

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**SHEILA KAY EBY,**  
Petitioner,

vs.

**WILLIAM ALAN EBY,**  
Respondent.

Case No. 20399

**MODIFICATION DECREE**

**DATE OF TRIAL:** August 21, 2001.

**DATE OF RENDITION:** August 22, 2001.

**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301).

**APPEARANCES:**

For the petitioner: Ronald J. Albin with petitioner.

For the respondent: Mark D. Fitzgerald with respondent.

**SUBJECT OF HEARING:** (1) respondent's petition for modification, and, (2) petitioner's counter-petition for modification.

**DECREE INVOLVED:**

Date of original decree: September 22, 1997.

Date last modified: September 9, 1998.

**FINDINGS:** The court finds:

1. The respondent has physical custody of the children. The petitioner pays child support. The respondent petitioned to increase the petitioner's support, and the petitioner counter-petitioned to decrease child support. The facts are largely undisputed.

2. The respondent's income has been relatively stable since the original decree. Of course, the relevant point of comparison is the last modification. To the extent that the respondent's income has decreased, the respondent presented persuasive evidence that such decrease resulted from financial difficulties encountered by his employer. Although he is employed by a family business, the evidence does not support a conclusion that he has the ability to control or manipulate his income. The proper number for inclusion as his gross income is the amount of his current regular salary.

3. The petitioner's income has varied over time. At the time of the most recent modification, she had gross monthly employment income of \$1,844.96. At the time of trial, she testified that she earned \$9.00 per hour and worked approximately 16 hours per week. This represents only \$624.00 per month of gross earnings. A calculation under the guidelines using these numbers is attached as Appendix "B-1."

4. After the 1998 modification, the petitioner continued to enjoy increased income. However, she also desired to obtain further education to earn a pharmacy degree, which would enable her to substantially increase her earnings. Prior to the date of respondent's petition for modification, the petitioner actually began the process of commencing that education. She applied to the University of Nebraska at Kearney in August of 2000 and was admitted, although she subsequently chose not to pursue her education at that institution. At the time, she was earning at or near \$3,104 per month gross earnings from her employment at Heartland Promotions in Omaha. The petitioner left that employment in January of 2001 to move to Grand Island in contemplation of furthering her education at UNK.

5. The petitioner testified to some frustrations and concerns with her job at Heartland Promotions. However, her testimony persuades the court that her principal motivation, indeed her long-term "dream," was to facilitate obtaining her pharmacy degree.

6. After the move to Grand Island, she was initially employed at a wage of \$8.00 per hour and worked about 36.8 hours per week (February and March hours annualized and divided by 52). After she entered an Internet-based pharmacy program through Creighton University, she reduced her hours to approximately 16 hours per week and her wage rate increased to \$9.00 per hour.

7. This court easily disposes of the petitioner's counter-petition for modification seeking a decrease in child support. The needs of the children would be seriously impaired if the child support amount was reduced, and it would be inequitable to reduce the child support in a circumstance where the petitioner has the earning capacity required to continue to meet the present child support order. Although the petitioner should be free to pursue further education, she may not, under the circumstances presented here, finance it at the expense of her children. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

8. However, the determination of the respondent's petition poses more troublesome issues.

9. The paramount concern and question in determining child support, whether in the initial marital dissolution action or in proceedings for modification of a decree, is the best interests of the child. *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001).

10. The main principle behind the child support guidelines is to recognize the equal duty of both parents to contribute to the support of their children in proportion to their respective net incomes. *Pursley v. Pursely*, 261 Neb. 478, 623 N.W.2d 651 (2001).

11. Of course, the guidelines contemplate that earning capacity may be the appropriate test under certain circumstances, rather than actual earnings. As the Supreme Court explained in *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000) (citing Nebraska Child Support Guidelines, paragraph D), the presumptive child support amount to be paid by the noncustodial parent is derived through an objective, mathematical process which begins with each parent's total monthly income from all sources, except means-tested public assistance benefits and payments received for children of prior marriages. The guidelines further provide: "if applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources." *Id.*

12. The *Porter* court also summarized the various cases applying the earning capacity test. In *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998), a noncustodial parent argued that the only evidence of his income was his military pension and that the trial court improperly imputed income to him from his operation of a bar. Finding that there was ample evidence that the parent worked a significant number of hours at the bar, the Supreme Court concluded that the trial court did not err in basing the obligation on the parent's earning capacity. The Supreme Court specifically noted that the parent was an able-bodied man who had demonstrated he was able to work. Similarly, in *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996), the Supreme Court instructed the trial court to impute income to the noncustodial parent commensurate with his earning capacity when he, by choice, worked only 5 1/2 months per year. In *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798

(1991), the Supreme Court found that the trial court properly imputed income to the noncustodial parent when he admitted that he was able-bodied and capable of gainful employment. And in *State v. Smith*, 231 Neb. 740, 437 N.W.2d 803 (1989), a paternity proceeding, that court held that the trial court properly based a noncustodial parent's child support obligation on his earning capacity rather than on his actual income, where it was shown that upon learning of the birth of the child, the father quit his salaried job and began working on his parents' ranch for no compensation other than room and board. The Supreme Court also observed that the Court of Appeals has treated "earning capacity" under the guidelines in a similar manner. In *Dworak v. Fugit*, 1 Neb. App. 332, 495 N.W.2d 47 (1992), the Court of Appeals held that the trial court properly imputed income to the noncustodial parent based upon his earning capacity where he had left his regular employment to start a cleaning business, significantly reducing his income. The court stated that the parent's "parental obligations may not permit him the luxury of promoting a new cleaning service and earning less than his demonstrated capacity." *Id.* at 336, 495 N.W.2d at 49. Similarly, in *In re Interest of Tamika S. et al.*, 3 Neb. App. 624, 628, 529 N.W.2d 147, 150 (1995), the appellate court found that the trial court properly imputed income to the noncustodial parent based upon her earning capacity when the evidence demonstrated that she worked only 30 hours per week in order to spend more time with her children and when she "presented no credible evidence that she was unable to work more than 30 hours per week."

13. The cases provide significant guidance regarding the circumstances under which income should be imputed. However, they fail to elaborate to the same extent concerning the appropriate method of calculating the *amount* of imputed income.

14. The respondent's argument simplistically asserts that measure should be determined by the petitioner's earnings at the previous Heartland Promotions employment. This position disregards the petitioner's articulated concerns with that employment. While this court finds that those reasons were not her primary motivation, I do not find that those reasons were false or insubstantial. The obligation to support one's children does not mean that the obligor is bound to undertake the highest paying employment in disregard of all other surrounding circumstances.

15. Moreover, this court concludes that this case is not one in which the petitioner changed jobs or undertook education for any improper motive to avoid child support or to avoid an increase in child support. The submission of her application for admission to UNK well before the respondent's petition for modification, together with the other surrounding circumstances, convinces the court that the change of employment and commencement of further postsecondary education was not motivated to avoid her support obligation.

16. Additionally, the court cannot necessarily conclude on the state of the evidence that the petitioner would still have that employment but for her voluntary termination. Her former employer testified by deposition that he would "probably not" rehire her because she had already been replaced. He also testified that her replacement was hired for about \$5,000 less (presumably annually) than the petitioner's former salary. On cross-examination, he "couldn't answer" whether she had job security for the next five years or even for the next year. In the context of initial determinations, the higher appellate courts have repeatedly articulated that there must be some evidence that the parent is capable of realizing such capacity through reasonable effort. E.g., *Grams v. Grams*, 9 Neb. App. 994, 624 N.W.2d 42 (2001). While that rule has less application on modification, this court believes it can apply under certain circumstances and does apply in this case.

17. Having concluded that it is not appropriate under these circumstances to impute to petitioner the full amount of her former salary at Heartland Promotions, the question becomes how much income should be imputed. For the same policy reasons upon which the court rejected the petitioner's counter-petition for modification, the court declines to impute an amount less than the gross monthly income attributed to the petitioner at the last modification of \$1,844.96. Her current hourly wage of \$9.00, even assuming 40 hours per week of full-time employment, would result in a smaller number. The evidence provides no other reasonable basis to exceed the previous determination of gross income. Having concluded that the former employment is not, under these circumstances, the proper measure of the petitioner's present earning capacity, the evidence leaves the court with no other acceptable alternative. The support under the guidelines attributable to such amount is calculated on Appendix "B-2," which is attached hereto.

18. The pretrial order articulated one issue as whether petitioner's change of employment resulted from necessity to be closer to children, and if so, what impact, if any, that has on her earning capacity. The court concludes that the evidence fails to show that the change of employment resulted from the necessity to be closer to the children or any impact on earning capacity relating to the relationship between the petitioner and the children.

19. The pretrial order also set forth for trial the issue whether respondent should receive a guideline deduction for the children's health insurance premiums actually paid by respondent's current spouse. The respondent's counsel reported during opening statement and adduced evidence that neither the respondent nor his current spouse incur any out-of-pocket expense for the children's medical and dental insurance provided through the spouse's employment.

20. Because the calculations under Appendix "B-2" show an increase of 10 percent or more, paragraph Q of the guidelines declares that such constitutes a rebuttable presumption of a material change in circumstances. The court concludes that the petitioner has failed to rebut the presumption. The court thus determines that there has been a material change of circumstances since the decree was last modified.

21. The pretrial order also sets forth issues regarding potential grounds for deviation from the child support guidelines for visitation travel expenses and because of the petitioner's current educational pursuits. As to the former, the court finds no significant evidence in support of such claim. As to the latter, the court concludes, for the policy reasons articulated previously, that application of the guidelines is just and appropriate. The court declines to deviate therefrom.

22. The child support should be modified retroactively to the first day of the month following the filing date of the application. *Riggs v. Riggs*, 261 Neb. 344, \_\_\_ N.W.2d \_\_\_ (2001).

**ORDER:** IT IS THEREFORE ORDERED, ADJUDGED, AND  
DECREEED that:

1. **RELIEF GRANTED/DENIED:** The respondent's petition for modification is granted to the extent of the relief set forth below and is otherwise denied. The petitioner's counter-petition for modification is denied.

2. **PRIOR DECREE OTHERWISE EFFECTIVE:** The decree previously entered in this case (and as previously modified, if applicable) shall remain in full force and effect except as expressly modified by this order.

3. **SUPPORT MODIFIED:** The petitioner's support obligation shall be increased, effective as of the payment due on December 1, 2000, to:

- a. \$628.00 per month when there are three children to be supported;
- b. \$526.00 per month when there are two children to be supported;
- c. \$367.00 per month when there is only one child to be supported.

4. **TERMINATION OF SUPPORT:** The support obligation for each child continues until such child reaches majority under Nebraska law (presently age 19), becomes emancipated, becomes self-supporting, marries, or dies, or until the further order of the court.

5. **PAYMENTS:** All payments of **child, medical, or spousal support** shall be paid to the **State Disbursement Unit** (and until the State Disbursement Unit is operative, to the Clerk of the District Court for this county) for disbursement to the person entitled thereto. All payments of **alimony, court costs, or attorneys' fees** shall be paid to the **Clerk of the District Court** for this county for disbursement to the person entitled thereto.

6. **INTEREST:** Delinquent support shall bear interest at the rate of 5.442% per annum from the time and in the manner provided by law.

7. **RETROACTIVE EFFECT:** The State Disbursement Unit (and until the State Disbursement Unit is operative, the court clerk) shall adjust the child support records accordingly to reflect the retroactive application of this order.

8. **INFORMATION REPORTING:** Each party shall be required to furnish the clerk of this court, in writing, with such party's address (including specific street address or other physical location, in addition to mailing address), telephone number, and social security number, the name and address of such party's employer, whether or not such person has access to employer-related health insurance coverage and, if so, the health insurance policy information, and any other information that the Court shall deem relevant until the judgment is paid in full. Each party shall also be required to advise the Clerk of any changes in such information between the time of entry of this order and payment of the judgment in full. Failure to comply with the provisions of this section shall be punishable by contempt.

9. **INCOME WITHHOLDING:** The income of the any party obligated to pay support hereunder shall be subject to income withholding, which shall be implemented pursuant to the Income Withholding for Child Support Act.

10. **SUPPORT ENFORCEMENT:** In the event that any such party obligated to pay support fails to pay any child, medical, or spousal support payments, as such failure is certified each month by the State Disbursement Unit (and until the State Disbursement Unit is operative, by the District Court Clerk) in cases where court-ordered support is delinquent in an amount equal to the support due and payable for a one-month period of time, such party may be required to appear before this Court on a date to be determined by the Court and show cause why such payment was not made. In the event such party fails to pay and appear as so ordered, a warrant shall be issued for such party's arrest.

11. **JUDGMENT:** Judgment is hereby rendered accordingly. Each party shall be required to pay their own respective costs and attorney fees.

Signed at O'Neill, Nebraska, on August 22, 2001.

DEEMED ENTERED upon the date of filing by the court clerk.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- : Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- : Mail postcard/notice required by § 25-1301.01 within 3 days.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- : Note the decision on the trial docket as: [date of filing] Signed "Modification Decree" entered.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge