

**IN THE COURT OF APPEALS OF IOWA**

No. 9-476 / 08-0933

Filed July 22, 2009

**IN RE THE MARRIAGE OF ADAM BISHOP GILBERT  
AND GAYLENE JOY GILBERT**

**Upon the Petition of  
ADAM BISHOP GILBERT,**  
Petitioner-Appellant,

**And Concerning  
GAYLENE JOY GILBERT,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Cedar County, Mark J. Smith,  
District Court Judge.

Adam Gilbert appeals from the district court's order setting temporary child  
support. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Karla Wolff, Cedar Rapids, for appellant.

Phil Turvin, Iowa City, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

**MAHAN, P.J.**

Adam Gilbert appeals from the district court's order setting temporary child support. He contends the court erred in deviating from the child support guidelines in determining the correct amount of temporary child support to be ordered for the parties' eleven-year-old son. Adam alleges the court failed to take evidence, make a record, or provide in writing an explanation as to how the application of the guidelines would be unjust or inappropriate. See Iowa Ct. R. 9.11; *In re Seay*, 746 N.W.2d 833, 836 (Iowa 2008) (stating the child support guidelines are "presumptively valid but may be varied if the district court makes written findings that application of the guidelines would be unjust or inappropriate according to established criteria.").

An unreported hearing on temporary support was held on May 27, 2008. Prior to the hearing, Gaylene Gilbert had filed an application for temporary child support and spousal support, and attached thereto an affidavit of her financial status, the parties' 2006 individual tax return, and the child support guidelines worksheet signed by Gaylene and her counsel. According to her financial affidavit, Gaylene earned approximately \$700 per month working three part-time jobs. Adam had filed his version of the child support guidelines worksheet signed by his counsel (but without Adam's signature) and a financial affidavit indicating he had \$30,000 in cash, but was currently unemployed.

Several months prior, Adam completed a two-year contract of employment under which he had served as a truck driver in Iraq earning \$96,000 per year. The parties stipulated that although Adam had the ability to renew the contract, he chose not to do so. As the district court noted, "There was no reason that

Adam chose not to renew his contract. He was not disabled nor was he designated as unfit to serve under his previous contract.” Under his version of the child support guidelines, Adam indicated his monthly amount of support should have been fifty dollars. He submitted no evidence as to his earning capacity or what his income could have been. The district court imputed an earning capacity of \$96,000 per year to Adam and ordered him to pay the amount of \$1339.80 per month as child support.<sup>1</sup>

On October 23, 2008, the supreme court granted Adam’s motion for limited remand for purposes of establishing the record for appeal. In an order dated November 12, 2008, the court clarified its previous ruling:

The Court indicates that Mr. Gilbert had for two years earned the sum of \$96,000 per year on contract for services in Iraq. He voluntarily chose not to renew this contract, which the Court viewed as a voluntary reduction in income. The Court imputed the sum of \$96,000 per year in that there was no other evidence as to what Mr. Gilbert’s earning ability was that was given to the Court. The Court was unwilling to agree with statements by Mr. Gilbert’s counsel that he was unable to earn an income. There was no evidence submitted by Petitioner as to what his earning capacity was at the time of the hearing other than that stated above.

Upon our de novo review, see Iowa R. App. P. 6.4; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007), we agree with the court that an income should be imputed to Adam for purposes of calculating his temporary child support obligation. *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993); *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991). However, under the circumstances in this case, we find the court erred in imputing the amount of \$96,000 per year for Adam’s salary. The court was incorrect in

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<sup>1</sup> The court also ordered the amount of \$300.20 as temporary spousal support to be paid monthly.

determining Adam's inability to pay child support was self-inflicted. Adam's employment in Iraq was a potentially dangerous job. Furthermore, he had already spent two years away from his family and would face an additional two years away by renewing his contract. Under these circumstances, he should not be faulted for failing to renew his contract.

At the same time, we disagree with Adam's contention that he should only pay fifty dollars per month. The fact remains that once Adam got back from Iraq, he failed to seek new employment. More importantly, Adam presented no evidence of what his income could have been, or of his ability to earn an income. In an abundance of caution and fairness, we remand for a determination of what income should be imputed to Adam under the circumstances that now exist.

Gaylene requests appellate attorney fees. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.*; *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). We decline to award attorney fees in this case.

We affirm in part on the issue of imputing income. We reverse in part and remand for further proceedings on the issue of what income should be imputed to Adam for purposes of setting temporary support. Costs of appeal shall be divided equally between the parties.

**AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**