

**IN THE COURT OF APPEALS OF IOWA**

No. 7-778 / 07-0157  
Filed November 15, 2007

**IN RE THE MARRIAGE OF JOHN SCHUSTER  
AND STEPHANIE SCHUSTER**

**Upon the Petition of  
JOHN SCHUSTER,**  
Petitioner-Appellant/Cross-Appellee,

**And Concerning  
STEPHANIE SCHUSTER, n/k/a  
STEPHANIE BEINHART,**  
Respondent-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert B. Hanson,  
Judge.

John Schuster appeals from the district court's ruling on the application to  
modify his dissolution decree. **AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED WITH DIRECTIONS.**

C. Jean Pendleton of the Pendleton Law Firm, P.C., West Des Moines, for  
appellant.

Debra Hockett-Clark, West Des Moines, and Lori Holm, Des Moines, for  
appellee.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

**BAKER, J.**

John Schuster appeals from the district court's ruling on the application to modify his dissolution decree. We affirm in part, reverse in part, and remand with directions.

**Background Facts and Proceedings.**

The marriage between John Schuster and Stephanie Schuster, n/k/a Beinhart, was dissolved by decree in Polk County, Iowa, in 1996. That decree was modified by the Circuit Court of Jackson County, Missouri, on September 19, 2000, to award custody of the parties' child, Zachary, to John and to require Stephanie to pay child support in the amount of eighty-one dollars per month.

On May 6, 2004, Stephanie filed in Polk County, Iowa, an application to modify the decree further, specifically requesting that Zachary's custody either transfer to her or that her visitation be increased. John filed a counterclaim in which he sought to raise Stephanie's child support. After the parties entered into a stipulation that Zachary would remain in John's care, the issue of child support remained for trial. Following a trial, the court entered a ruling that refused to modify the child support award, concluding that there was not a substantial change in circumstances since the Missouri court had entered the previous modification. John appeals from this ruling contending the court should have increased Stephanie's support obligation and that such modification should be made retroactive to three months after the filing of his counterclaim.

**Scope of Review.**

We review modification proceedings de novo. *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). We give weight to the trial court's findings of

fact, especially when we consider witness credibility, but we are not bound by those findings. *In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997).

**Modification.**

Pursuant to Iowa Code section 598.21(8) (2003), a court may modify support orders if there is a substantial change in the parties' circumstances. The change must be permanent or continuous and not contemplated by the district court at the time of the decree. *Id.* One of the factors to consider is a change in income. Iowa Code § 598.21(8)(a). The Code also defines a “substantial change” to be “when the 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 § 598.21(9).

**Income Level.**

The trial court imputed to Stephanie earnings of \$29,640 per year. John unsuccessfully urged at trial and, now re-asserts on appeal, that Stephanie's income for purposes of application of the guidelines should be at least \$36,400 per year. Upon our *de novo* review of the record, we believe the court was correct in denying John's request to impute additional income to Stephanie.

In 2002, Stephanie went to work for her current husband at his business. Her taxable income in that year was between \$25,000 and \$27,000. She continued to work there full-time through April of 2005 when she quit due to apparent concerns that her marriage was being affected by working closely with her husband. Regardless of why she left, her husband's business was experiencing financial problems and they did not expect that it would be open for much longer. Furthermore, Stephanie lives in a small, rural community where job

opportunities are limited. She testified that there were no jobs in her immediate community in which she could have earned \$36,000. Finally, while Stephanie was engaged in a log home business, she did not earn a profit from this business until 2005, and had only sold one “log shell” since starting. She testified that at the time of the modification trial, she had no potential sales and the log home business was basically no longer in existence. In conclusion, we agree with the trial court that the evidence does not support imputed income of over \$36,000 per year.

#### **Application of Iowa Guidelines.**

While the record is not entirely clear, it appears that when the Missouri court modified the decree to provide that Stephanie be obligated to pay eighty-one dollars per month in child support, it applied Missouri’s child support guidelines after determining John’s monthly salary to be \$10,833 and Stephanie’s to be \$2470. However, in denying the parties’ request to modify in the current action, the court simply concluded there had been no substantial changes in relation to the parties’ respective income levels.

On appeal, John urges that the court should have applied those income levels to the Iowa Child Support Guidelines and then compared them to the support obligation imposed by the Missouri guidelines in the previous modification action. Only then, he asserts, could the court have determined whether the parties’ circumstances had substantially changed.

We first consider whether this precise contention has been preserved for appellate review. We have noted the court did not address this issue as now

specifically urged by John<sup>1</sup>, which normally would cause us to conclude it has not been preserved. However, we believe this issue was inherent in the modification request and raised at least generally in the pleading. Because the guidelines were established to provide for the best interests of the affected children, *In re Marriage of Guyer*, 522 N.W.2d at 818, 821-822 (Iowa 1994), we proceed to the merits of this issue.

We agree with John the court erred in failing to consider whether application of the Iowa Child Support Guidelines in comparison to Stephanie's current obligation shows a substantial change in circumstances, thus warranting modification. The ultimate question was not necessarily whether the parties' income levels had changed substantially, or whether those levels had changed by ten percent, but rather whether, applying current circumstances, the "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 § 598.21(9) (emphasis added)

Accordingly, we remand to the district court to calculate Stephanie's child support figures under the Iowa Child Support Guidelines using the parties' income figures as previously imputed to them. After doing so, it shall compare that figure to the child support amount currently paid by Stephanie, or eighty-one dollars. At that point, the court shall then determine whether a substantial change in circumstances has occurred and, in particular, whether the obligation

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<sup>1</sup> We do not fault the court for this failure. Neither party appears to have provided the court with guideline worksheets comparing the Missouri calculations with the current Iowa calculations. This would have more accurately alerted the court that this issue was before it.

would vary by more than ten percent. If it so determines, the court shall modify Stephanie's support obligation accordingly.

**Retroactivity.**

John requests that Stephanie's increased support obligation be made retroactive to three months after the filing of his counterclaim. On August 1, 2005, the parties entered into a Stipulated Modification Order wherein it was agreed that, in return for other concessions, the parties would let a court decide the amount of child support and John would not seek retroactivity. We see no reason to disturb this agreement.

**Attorney Fees and Costs.**

John and Stephanie both request appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We order that each party pay their own attorney fees. Costs on appeal are taxed one-half to each party.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**