

IN THE COURT OF APPEALS OF IOWA

No. 1-563 / 91-678

FILED

JUN 25 1992

CLERK SUPREME COURT

STATE OF IOWA, ex rel., TREVOR WENDELL NICHOLSON,

and

1270

STATE OF IOWA, ex rel., IOWA DEPARTMENT OF HUMAN SERVICES,
SHAWN GREEN, on Behalf of BRANDON TOFTEE,

Appellees,

vs.

JOHN WAYNE TOFTEE,

Appellant.

Appeal from the Iowa District Court for Hamilton
County, Newt Draheim, Judge.

John Toftee appeals a district court order and judgment
recognizing his admission of paternity and establishing his
child support obligation for two of his three children.

AFFIRMED AS MODIFIED.

Charles Deppe and Douglas Cook of Brekken, Deppe &
Wynia, Jewell, for appellant.

Bonnie J. Campbell, Attorney General, John Parmeter,
Special Assistant Attorney General, Robert R. Huibregtse,
Assistant Attorney General, and Rhonda Fitchett, Assistant
County Attorney, for appellees.

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

SCHLEGEL, J.

On September 8, 1976, a child named Heather Toftee was born from the marriage of John Wayne Toftee and Debbie L. Toftee. This marriage was dissolved on June 2, 1980, and John Toftee was required by court order to pay monthly child support of \$125 for Heather Toftee. On August 23, 1983, a child was born to Shawn M. Green and was named Brandon Toftee. On July 28, 1990, Trevor Wendell Nicholson was born to his mother, Mary Nicholson. John Toftee stipulated in this action he is the father of both Brandon Toftee and Trevor Nicholson. Through the State of Iowa, both Brandon and Trevor initiated actions requesting child support from John Toftee. Both sides filed a stipulation agreeing to the income of John Toftee; Shawn Green, the mother of Brandon Toftee; and Mary Nicholson, the mother of Trevor Nicholson. The stipulation also stated this action would not affect the support in the amount of \$125 already established for Heather Toftee.

Following a trial to the court, the district court entered its order establishing Toftee's child support obligation for Trevor and Brandon. The court determined the child support guidelines for one child, as opposed to three children, should be used to set support. The court then ordered John to pay child support of \$223 per month for Brandon and \$175.50 per month for Trevor. John appeals.

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).

The sole issue before us is whether the trial court erred in applying the guidelines for one child to determine child support for two children living with two separate mothers where the father is already paying support to another child. The father argues the guidelines chart for three children should be applied. We disagree. We find the proper chart under the circumstances is the two-children chart.

After the trial court decision in this case, the supreme court filed three opinions dealing with serial children situations. In Gilley v. McCarthy, 469 N.W.2d 666, 668 (Iowa 1991), the court explained: "By adopting these guidelines we intended that trial courts select a chart consistent with the number of children who live in the custodial parent's household and can legally claim both parties as parents." The father and noncustodial parent in that case, McCarthy, had two children living with him due to his current marriage. Support was disputed as to a previous child of McCarthy. The court held the chart for

one child instead of for three should be used to determine support for the child.

The Gilley court further found:

Based on our de novo review of the facts and circumstances in this case, including all of the financial evidence presented by the parties, we likewise can make no finding of any special circumstances that would justify deviation from the one-child percentage amount in the guidelines. McCarthy has failed to present evidence of any special circumstances that would make a monthly support obligation based on the chart for one child unjust or inappropriate.

Id. at 669. The supreme court has followed this reasoning in both In re Marriage of Ladely, 469 N.W.2d 663, 665 (Iowa 1991), and State ex rel. Epps by Epps v. Epps, 473 N.W.2d 56, 58 (Iowa 1991).

The situation in all three of the above cases dealt with two or three children living with the father due to a present marriage and one other child seeking support. The supreme court utilized the one-child chart to determine the support for the other child in all three. We find the facts of this case are sufficiently different to warrant a different method of computing support.

Toftee must pay support to three children in three separate households where all children are noncustodial. We realize treating a situation where a payor's children live with different custodial parents in separate households equivalent to a situation where all children live in the same home results in computation of an artificially low support amount for each child. We find,

however, that if we utilize the one-child chart for the two children involved here, Toftee will be paying a very large portion of his net monthly income to child support. Under the trial court distribution, Toftee was left with an income of \$526 per month. The supreme court did take into consideration in Gilley that the payor in that case did not have other children living in different households to which he was obligated to pay child support; "[h]e has only one noncustodial child and no other court-ordered child support obligations." Gilley, 469 N.W.2d at 668.

We find the two-children chart should be used to determine support under the circumstances of this case. We note that the trial court's calculation of the support was inequitable between the two children. The court first properly reduced Toftee's stipulated monthly income of \$1050 by the support he pays to Heather to get \$925. The court then set support for Brandon Toftee by comparing the guidelines with the \$600 net monthly income of Brandon's mother, Shawn Green. The result was a \$223 monthly support obligation for Brandon. The court then subtracted this \$223 from \$925. The remainder, \$702, was left for guidelines comparison with the stipulated zero income of Mary Nicholson, mother of Trevor Nicholson. This comparison resulted in a \$175.50 monthly support to Trevor.

The one-child guideline table was used by the trial court for the support determination of first Brandon and then Trevor. Had the trial court determined Trevor's

support first, the figures would have been sufficiently different. A computation in reverse order results in support of \$237 for Trevor and \$155 for Brandon.

Because we find use of the one-child chart unjust, we utilize the two-children chart for computation of Toftee's child support for Trevor and Brandon. Heather's support of \$125 is not changed by this appeal. We treat both mothers as one with a combined income of \$600 and compare this figure with Toftee's net monthly income of \$925. Using the guidelines, Toftee's total support obligation for both Trevor and Brandon is 33.6 percent of \$925, or \$311. We divide this amount in order to avoid an unjust result. We award \$180 to Trevor Nicholson whose mother has no income. Brandon is then awarded \$131.

In conclusion, though each child has a different mother who must provide and maintain a separate dwelling, we do not utilize the one-child chart to set support. We use the two-children chart to avoid the substantial injustice that would otherwise result to Toftee as the noncustodial parent of three children in three different households. We divide Toftee's total support obligation in order to do justice between the two children.

AFFIRMED AS MODIFIED.