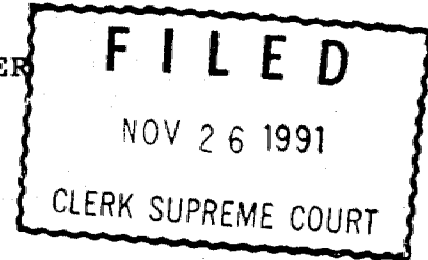


IN THE COURT OF APPEALS OF IOWA

No. 1-323 / 90-1946

IN RE THE MARRIAGE OF SUSAN LOUISE SELLER
and TIMOTHY M. SELLER



Upon the Petition of

SUSAN LOUISE GARLAND f/k/a SUSAN LOUISE SELLER,

Appellant,

And Concerning

TIMOTHY M. SELLER,

Appellee.

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Appeal from the Iowa District Court for Marshall
County, Timothy J. Finn, Judge.

Petitioner appeals from the district court's ruling
which modified the parties' dissolution decree. **AFFIRMED**
AS MODIFIED.

Curtis A. Ward of Brooks, Ward & Trout, Marshalltown,
for appellant.

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan,
Condon & Klaessy, Marshalltown, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden,
JJ.

OXBERGER, C.J.

Timothy and Susan were divorced on July 28, 1981. They had been married since 1969. They have two minor children, Sam, born March 1, 1974, and Tom, born May 22, 1979. Their original decree gave legal custody of the boys to Susan, and ordered Timothy to pay child support of \$400 per month and provide health insurance. Susan began this round of litigation by applying for an order to modify the support provisions of the decree. Timothy countered by asking the decree be modified to award him joint legal custody, extend his visitation rights, require Susan to pay one-half the cost for transporting the children during visitation, and eliminate the requirement that he maintain health insurance on the children.

The court observed that since the time of the dissolution decree, both parties have remarried. Susan, who had been laid off at a Marshalltown packing plant, ultimately left the work force for seven years to obtain a masters degree at Kansas State University in adult and continuing education. Timothy had left his job as an experienced teacher to work as a sales representative in Colorado. At the time of the hearing, the trial court found Timothy's monthly net income to be \$2,546 after deductions for state and federal taxes. Susan worked part-time at a bank in Ankeny, Iowa earning \$6.25 per hour. The trial court believed that she was underemployed

and her earning capacity would be somewhere between \$14,000 and \$30,000 annually. Susan testified she did not want to work full-time because she wanted to spend more time with the children. Susan's present husband earns approximately \$56,700 per year. Timothy's present wife is an assistant principal whose gross annual wages were \$21,654.

After hearing the evidence, the district court concluded there had been a substantial change in circumstances which warrants a modification of the decree. In short, both parties are making additional incomes. Based on these changes in circumstances, the district court applied the child support guidelines to Timothy's net income, but then adjusted the amount downward because Timothy has adopted a child with his current wife. Thus, the court applied the child support guidelines based on three children, and required him to pay two-thirds of this which calculated to \$594. To this amount, the district court added an additional \$50 per month which would be the cost to reflect Timothy's share of the medical insurance Susan will provide through her current husband's employer. The court further modified the decree to provide that the parties are to have joint legal custody of their two children, but the primary physical care of those children continues to remain with Susan. Because of the distances involved, the court modified the visitation provisions of the parties' decree to allow Timothy to exercise visitation

for one-half of their Christmas vacation and six weeks during the summer. The court allowed Timothy to claim the income tax exemptions for the children. Additionally, the court ordered Susan to be responsible for one-half the cost of transporting the children for the Christmas and summer visitation periods. Because neither party totally prevailed on their respective applications to modify the decree, the court denied Susan's request for attorney fees.

Susan appeals. She requests the child support be increased to the amount reflected in the guidelines for two children, rather than three, based on Timothy's net income of \$2,995.92 with the increased support made retroactive to the date she filed her application for modification. She asks that she be relieved from paying any portion of Timothy's transportation costs associated with his visits. Finally, she asks that Timothy be ordered to pay a portion of her trial and appellate attorney fees.

SCOPE OF REVIEW: In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Our courts have repeatedly recognized that while in cases of equity the reviewing

court is not bound by the fact-findings of the trial court, factual disputes which depend heavily on the credibility of witnesses are best resolved by the trial court which has a better opportunity to evaluate credibility than we do. Maisel v. Gelhaus, 416 N.W.2d 81, 86 (Iowa App. 1987).

TIMOTHY'S INCOME: We first consider whether the trial court erred in finding Timothy's monthly net income to be \$2,546. Evidence of Timothy's sworn affidavit based upon quarterly reports prepared by a CPA was provided to the court for the determination of Timothy's income. He is employed in the area of sales, which does not lend itself easily to concise computations for determining income. The trial court was able to consider variables affecting income, such as a changing sales territory and market strength. We find nothing in the record to outweigh the trial court's findings on this matter. We affirm the trial court on this issue.

APPLICATION OF THE CHILD SUPPORT GUIDELINES: Susan asserts the trial court erred in adjusting down Timothy's child support obligation, where a child had been adopted in his subsequent marriage. We agree.

The Iowa Supreme Court recently addressed the issue of whether a parent's obligation to support his or her family should be considered to be a special circumstance which justifies a deviation from the guideline level of child support for children from a previous marriage. The court

found the mere fact a parent now has a new family to support is not sufficient to establish that application of the guidelines in fixing the support for a child from a previous marriage is inequitable. See In re Marriage of Ladely, 469 N.W.2d 663, 665 (1991).

In addition, Susan requests retroactive child support. The record indicates that the circumstances which prompted the court to modify the decree on December 1, 1990, existed when the petition for modification was filed, on September 8, 1988. We balance this consideration with the overall circumstances of both parties in this case. We modify the district court's support order and direct Timothy's monthly child support payment for Sam and Tom to be fixed at \$616 retroactive to October 12, 1989, the date the original child support guidelines became effective. Support payments for Sam and Tom accruing on or after December 31, 1990, shall be \$764 per month, consistent with the current guidelines. These figures are based upon \$2,546, net income for Timothy and \$1,100 net income for Susan. In addition, we direct Timothy to pay \$50 per month, for one-half the costs, to Susan's husband's employer for medical insurance for the children.

COSTS FOR TRAVEL TO ENABLE VISITATION: Susan asserts it is inequitable to require her to pay one-half the costs of travel for the children to visit Timothy in Colorado. We disagree.

Our society today is a highly mobile society. Decisions to relocate are often based upon the desire to seek employment. We find Timothy's decision to relocate for employment is reasonable. The requirement that parents share equally their children's travel expense, where one parent has relocated out of state, has been recognized as equitable. See In re Marriage of Wahlert, 400 N.W.2d 557, 561 (Iowa 1987). We affirm the trial court on this matter.

ATTORNEY'S FEES: Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We direct Timothy to pay \$750 of Susan's attorney's fees. Costs are taxed to Timothy.

We have considered all other issues in this case and, except as modified, affirm the trial court.

AFFIRMED AS MODIFIED.