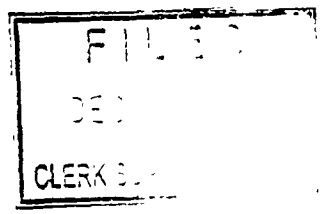
IN THE COURT OF APPEALS OF IOWA

No. 1999-248 (9-478) / 98-1192
Filed December 13, 1999



IN RE THE MARRIAGE OF TREZINA ATHO LUETH AND JOHN UKEC LUETH

Upon the Petition of
TREZINA ATHO LUETH,
Petitioner-Appellee/Cross-Appellant,

And Concerning
JOHN UKEC LUETH,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Story County, Gary L. McMinimee, Judge.

The respondent appeals, and petitioner cross-appeals, from the child support provisions of the parties' dissolution decree. Respondent contends his child support obligation should be lowered because he was awarded joint custody of the parties' two minor children and he has them under his care for a greater period of time than petitioner. On cross-appeal, petitioner argues the district court erred in the calculation of respondent's net monthly income and that his child support payments should increase. Petitioner also requests an award of appellate attorney fees. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

Bruce L. Cook of Cook & Brown, P.L.C., Clive, for appellant.

Alex P. Galyon of Galyon Law Office, Ames, for appellee.

Heard by Sackett, C.J., and Zimmer and Miller, JJ.

MILLER, J.

Respondent John Lueth appeals the trial court's judgment and decree that dissolved the parties' marriage. He claims the trial court should have granted him a downward departure from the amount of child support provided by the Child Support Guidelines. Petitioner Trezina Lueth cross appeals. She claims the trial court incorrectly deducted insurance premiums in arriving at John's net monthly income. Trezina requests appellate attorney fees. We affirm.

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). Our Supreme Court has set child support guidelines which are to be applied unless their application would lead to an unjust or inappropriate result. Iowa Code § 598.21(4)(a) (1999); Supreme Court Order of September 29, 1989. There is a rebuttable presumption that the amount of child support determined in accordance with the guidelines is the correct amount of child support to be awarded. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). That amount may be adjusted upward or downward when necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case. *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). To justify a departure from the guidelines, the court must make written findings the scheduled amount would be "unjust or inappropriate" under the criteria prescribed by the Supreme Court. Iowa Code § 598.21(4)(a) (1999). Deviation from

the uniform application of the child support guidelines is discouraged. *In re Marriage of Thede*, 568 N.W.2d 59, 62 (Iowa App. 1997).

John and Trezina were married October 23, 1967 in the country of Sudan. Due to war conditions in Sudan in the early 1980's, John, who was a general in the Sudanese army, chose to move his family to the United States. Problems broke out between the parties over bringing more of John's family to the United States to live with him, including other children of John's by other wives, multiple wives being allowed under Sudanese law. The parties have lived in Ames, Iowa since 1982, except for a short period in Oklahoma in the late 1980's.

Trezina filed a petition for separate maintenance. John answered, seeking a dissolution of the parties' marriage. There are two minor children who will be affected by this action, Matthew, born August 7, 1984, and Benjamin, born December 28, 1986. The district court entered its findings of fact and a judgment on June 8, 1998. The parties were granted joint legal custody. The court expressly rejected joint physical care and placed the children's physical care with Trezina. The decree provides that John is to have two weeks visitation each summer. For the remaining fifty weeks he is to have visitation from 7:45 p.m. to 8:15 a.m. Sunday through Thursday nights, to coincide with Trezina's 8:00 p.m. to 8 a.m. work hours caring for a lady, and every other weekend from 6:30 p.m. Friday to 6:00 p.m. Sunday. The trial court concluded that child support "should be set based upon the child support guidelines," and ordered John to pay $462.13 child support per month. John argues

the trial court erred by not granting a downward departure from the child support guidelines.

The appeal. John will have the children with him fifty-one and one-half percent of the time if they are with him all the times provided by the trial court's decree. His argument, in sum, is that because he has visitation for so much time he should be granted a downward departure from the child support guidelines. For the reasons that follow we do not find that there are any unusual or special circumstances that would justify such a departure.

Because some form of shared physical care is the norm, the guidelines incorporate the reasonable living expenses of the non-custodial parent and need no further adjustment. *In re Marriage of Fox*, 559 N.W.2d 26, 29 (Iowa 1997). In the absence of special circumstances justifying a departure, the guidelines must be applied. *Id.* The use of guidelines is "intended to remedy the inadequate, inconsistent, and ineffective case by case approach for setting child support." *In re Marriage of Powell*, 474 N.W.2d 531, 533 (Iowa 1991).

The time John spends parenting his sons, however substantial, does not greatly exceed that typically provided in cases involving liberal visitation. The record does not show unusual expenditures by John that would demonstrate such hardship or unfairness as would require a departure from the guidelines. As the parent with physical care, Trezina will be responsible for many of the major expenses of raising children, such as clothing, shoes, school fees and supplies, and health care expenses

not paid by insurance. Additionally, the time that the children spend with John during the week is mostly sleeping and studying hours.

Iowa case law supports a decision to not grant a downward departure. In *State ex rel Lara v. Lara*, 495 N.W.2d 719 (Iowa 1993), the state initiated an administrative proceeding against a non-custodial father for child support and the father sought judicial review of an administrative order of the department of human services that required him to pay support. The Supreme Court held that the father's support obligation continued although visitation occurred more than fifty percent of the time and that no special circumstance were shown which would allow deviation from the child support guidelines. *Id.* at 721. In *Lara*, the court stated:

> We first held in *In re Marriage of Glass*, 213 N.W.2d 668, 671 (Iowa 1973), and again later in *In re Marriage of Fleener*, 247 N.W.2d 219, 221 (Iowa 1976), that child support generally should not be suspended during periods of visitation with the noncustodial parent. This is because the custodial parent still must incur most of the expenses of maintaining a home for the parent and the children even when the children are absent. *Fleener*, 247 N.W.2d at 221; *Glass*, 213 N.W.2d at 671.

Id. at 721.

In *In re Marriage of Fox*, 559 N.W.2d 26 (Iowa 1997), the father had visitation with his daughter for about one-third of the time. The Supreme Court held that this was not a special circumstance in which a deviation from the child support guidelines was warranted. *Id.* at 29. The Supreme Court noted that attempting to account for the child living half the time with the non-custodial parent "departs from the guidelines

by creating what amounts to 'half a custodial parent' and 'half a child'. King Solomon rejected a similar notion 3000 years ago." *Id.* at 28.

In *Fox* the Supreme Court rejected the father's contention that his "'one-third' share of parenting" entitled him to a corresponding reduction in his child support obligation. *Id.* at 29. The Supreme Court went on to say "[i]t would make no difference whether the split were 60/40, 70/30, or 80/20. We think it simply unwise and counterproductive to use such artificial formulas to chip away at the uniformity and fairness sought to be achieved by the guidelines." *Id.* at 29.

We conclude that the trial court was correct in declining to order a downward departure from the amount of child support provided by the child support guidelines.

The cross appeal. On cross appeal Trezina claims the trial court erred in calculating John's income for the purpose of computing child support. She argues that in determining John's net income the trial court improperly allowed a full deduction from gross income for medical and dental insurance premiums. Although her brief is somewhat unclear on the point, she appears to argue that the trial court allowed a deduction of $562.63 ($61.00 dental insurance plus $501.63 medical insurance) per month, but it did not include in John's income $398.12 that his employer contributed toward those premiums each month. In his brief John disagrees. The parties each forcefully assert at length what each believes the trial court did in calculating John's net income. Their views of what the trial court did vary widely,

and the trial court's ruling does not clearly support either party's version of what it did.

The trial court's ruling does not directly address the question of what part of the medical and dental insurance premiums, if any, was paid for by John's employer, or how it treated such premiums and any reimbursement in determining John's income. Rather, the trial court made a finding that John had gross wages of about $32,114 in 1997, from which $106.93 was deducted each month for a tax deferred annuity, and that in addition to his wages and retirement benefits his employer provided him "with family health insurance at a cost of $501.63 per month and dental insurance at a cost of $61.00 per month." It noted that when Trezina was no longer covered by the insurance the cost would be about $100 per month less. The trial court made no specific finding as to whether the cost of the insurance premiums was borne entirely by John or was in part paid by his employer, and no such finding can with any reasonable degree of certainty be deduced from its ruling.

In oral argument both parties conceded that neither party had filed with the trial court the child support guidelines worksheet required of each by the child support guidelines adopted by the Iowa Supreme Court pursuant to section 598.21(4) of the Code. The trial court did not, and apparently could not, make any finding, supportable by the record, as to what the parties' respective net incomes were. It appears likely that the trial court made estimates of net incomes from the gross income information that was provided and based child support on such estimates. On

appeal we cannot determine what the parties' respective net incomes were or what income figures the trial court used.

We conclude that the portion of the trial court's ruling which sets John's child support obligation should be vacated and this case remanded to the trial court to determine the parties' respective net incomes and set child support accordingly. Each party shall provide a properly calculated child support guidelines worksheet and the trial court should make findings concerning the parties' respective net incomes. In making those findings the trial court should resolve any fact issues concerning medical and dental insurance premiums, whether and to what extent such premiums are reimbursed by John's employer, and how those premiums and any reimbursements are to be treated in determining John's net income.

Attorney fees. Trezina requests appellate attorney fees. An award of attorney fees is not a matter of right but rests within the court's discretion and the parties' financial positions. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Id.* The trial court found John's gross income to be about $33,400 per year ($32,114 plus $106.93 per month tax deferred annuity). From its findings regarding Trezina's hours of work and rates of pay, it appears her gross income is about $26,500 per year. Although Trezina was obligated to defend

the trial court's decision on John's appeal and did so successfully, she also challenged that decision. We decline to award appellate attorney fees.

Other matters. One additional matter deserves mention.

We have addressed the merits of the parties' claims, despite some doubt as to whether either party preserved error on the issue which that party presents. Issues must ordinarily be presented to and passed on by the trial court before they may be raised and adjudicated on appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). Nothing in the record clearly shows or strongly suggests that John presented to the trial court any request for a downward departure from the child support guidelines. Assuming that he did so, nothing in the trial court's ruling clearly shows or strongly suggests that it ruled on such an issue. Similarly, although questions concerning deductibility of health insurance premium expenses and inclusion in income of what appears to be an employer's contribution toward them were clearly before the trial court, nothing in its ruling clearly shows or strongly suggests that it ruled on these issues. A motion in the trial court pursuant to Iowa R. Civ. P. 179(b) seeking enlarged or amended findings and conclusions is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. *State Farm Mut. Automobile Ins. Co. v. Pfliblsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). No such motion was apparently filed by either party in this case.

Disposition. We affirm that part of the trial court's ruling which may be seen as declining to grant a downward departure from the child support guidelines. We vacate that part of the trial court's ruling which sets John's child support obligation and remand to the trial court to determine the parties' respective net incomes and set child support accordingly. We do not retain jurisdiction. We decline to award appellate attorney fees.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

Sackett, C.J. concurs in part and dissents in part; Zimmer, J. concurs.

SACKETT, C.J. (concurs in part and dissents in part)

I concur in part and dissent in part. I would reverse and remand. Respondent-Appellant John Ukec Lueth challenges the district court's decision setting his child support for his two minor children at the guidelines amount. He contends and it is not disputed that the two children are in his custodial care under the provisions of the decree approximately fifty-five percent of the time. The district court awarded John and his former wife Petitioner-Appellee/Cross Appellant Trezina Atho Lueth joint physical care, but despite the provision that resulted in John assuming custodial care for more than half of the time, named Trezina as the primary custodian.

The majority in reliance on two cases has determined the trial court correctly determined John's support obligation by the treating him as the noncustodial parent for purposes of applying the guidelines. To reach this result the majority has relied on *State ex rel. Lara v. Lara*, 495 N.W.2d 719, 722 (Iowa 1993) and *Marriage of Fox*, 559 N.W.2d 26 (Iowa 1997). I find the cases not to be instructive it is distinguishable on the facts from the situation here. In *Lara*, the court, while recognizing the protesting father had visitation with the child fifty-five percent or more of the time thereby providing some support, *still required him to pay monthly child support to partially reimburse the state for public assistance paid for his child.* (Emphasis added.) *Id.* at 722-723. Trezina, unlike the mother in *Lara*, does not receive public assistance but has an ability equal to John's to support the children. Therefore the rationale advanced to charge the father in *Lara* as a noncustodial parent for child

support purposes is not applicable here. Nor does *In re Marriage of Fox*, 559 N.W.2d 26, (Iowa 1997) dictate the result the majority reached. In *Fox* the parents enjoyed shared custody and the father who had the child in his care about one-third of the time asked for a reduction in support. The Court in *Fox* recognized "An argument might be made that where one child spends equal time in two households, each parent should be deemed the noncustodial parent on the one-child guidelines chart for purposes of calculating the support each would owe the other." *Fox*, 559 N.W.2d at 28. The court, however, rejected that argument as to Fox saying, "The record amply supports the district court's conclusion that the time James spends parenting Elizabeth, however substantial, does not exceed that typically enjoyed in a liberal visitation situation. Nor does the record reveal unusual expenditures by James that would demonstrate hardship or unfairness warranting a departure from the guidelines. See Iowa Code § 598.21(4)(a). We think it sufficient to say that we are convinced -- as was the district court -- that Elizabeth [the child] spends significantly more time in her mother's home than with her father."

The court then specifically said, "We reject James' contention that his 'one-third' share of parenting entitles him to a corresponding reduction in his child support obligation." *Id.* at 29.

The children are on John's home over fifty percent of the time. He and Trezina both have adequate incomes. Fairness dictates a substantial downward adjustment in John's child support.

The record of the parents net incomes as defined by the guidelines is not complete. The district court set child support without making a finding of each party's net income.

Therefore I concur with the majority decision to remand and direct the district court first determine net incomes for the purpose of applying the child support guidelines.