

IN THE COURT OF APPEALS OF IOWA

No. 6-141 / 95-262

FILED

NOV 27 1996

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF BEVERLY ROBIN ROSENFELD AND MARTIN
SANFORD ROSENFELD**

Upon the Petition of
BEVERLY ROBIN ROSENFELD,
Appellee/Cross-Appellant,

And Concerning
MARTIN SANFORD ROSENFELD,
Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Jerrold W. Jordan,

Judge.

The respondent appeals the district court's order on issues of visitation, child support, and attorney fees. The petitioner cross-appeals the court's judgment awarding her reimbursement for a tax levy against her income. **AFFIRMED.**

David S. Wiggins of Wiggins, Anderson & Conger, P.C., West Des Moines, for appellant.

Bernard L. Spaeth, Jr. and Megan Manning Antenucci of Whitfield & Eddy, P.L.C., Des Moines, and Jill Rolek, West Des Moines, for appellee.

Considered en banc. Huitink, Streit and Vogel, JJ., take no part.

PER CURIAM:

Respondent Martin Rosenfeld appeals the child support and visitation provisions of the modification of the original decree dissolving his marriage to the petitioner, Beverly Rosenfeld. He also challenges the district court's denial of his motion to recuse and its refusal to allow the minor children to testify at the hearing. Finally, he appeals the award of attorney fees and expenses to Beverly. We affirm.

This appeal is part of a long and contentious dispute between the parties that has been before our court several times since the marriage was dissolved on December 14, 1990. Beverly and Martin Rosenfeld were married on May 28, 1979. The parties have two children together, Natalie, age 13, and Andrew, age 7. Martin is an orthopedic surgeon practicing in Des Moines and Beverly is a doctor of osteopathic medicine who was practicing in Des Moines at the time of the modification.

In the original decree, Martin was awarded primary physical custody of the two children. In 1992, Beverly sought a modification. Based on evidence that Martin and his current wife had alienated the children from their mother, the trial court issued a Ruling and Temporary Order on November 3, 1993, awarding physical custody to Beverly. Martin filed a Notice of Appeal and Application for Interlocutory Appeal. In a decision filed on August 25, 1994, the Iowa Court of Appeals affirmed the transfer of custody to Beverly but modified the ruling as to the time of the change. The

remaining issues were decided in the trial court on January 11, 1995, after a four day hearing. Martin appeals certain aspects of that hearing and the subsequent decision of the district court.

I. Recusal.

Martin challenges the trial judge's decision to hear the case despite Martin's challenge to the presiding judge's impartiality. He argues that the following evidence demonstrates the predisposition of the trial judge: the tone of voice used by the judge to address Martin's counsel; the court's request for names of psychologists prior to the final submission of the case; the admission of hearsay evidence offered by Beverly when similar testimony offered by Martin was excluded; and the award of temporary child support in the November order absent current financial statements from either party. Martin also asserts that the trial judge should have recused himself because the judge's son had been terminated from the employment of Martin's accountant, a witness who testified at the hearing.

We review a judge's decision not to recuse himself for an abuse of discretion.¹ *Matter of Estate of Olson*, 479 N.W.2d 610, 613 (Iowa 1991); *State v. Smith*, 242 N.W.2d 320, 323-25 (Iowa 1976). In order to show abuse of discretion, one must

¹ Under Iowa Code section 602.1606(1), a judicial officer is disqualified from acting in a proceeding if the officer has a personal bias or prejudice concerning a party. Canon 39(D)(1) of our Code of Judicial Conduct provides that "[a] judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

generally show the court exercised its discretion “on grounds or for reasons clearly untenable or to an extent clearly unreasonable.” *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) *quoting Weeks v. Burnor*, 132 Vt. 603, 326 A.2d 138, 140 (1974).

The burden is on the party claiming prejudice to establish the basis for disqualification upon claimed personal bias by allegations of fact, not conclusions or frivolous assertions. *Smith*, 242 N.W.2d at 324. Speculation is insufficient and “there is as much obligation for a judge not to recuse when there is no occasion for him to do so as there is for him to do so when there is.” *State v. Mann*, 512 N.W.2d 528, 532; *quoting Hinman v. Rogers*, 831 F.2d 937, 939 (10th Cir. 1987). Actual prejudice must be shown before a judge’s recusal is necessary. Iowa Code §602.1606; *see In Interest of C.W.*, 522 N.W.2d 113, 117(Iowa App. 1994). The test to determine whether recusal of a judge is necessary is whether a reasonable person would question a judge’s impartiality. *McKinley v. Iowa Dist. Court for Polk County*, 542 N.W.2d 822, 827 (Iowa 1996).

Upon reviewing the facts of this case, we find the trial judge did not abuse his discretion. Martin’s assertions merely reflect his subjective view that he was being treated unfairly by the court. There is nothing in the record linking any of his perceptions to actual evidence of bias or predisposition. Furthermore, the judge’s impartiality is not called into question by his connection to Martin’s accountant. The judge disclosed his son’s prior employment with the accountant. The accountant

testified that the relationship ended on friendly terms. Likewise, the judge stated on the record that he never viewed his son's termination as "a hostile matter." We find that the trial judge was entitled to consult his own conscience and assess whether or not he could give Martin a fair and impartial trial. *See Smith*, 242 N.W.2d at 324. The denial of the motion to recuse is affirmed.

II. Visitation.

Martin has appealed the visitation provisions of the modification decree. Since Martin's appeal, Beverly filed an Application for Limited Remand with the Iowa Supreme Court on the issue of visitation. The Iowa Supreme Court remanded the case to district court for consideration of these matters. Beverly filed an Application Regarding Visitation with the district court on June 1, 1995. As part of the Findings of Fact, Conclusions of Law, and Judgment Entry entered on August 31, 1995, the trial judge rescinded all previous orders regarding visitation. Therefore, the visitation issue raised in the appeal presently before us is moot.²

III. Child Support.

Martin challenges the district court's child support determination that orders him to pay Beverly \$2539 per month. Martin argues that the district court erred in calculating his net monthly income at \$16,658 and also in setting the award at 12% of this amount. The district court set Beverly's monthly income at \$5027.

² Martin has now filed another appeal in connection with the trial court's order dated August 31, 1995.

Martin asserts that the court overestimated his income by including state and federal tax refunds for 1993 that were received in 1994. The monthly \$3661 refunds, he contends, were received only as a result of a charitable deduction that he no longer receives as of 1995. The trial court added the refunds to offset the termination of Martin's alimony obligation in 1996. However, he argues, the tax refunds are \$3661 per month compared to the after-tax alimony savings of only \$1082 per month.

After deducting the amount reflecting the tax refunds, Martin asserts that his net monthly income is \$12,997, or \$25,550 gross monthly income less \$12,553 in deductions.

Beverly responds by citing several sources of income not reflected in Martin's financial affidavit. She asserts that Martin's charitable deductions can be carried forward until 1997. Beverly also challenges Martin's calculation of his social security deductions. Finally, she questions some of Martin's personal expenses as reported in his financial affidavit.

Martin next contends the district court erred by setting support at 12% of the excess of his net monthly income above \$3000. He argues that since both parties' respective incomes exceed \$3000 per month, only 30% of \$3000, or \$900 per month, should be due. *See Child Support Guidelines, Adopted December 31, 1990.* Alternatively, Martin compares the 12% figure to other appellate decisions where the non-custodial parent's net income exceeded \$3000. His analysis generated an average

award of 4.07% of the income above \$3000. Using this percentage, Martin calculates a total child support obligation of \$1307 per month ($\$9997 \times 4.07\% = \407 . $\$407 + \$900 = \$1307$.).

Martin also argues a third alternative calculation applying the 12% figure to his proposed net monthly income exceeding \$3000, or \$9997. He calculates a figure of \$1200. He then adds \$900 to this amount to reach a maximum child support award of \$2100 per month.

Our review in this equity case is de novo. *See* Iowa R.App.P. 4; *see also In re Marriage of Gehl*, 486 N.W.2d 284, 287 (Iowa 1992). We give weight to the findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *See* Iowa R.App.P. 14(f)(7).

We have reviewed the parties' respective financial affidavits, and we concur in the trial court's calculation of Martin's monthly income. We agree with the trial court's rationale for including the tax refunds in Martin's monthly income. The figure is reasonable in light of the elimination of Martin's alimony obligation in 1996. Accordingly, we affirm the decision setting his net monthly income at \$16,658.

For the support of two children, the Child Support Guidelines require a non-custodial parent earning a net income of \$3001 or more per month to pay at a minimum, the dollar amount as provided for a non-custodial parent earning \$3000 per

month. *See* Child Support Guidelines, Adopted Effective December 31, 1990³ Both parties' incomes were found to exceed \$3000 per month. Thus, as Martin correctly notes, at a minimum, the guidelines obligate him to pay \$900 per month. However, in this range of income, "the appropriate figure is deemed to be within the sound discretion of the court or agency fixing support by administrative order." We limit our review of the district court's decision to an abuse of discretion standard. *See In re Marriage of Gehl*, 486 N.W.2d 284, 287 (Iowa 1992).

We find that the trial court's decision to set support at 12% of Martin's income above \$3000 was not an abuse of discretion. In dissolution matters, prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *See In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). Therefore Martin's argument based on the percentages applied in other appellate cases where the parent's income exceeded \$3000 is not helpful. The court considered all the factors set forth in Iowa Code section 598.21(4) including the standard of living enjoyed by the children in Martin's home and the

³ We note that since the amount of child support has been appealed, we must recalculate the child support obligation according to the new child support guidelines which became effective July 1, 1995. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343, n.2 (Iowa App. 1996). However, since the new guidelines deem the award to be discretionary when the non-custodial parent's monthly income exceeds \$6000, their adoption will not affect our determination except that the minimum award shall be no less than 23.3% of \$6000, or \$1398 per month, instead of 30% of \$3000. *See* Child Support Guidelines, Adopted Effective July 1, 1995. Martin's monthly income far exceeds \$6000 per month thus he remains in the discretionary range according to the guidelines.

ability of Beverly to provide a similar standard. Furthermore, on an annual basis, the trial court noted that the award is only equal to 10% of Martin's gross income and 15% of his net income. Accordingly, we affirm the child support award as provided in the district court's order.⁴

IV. Testimony of the Minor Children.

Martin argues that the district court erred in sustaining Beverly's motion in limine to prohibit the children from testifying. He asserts that the testimony was necessary in order for the court to determine the veracity of hearsay statements offered by Beverly.

We review the trial court's decision for abuse of discretion. *In re Marriage of Abkes*, 460 N.W.2d 184, 186 (Iowa App. 1991). In light of the hostilities in this custody matter and the evidence of its effect on Natalie and Andrew, we find no abuse of discretion in the trial court's decision.

Martin attempted to present the children to the court as an offer of proof as to their proposed testimony. We agree with the trial court's rationale for declining his

⁴ As explained in footnote 3 of this opinion, we are required to apply the current Child Support Guidelines. Under the Guidelines, the minimum award must be no less than \$1398 for a non-custodial parent earning more than \$6000 net income per month. Martin's income in excess of \$6000 is \$10,658. Applying the district court's formula, 12% of this amount is \$1279. This number is added to the \$1398 minimum award for a total obligation of \$2677 per month. However, since the award is discretionary where the non-custodial parent's award exceeds \$6000, we will not disturb the district court's total award of \$2539. Instead we acknowledge that under the present Guidelines, Martin's obligation actually reflects 11% of his income exceeding the maximum \$6000 ($\$2539 - \$1398 = \1141. $\$1141 / \$10658 = 11\%$).

request. The purpose of the trial court's refusal to permit the children to testify was to protect them from the negative impact of testifying. *See Abkes*, 460 N.W 2d at 186. The court correctly noted that this impact is the same whether the testimony is introduced as an offer of proof or as a presentation of the evidence itself. Martin's proposed offer of proof was an obvious attempt to call the children as witnesses "one way or another" and therefore will not be permitted. *Id.*

V. Attorney Fees.

Martin challenges the trial court's award of attorney fees to Beverly. In her application, Beverly requested \$201,758.90 for fees and expenses incurred since the commencement of her modification action back in early 1992. The trial court included an additional \$4200 for the costs incurred by Beverly during the four day hearing held in January 1995. Beverly was awarded 67% of the total attorney fees, or \$137,857. The court also awarded her \$19,265.45 in costs.

Martin contends that the Iowa Court of Appeals opinion dated August 25, 1994, already determined that the parties are to pay their own fees. Therefore, under the doctrine of issue preclusion, the award of trial attorney fees by the district court was in error. We disagree.

Our August 25, 1994 decision was issued following Martin's interlocutory appeal from the temporary order of the district court modifying custody. The opinion

contains the following statement: "Beverly and Martin are responsible for their own attorney fees.

In order to determine what fees we were referring to in our decision, it is necessary to examine the sequence of court filings beginning with the temporary order issued by the district court on November 3, 1993. That decision ordered the parties to submit within ten days, any request for attorney fees, expenses, and court costs. The following day, Martin filed his Notice of Appeal from the ruling and filed an Application for Interlocutory Appeal with the Iowa Supreme Court. On November 15, 1993, Beverly filed an Application with the district court for \$185,415.90 in fees and expenses. However, the Docket and Calender Entries indicate that the district court never ruled on her Application.

It is the general rule that the trial court loses jurisdiction over the merits of a controversy once an appeal is perfected. *Shedlock v. Polk County Dist. Court*, 534 N.W.2d 656, 658 (Iowa 1995); *Wolf v. City of Ely*, 493 N.W.2d 846, 848 (Iowa 1992). The trial court lost jurisdiction when Martin filed his notice of appeal and accordingly, it did not rule on the issue of fees. On appeal, we can only assume jurisdiction of issues where the trial court had jurisdiction. *Stalter v. Stalter*, 467 N.W.2d 586, 588 (Iowa App. 1991). Therefore, we now conclude that our August 24, 1994 opinion only decided the issue of appellate attorney fees in connection with the interlocutory appeal. The decision did not pertain to any trial fees. In fact, Martin's counsel conceded this

fact before the trial court. We expressly reject Martin's contention that the doctrine of issue preclusion prohibited an award of trial attorney fees by the district court.

Martin also argues that because we ruled in the prior appeal that each party had the ability to pay their own appellate attorney fees, the trial court is bound by this finding when considering the award of trial fees. We find this argument wholly without merit. The trial court was entitled to consider this matter anew in connection with the fees stemming from the modification proceeding.

Martin contends that the fees awarded to Beverly are excessive. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.*

Martin asserts that the district court erred in failing to make a finding as to the reasonableness of the fees and as to the reasonableness of the number of attorneys and support staff working on the case. The district court had before it Beverly's affidavit that explains in detail what tasks were completed in her case and by whom. The court also had the parties' financial affidavits demonstrating the significant disparity between their monthly incomes. We find no abuse of discretion in the district court's award and affirm.

Martin has also resisted Beverly's application for appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the court's

discretion and the parties' financial position. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We order each party to pay their own appellate attorney fees.

VI. Cross-Appeal

Beverly appeals the district court's award of reimbursement to her for an I.R.S. levy against her 1993 tax returns. The court awarded \$3,389.53 to be paid by Martin per his liability for any tax assessments under the original decree. It is her request that she also be awarded prejudgment interest on that amount beginning with the date of the seizure of her tax refund, July 24, 1993, and ending the date of judgment, January 11, 1995. She calculates a total award of \$497.75 in interest computed at the statutory rate.

Martin responds that Beverly waived this issue by not raising it in her Rule 179(b) motion following the modification hearing. *See* Iowa R.Civ.P. 179(b). In any event, she would only be entitled under Iowa Code section 535.3 to interest accruing from the date she filed her Application for Order to Show Cause in a Judgment Entry Against Respondent, November 17, 1994.

We find that Beverly failed to preserve error on this issue. Any theory of relief not raised in the district court will not be considered on appeal. *See, e.g., Champlin v. Walker*, 249 N.W.2d 839, 842 (Iowa 1977); *Burr v. Apex Concrete Co.*, 242 N.W.2d 272, 274 (Iowa 1976). Therefore, we will not consider Beverly's request for prejudgment interest.

We affirm the district court's order in its entirety

AFFIRMED.

Habhab and Cady, JJ., concur; Sackett, C.J., partially dissents.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority in all respects except I would not affirm the award of attorney fees, but I would modify to require each party to pay his or her own fees. This issue was determined in the earlier case. Additionally, Beverly and Martin have the ability to pay their own attorney fees. Furthermore, they both have contributed to the length of these proceedings.