

IN THE COURT OF APPEALS OF IOWA

No. 6-974 / 06-0919
Filed January 18, 2007

**IN RE THE MARRIAGE OF MARGARET A. SPENCE
AND HAROLD J. SPENCE**

**Upon the Petition of
MARGARET A. SPENCE,
n/k/a MARGARET BANKS,**
Petitioner-Appellant,

**And Concerning
HAROLD J. SPENCE,**
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, David R. Danilson,
Judge.

Petitioner appeals the district court order on her application to modify the
child support provision of the parties' dissolution decree. **AFFIRMED.**

John G. Martens of Terrill, Martens & Richardson Law Offices, Ames, for
appellant.

Harold J. Spence, Boone, pro se.

Considered by Sackett, C.J., and Zimmer, J., and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BROWN, S.J.**I. Background Facts & Proceedings**

Margaret Banks and Harold Spence were formerly married. They have two children, Joseph, born in 1988, and Kelsey, born in 1990. A dissolution decree was entered for the parties in Illinois on March 6, 1996. Margaret was granted physical care of the children. Harold was ordered to pay child support of fifty dollars per week, or about \$217 per month. The decree was modified in Illinois in August 2004 to increase Harold's child support obligation to \$511 per month.

Both parties have since moved to Iowa. In October 2005, Margaret filed an application in Iowa seeking to modify the child support provisions of the parties' dissolution decree.¹ Harold is employed as a diesel mechanic by Ball Plastic Container Corp., and his 2005 W-2 form showed wages of \$40,695. Some of this income is the result of overtime or bonuses. Margaret is self-employed as a pet groomer. Her 2005 tax returns showed annual gross income of \$20,028.

The modification hearing was held in May 2006. Harold asked that the court not consider his overtime and bonus pay in determining his child support obligation, because that income could change at any time. The district court determined Harold's guaranteed annual gross income was \$36,089. This included an average of two hours of overtime each week. The court determined

¹ In order to modify the Illinois child support order in Iowa, under Iowa Code section 252K.609 (2005), Margaret was required to register the Illinois order in Iowa. Margaret registered the Illinois dissolution decree and 2004 modification with the Story County District Court.

other overtime hours or bonuses were uncertain or speculative. Harold's net monthly income was determined to be \$2387.12, while Margaret's net monthly income was \$1241.15. The court applied the child support guidelines and ordered Harold to pay child support of \$754.33 per month. Harold was also ordered to pay \$750 toward Margaret's attorney fees.

Margaret appealed the district court's decision, claiming Harold's net monthly income for purposes of calculating his child support obligation should include all of his overtime and bonuses. Margaret also seeks appellate attorney fees.

II. Standard of Review

Our standard of review in this equitable action is de novo. Iowa R. App. P. 6.4. "In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them." Iowa R. App. P. 6.14(6)(g).

III. Child Support

In order to modify child support, a party must establish by a preponderance of the evidence that there has been a substantial change in circumstances since the entry of the decree, or any subsequent modification. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). A substantial change of circumstances is considered to exist when a court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines. Iowa Code § 598.21C(2)(a) (Supp. 2005).

In order to apply the child support guidelines, the court must determine the net monthly income of both parties. *In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997). All income that is not anomalous, uncertain, or speculative should be included in determining a party's income. *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004). Overtime pay and bonuses are included in a party's income if they are reasonably expected to be received. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). We look to a party's employment history over the past several years to determine whether overtime pay or bonuses were consistently paid. *Nelson*, 570 N.W.2d at 105. If overtime pay and bonuses have been consistent, they should be included in a party's income. *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 333 (Iowa Ct. App. 2005).

Margaret disputes the district court's finding that Harold's overtime pay and bonuses were uncertain or speculative. She points out that Harold had been employed by Ball Plastic Container for one year and four months at the time of the modification hearing, and this should be long enough to determine whether his overtime hours and bonuses were consistent from year to year.

The district court found Harold regularly worked four forty-eight hour weeks, then four thirty-six hour weeks, giving him an average work week of forty-two hours. The court included two hours of guaranteed overtime in calculating Harold's income. The court went on to find:

There was no evidence that any of Harold's overtime pay, bonuses, or incentives were guaranteed or certain except the average of two hours of overtime a week. Clearly, the incentive pay for Harold's perfect attendance and the bonus for company performances are speculative. Although Harold has had overtime pay in 2005 and the first few months of 2006, the Court declines to

say that his overtime pay (except two hours a week) has been so consistent that it is no longer uncertain or speculative. Harold just completed his probation as a new employee and therefore does not have any long history of earning overtime wages.

We agree with the district court's conclusions. Harold testified the incentive bonus was based on the company's performance, and was speculative. He also testified he would lose his perfect attendance incentive if he was even two minutes late for work, or was sick one day. He stated he did not know if he would get overtime hours in the future. We note Harold has not had a long history of working for Ball Plastic Container, and so it is unknown whether he will consistently receive overtime pay and bonuses.

We affirm the district court's decision ordering Harold to pay child support of \$754.33 per month for the two children.

IV. Attorney Fees

Margaret seeks appellate attorney fees. 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 the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We determine each party should pay his or her own appellate attorney fees.

We affirm the decision of the district court.

AFFIRMED.