

**IN THE COURT OF APPEALS OF IOWA**

No. 8-699 / 07-0515  
Filed October 29, 2008

**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.

Petitioner appeals the district court decision denying his motion to modify  
the temporary child support order. **AFFIRMED.**

Eric Borseth and Judy Johnson of Borseth Law Office, Altoona, for  
appellant.

Tracey Roberts, Rembrandt, appellee pro se.

Considered by Mahan, P.J., and Vaitheswaran, J., and Robinson, S.J.\*

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

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

Michael and Tracey Roberts were married in Australia in 1996. They subsequently moved to Iowa. The parties have two children, Noah, born in 1998, and Mason, born in 2000. During the marriage, the parties started a company, Mile2 mki, Inc., that sells information technology training courses. Michael was employed as the president of the company.

On April 23, 2004, Michael filed a petition for dissolution of marriage. Tracey requested temporary child support. Tracey filed an affidavit of financial status stating she had income of \$1000 per month in child support for another child, and Michael had gross income of \$8000 per month. Michael's June 14, 2004 affidavit of financial status stated he had gross monthly income of \$3325 per month, and Tracey had \$2133 per month. Michael's child support guidelines worksheet, dated June 15, 2004, suggests that he pay child support of \$597 per month. Tracey did not file a child support guidelines worksheet, but filed an affidavit stating Michael had gross monthly income of \$4800 in January 2004, and \$8000 per month in February, March, and April of that year. In a deposition on June 22, 2005, Michael stated his salary was \$8000 per month. (Michael also filed an affidavit of financial status on December 7, 2004, affirming \$8500 per month gross income.)

The district court entered a ruling on temporary matters on October 18, 2004. The court placed the children in Tracey's physical care, with Michael

having visitation. The court ordered Michael to pay child support of \$1454 per month.

Michael did not stay current on his child support payments. On November 16, 2005, Michael filed an application for immediate reduction of his child support obligation, claiming Mile2 had suffered recent financial losses, and his obligation should be reduced. Tracey filed an application claiming Michael was in contempt for failure to pay child support. The district court entered an order on July 13, 2006, denying the request for a reduction in Michael's child support obligation, finding he "has failed to demonstrate that his reduction in income, if any, is not self-inflicted." On July 20, 2006, the court entered an order finding Michael in contempt of court for failing to pay child support, and was \$6630 in arrears.<sup>1</sup>

On July 27, 2006, Tracey filed a new application citing Michael for contempt. She asserted that he had paid the \$6630 that he was in arrears, but that he still owed \$4366 in past-due child support. On August 7, 2006, Michael filed a new application for reduction in his child support obligation.

On December 13, 2006, the district court entered an order finding Michael in contempt for failure to pay child support, and the total amount due at that time was \$10,236. The court noted that Mile2 was still in business, and that Duane Anderson, the receiver for the company, testified Michael received \$3000 to \$4000 per month from the company. The court concluded, "Petitioner [Michael] is receiving income from the business and is capable of paying child support as

---

<sup>1</sup> On July 20, 2006, the district court appointed a receiver for Mile2 based on Tracey's allegations that Michael was mismanaging the business. Duane Anderson, an employee of the company, was named as the receiver.

ordered.” On February 9, 2007, the court entered an order denying Michael’s request to reduce his child support obligation, based on its findings in the December 13, 2006 order. Michael appeals.

## **II. Standard of Review**

In this equitable action our review 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). In a modification action, the district court “has reasonable discretion to determine whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity.” *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983).

## **III. Merits**

**A.** Michael first contends that the order setting temporary child support on October 18, 2004, was improper because the court did not specifically find the net monthly income of each party and then apply the child support guidelines. See Iowa Ct. R. 9.4, 9.5. He asserts his child support obligation was set too high in the first instance.

A temporary order setting child support is a final judgment, and is appealable as a matter of right. See *In re Marriage of Denly*, 590 N.W.2d 48, 50 (Iowa 1999). A temporary order for financial assistance “must be appealed within 30 days from the district court decision in order to preserve the right to contest the award of assistance.” *Id.* Michael did not appeal the October 18, 2004 order

setting temporary child support within thirty days. We conclude he cannot now contest that order.

**B.** Michael also claims the district court should have found there was a substantial change in circumstances since the October 2004 order justifying a reduction in his child support obligation. He asserts he has had a reduction in income because Mile2 has not been profitable. Michael contends he has not voluntarily reduced his income, and points out it is not uncommon for new businesses to have trouble remaining consistently profitable.

A party seeking modification must establish by a preponderance of the evidence that there has been a substantial change in circumstances since the entry of the decree, or its last modification. *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 331 (Iowa Ct. App. 2005). In this case, we determine whether there has been a substantial change in circumstances since July 13, 2006, when the court previously addressed Michael's request to reduce his child support obligation. At that time, the court found Michael had failed to show his reduction in income was not self-inflicted.

In determining whether there has been a substantial change in circumstances, the court may consider “[c]hanges in the employment, earning capacity, income, or resources of a party.” Iowa Code § 598.21C(1)(a) (Supp. 2005); *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). However, “a parent may not rely on a claim of decreased income to obtain a modification of a support order if the parent's reduced earning capacity and inability to pay support is self-inflicted or voluntary.” *In re Marriage of Swan*, 526 N.W.2d 320,

323 (Iowa 1995). Where a parent's reduction in income is the result of an improper intent to deprive children of support, we may refuse to modify the parent's child support obligation. See *In re Marriage of Rietz*, 585 N.W.2d 226, 229-30 (Iowa 1998); *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998).

At the time of the February 7, 2007 hearing on Michael's request for modification, Michael still held the title of president of Mile2, and was recognized as the owner of the company. Michael was spending much of his time in the country of Finland, with his paramour. Due to Michael's absence and the receivership, Anderson was making the company's payments. Anderson testified the company's finances were such that he could not afford to pay Michael more than \$3000 or \$4000 per month. Anderson stated Anderson received \$60,000 per year, and Michael was capable of doing his job, and in fact had done so prior to the receivership.

We conclude the district court did not abuse its discretion in refusing to modify Michael's temporary child support obligation. Michael was the owner of Mile2 and could have decided to pay himself a greater salary. There is evidence in the record to support the court's decision that Michael's reduction in income was self-inflicted or voluntary.

#### **IV. Attorney Fees**

Michael seeks attorney fees for this appeal. We determine each party

should pay his or her own appellate attorney fees. Costs of this appeal are assessed to Michael.

**AFFIRMED.**