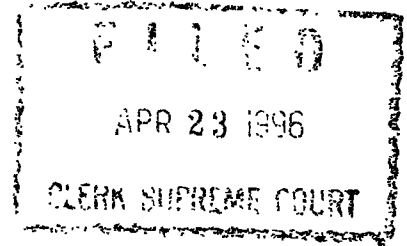


**IN THE COURT OF APPEALS OF IOWA**

No. 5-557 / 94-1663



**IN RE THE MARRIAGE OF RICHARD THOMAS REID AND REBECCA  
JANE REID**

000213

Upon the Petition of  
**RICHARD THOMAS REID,**

Appellant/Cross-Appellee,

And Concerning  
**REBECCA JANE REID,**

Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Clinton County, C. H. Pelton, Judge.

Appeal and cross-appeal from the modification of a child support obligation.

**AFFIRMED AS MODIFIED.**

William B. Norton and Tricia L. Spratt of Norton & Spratt, P.C., Lowden, for  
appellant.

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellee.

Considered by Habhab, P.J., and Huitink and Streit, JJ.

**HUITINK, J.**

**(11/12/15)**

At issue in this modification action is whether all of the father's overtime should have been considered in calculating his child support obligation and whether the parties' shared custody arrangement warranted a deviation from the child support guidelines. We find all of the overtime was properly considered, and the trial court should not have deviated from the guidelines.

Richard and Rebecca were divorced in 1990. They have two daughters, Tawnya, born February 17, 1978, and Amanda, born August 11, 1982. The parties stipulated to a shared care arrangement which was designed to accommodate the fact the mother worked 7 a.m. until 3 p.m. and the father worked 11 p.m. until 7 a.m. Under the stipulation Richard was to drop the girls off at school each morning and pick them up from school each day. On Tuesday and Wednesday of each week the children would stay with the father after school until 8:30 p.m. Richard was to have the girls every other weekend, and on the weekends he did not have the girls, he was to have them for three hours on Friday night. During the summer, Richard was to care for the children every weekday from 8 a.m. until 3:30 p.m. and every third weekend. This shared arrangement eliminated the need for child care while the parents worked.

Under the 1990 dissolution decree, Richard was ordered to pay \$115 per week in child support. At that time he earned \$48,000 a year which included substantial overtime. Rebecca earned \$16,300. Richard had indicated he did not expect to earn as much overtime in the future. The trial court specified that in setting the amount of

child support at \$115 per week, the court had taken into account the shared physical care arrangement and the fact the children would be in Richard's care a substantially greater amount of time than if Rebecca had sole physical care.

Rebecca filed a modification action in 1994 seeking an increase in Richard's child support obligation. The parties disputed whether the children continued to spend as much time in their father's care. At the time of the modification trial the children were sixteen and eleven years of age. Tawnya had a job and spent approximately three to four hours a week with her father. Amanda continued to have after school visits with her father for three days during the week and visited him for approximately four to five hours each weekend. It appeared the father's heavy work schedule precluded the girls from having many overnight or prolonged visits with him.

After the dissolution, Richard had continued to regularly work overtime. At the time of the modification hearing he testified he worked an average of six days a week. He earns \$14.99 an hour. He receives a premium bonus for working third shift, time and one-half for overtime, and double time on Sundays if he works over forty-eight hours in a week.

The record indicates the parties had the following earnings over the past few years:

| Year | Richard  | Rebecca  |
|------|----------|----------|
| 1989 | \$48,000 | \$16,300 |
| 1991 | \$51,930 | \$23,238 |
| 1992 | \$58,480 | \$28,368 |
| 1993 | \$53,693 | \$28,486 |

In its modification ruling the trial court found there was a material and substantial change in circumstances. The court found the father earned \$53,000 per year and had at least \$39,100 in net income. It found the mother grossed between \$23-28,000 per year. Applying the child support guidelines, the court found Richard's support obligation for one child would be \$170 per week and \$225 per week for two children. The court deviated from the guidelines and imposed only a \$170 per week obligation because it found the guideline amount of \$225 would be excessive in light of the unusual amount of time Richard spent with the children and the additional expenses he incurred on their behalf.

Both parties appeal. Richard argues: 1) the trial court should not have considered all of his overtime pay in calculating the amount of child support he should pay; and 2) the shared physical care arrangement should be treated as analogous to a split custody arrangement and his support obligation determined in accordance with the off-set procedure followed in *In re Marriage of Hansen*, 465 N.W.2d 906, 911 (Iowa App. 1990). In her cross-appeal Rebecca contends the trial court should not have deviated from the guidelines and Richard should have been ordered to pay \$225 per week.

Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes. *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). Overtime is excluded from such calculation where its receipt appears to be an anomaly or is uncertain or speculative. *See id.* In

considering the inclusion of overtime, we keep in mind a parent's child support obligation should not be so burdensome the parent is required to work overtime to satisfy it. *See id.*

Since the parties' 1990 dissolution Richard's income has been regularly supplemented by the receipt of substantial overtime pay. The receipt of this overtime income has been consistent, and its inclusion in calculating Richard's net monthly will not result in the type of burden addressed in *Brown*. The evidence does not support Richard's argument he will be compelled to work seven days a week in order to satisfy his support obligation. At the time of the 1994 modification Richard had a four-year history of receiving substantial overtime. The trial court was correct in considering all of this income in determining Richard's support obligation.

Richard argues the parties' shared custody arrangement is analogous to split custody in which each parent retains the custodial care for a child. He contends his support obligation should be determined for one child and should be off-set by the amount of support Rebecca would be obligated to pay for one child. *See Hansen*, 465 N.W.2d at 911 (calculation of support in split custody arrangement). We reject this argument and note our supreme court has also rejected the argument that split custody can arise from what is otherwise the exercise of extensive visitation. *See State ex rel. Lara v. Lara*, 495 N.W.2d 719, 721 (Iowa 1993) (supreme court vacated court of appeals decision which had treated noncustodial parent's extensive visitation as equivalent of split custody).

Despite the characterization of Richard and Rebecca's arrangement as a shared custody arrangement, Rebecca has had, and continues to have, most of the care for the children. While Richard exercises more daily visitation with his children than the typical noncustodial parent, he has few overnight or prolonged visits. His care for the children does not rise to the level of split custody, and we will not apportion his child support as if it did.

Rebecca claims the trial court erred in deviating from the child support guidelines. There is a rebuttable presumption the amount of child support which results from the application of the child support guidelines is the correct amount to be awarded. *State ex rel. Schaaf v. Jones*, 515 N.W.2d 568, 570 (Iowa App. 1994). In order to vary from the guidelines, a court must make a written finding that application of the guidelines would be unjust or inappropriate. *Id.* Deviation from the uniform application of the guidelines is discouraged. *Id.*

We find deviation from the guidelines was not warranted in this case. The children are both school-age. They spend some time with their father after school, but almost all of their nights and much of their weekends are spent with their mother. Neither the amount of time Richard spends with the children nor his expenditures on their behalf render it unjust or inappropriate to adhere to the guidelines. The district court should not have deviated from the guidelines and should have ordered Richard to pay the guideline amount of \$225 per week for the two children.

Rebecca has filed an application for an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppelle*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we find equity requires an award of appellate attorney fees to Rebecca in the amount of \$1000. The costs of this appeal shall be paid by Richard.

**AFFIRMED AS MODIFIED.**