affidavits, but kept physical care of the children with Timothy and visitation to Donna. The court reduced Donna's child support obligation from \$50.00 per month per child to \$75.00 per month total. The court also ordered Timothy to pay Donna spousal support of \$750 a month for five years beginning July 1, 2005. The court further restated that

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<sup>2</sup> There was some confusion between the district court and the Clerk's office as to whether the affidavits had been filed, and associated with the court file.

Timothy was to pay \$5000 of Donna's attorney fees. Timothy appeals, asserting that it was patently unfair for the court to admit additional evidence six months after trial when none of the new evidence was subject to cross-examination. He requests child support be based on Donna's earning capacity of \$26,000 annually, as evidenced at trial or, at a minimum, a figure which would reflect Donna's post-trial, alleged reduced earnings of \$14,560. Timothy also argues that Donna should not benefit from a spousal support award, and that her attorney fees award should be reduced to \$1000.

**Child Support.** Our Iowa Child Support Guidelines provide that there, "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." *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006) (citing Iowa Ct. R. 9.4). Timothy argues that \$75.00 child support per month is a significant departure from the child support guidelines and is inequitable. The district court reasoned it departed from the guidelines, "in consideration of Tim's stated desire not to receive support from Donna, the disparity between Donna's income and Tim's income, Donna's obligation to provide support for her children and, in part, as an offset against Tim's alimony obligation." In his post-trial affidavit, Timothy did state that he did not "want or require any funds from Donna" for support of the children. This statement came on the final page of an eleven page post-trial plea for physical care of the children, and we do not consider it to be a waiver of child support, if such were even possible. We reject the district court's reasoning for departing from the guidelines; in part because the guidelines are inherently formed to

consider the disparities in the parties' incomes, and because a party cannot waive a parent's legal obligation to provide financial support for a child. See *Huysen v. Iowa Dist. Ct.*, 499 N.W.2d 1, 3 (Iowa 1993) (reaffirming the proposition that agreements to waive child support are against public policy and "ordinarily ineffective for that purpose"); *In re Marriage of Sundholm*, 448 N.W.2d 688, 690 (Iowa Ct. App. 1993) (stating that parents may not agree to "relieve a [parent] entirely and permanently of the duty to support [a] minor child," as such agreement is void as against public policy). Nor do the guidelines or Iowa Code otherwise provide for consideration of a spousal support offset when setting the child support obligation of the parent receiving spousal support.

We agree with Timothy that significant change-of-circumstance information from both parties admitted into evidence more than six months after trial, without the opportunity for a hearing, has created a less than ideal record. However, to review the child support issue, we look to the whole record, including the earning capacities of the parties as evidenced at trial.

Donna's post-trial affidavit asserted her employment circumstances had changed and her income was reduced to \$14,560. However, her work history established at trial that her earning capacity was at least \$26,000. While Donna does not have formal training or education beyond high school, she has demonstrated abilities in bookkeeping and payroll management that would support an earning capacity above the retail position of \$7.00 per hour she claimed in her post-trial affidavit. Therefore, child support should be based upon Donna's earning capacity of \$26,000 and Timothy's annual salary of \$80,516. Using the Iowa Support Master program and child support guidelines, the total

support for the parties' two minor children to be paid by Donna to Timothy would be \$474.49 per month. We modify that portion of the decree setting the amount of child support to this amount.

**Spousal Support.** Timothy also appeals the district court's award of spousal support to Donna of \$750 per month for five years. While Timothy argues Donna should be held to the one dollar of support she requested at trial, Donna requested the minimal amount at trial simply because Timothy was unemployed at that time, but anticipated a modification upon his reemployment. See generally Iowa Code § 598.21C (2005) (providing for modification of a spousal support award based upon change in the employment, earning capacity, or income of a party); *In re Marriage of Horstmann*, 263 N.W.2d 885, 892 (Iowa 1978) (noting wife awarded one dollar in "token alimony" had the option to seek modification once former husband's earning capacity in the legal profession increased from the level beyond his clerkship for a federal judge);. From Timothy's own post-trial affidavit, his annual income increased to \$80,516 while we have imputed an annual income to Donna of \$26,000. Upon considering the factors listed in Iowa Code section 598.21A(1) (2005), we conclude a more equitable award of spousal support to Donna would be to reduce the duration from five years to three years at the same \$750 per month. Considering the disparate earning capacity of the parties, this support will allow Donna to further develop her job skills, should she pursue the opportunity. Donna is healthy, is capable of supporting herself, and does not have the responsibilities of physical care of the children. Although we recognized that paying child support to Timothy minimizes the benefit received from spousal support received, we note

that Donna's obligation to support her children is mandated by Iowa law, Iowa Code § 598.21B. Spousal support, as "a stipend to a spouse in lieu of the other spouse's legal obligation for support," has discretionary parameters in our case law and as set forth in 598.21A(1). *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989). We modify that portion of the decree accordingly.

**Attorney Fees.** Timothy next asserts that the district court's award of \$5000 of trial attorney fees to Donna is excessive. An award of trial attorney fees rests in the sound discretion of the district court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay the fees and the fees must be fair and reasonable." *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 2003). Donna only requested \$2000 in trial attorney fees. Therefore, we conclude the award of \$5000 in attorney fees was an abuse of discretion and modify that portion of the decree to reduce the award of attorney fees to \$2000.

Timothy also requests attorney fees on appeal. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider, among other things, the needs of the party making the request and the ability of the other party to pay. *Id.* We conclude Timothy has adequate resources above those of Donna to pay his own attorney fees on appeal, and we decline his request. Costs on appeal are assessed to Donna. Further changes in the

parties' situations should be brought in a modification action. See Iowa Code § 598.21C.

**AFFIRMED AS MODIFIED.**

Sackett, C.J., concurs; Zimmer, J., concurs specially.

**ZIMMER, J.** (concur specially)

I concur in the result.