IN THE COURT OF APPEALS OF IOWA

No. 0-392 / 99-0899
Filed October 13, 2000

MICHAEL B. STAMBAUGH,
Petitioner-Appellee,

vs.

PAMELA M. TROMANHAUSER,
Respondent-Appellant.

FILED
OCT 13 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Jon Fister, Judge.

Mother appeals following the entry of an order establishing the custody, visitation, and child support regarding the parties' son. She contends the court erred in calculating child support when it allowed Father to take a business-related mileage deduction for a van. She also contends the court erred in failing to allow her to have the parties' son for some extended time in the summer uninterrupted by visitation with Father. **AFFIRMED AS MODIFIED.**

Thomas A. Mayes of Legal Services Corporation of Iowa, Waterloo, for appellant.

Christy R. Liss of Clark, Butler, Walsh & Hamann, Waterloo, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

MILLER, J.

Mother appeals following the entry of an order establishing the custody, visitation, and child support regarding the parties' son. She contends the court erred in calculating child support when it allowed Father to take a business-related mileage deduction for a van. She also contends the court erred in failing to allow her to have the parties' son for some extended time in the summer uninterrupted by visitation with Father. We affirm as modified.

Background Facts

Michael and Pamela are the parents of Shea, born September 13, 1995. Michael and Pamela were never married. Michael and Pamela separated sometime in 1996 due to Pamela's concerns of Michael's drug and alcohol use and domestic violence. After the parties separated, Shea lived with Pamela. A child support obligation of $476.00 per month was established in an earlier, separate case.

In June 1998 Michael filed this equitable action, requesting that the court review the child support obligation set in the earlier support case and set child support in accordance with the child support guidelines, and establish custody and visitation. An order establishing temporary visitation was entered pursuant to an agreement of the parties in July 1998. After trial the district court awarded the parties joint custody of Shea, with physical care placed with Pamela. The court awarded Michael visitation on alternating weekends, each Tuesday and Thursday for four hours in the evening, and four non-consecutive weeks during Shea's summer vacation from school. The court also awarded Michael visitation on various holidays and birthdays. Michael was ordered to pay $130.00 per

month in current child support and $50.00 per month in past child support. Pamela appeals.

Because this case was tried in equity, our review is de novo. Iowa R. App. 4. Our de novo review requires an examination of the entire record and a determination of rights anew on those propositions here properly presented, provided issue has been raised and error, if any, duly preserved in course of the trial proceedings. *In re Ried's Marriage*, 212 N.W.2d 391, 392-93 (Iowa 1973). Weight must be given to the fact findings of the trial court, especially when considering the credibility of witnesses, but the court is not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa App. 1995).

Pamela first asserts it is improper to allow Michael to claim a $5,454.00 business-related mileage deduction, based on the Internal Revenue Service's alternate mileage deduction procedure for a vehicle used for business purposes, in determining his child support obligation. Her claim rests on the assertion that the record shows Michael does not own the vehicle, thus 1) The expense deduction is improper under federal law because Michael does not own or lease the vehicle, *see* Rev. Proc. 98-63, 1998-52 I.R.B. 25; 2) The expense is inconsistent with Iowa Code section 321.45, because Michael is claiming an incident to ownership of a vehicle he does not own; 3) The expense "subverts" Iowa's vehicle registration sanctions, see Iowa Code § 321.101 and Iowa Code chapter 252J; and 4) the expense would be inequitable because Michael does not "come with clean hands."

At the close of trial the court allowed the record to remain open to noon of the next day for each party to "file an additional child support guidelines work sheet." The court made it clear in allowing counsel to file child support guidelines worksheets that they were to be prepared by "tak[ing] the evidence you've heard." This was permitted by the trial court because the parties had just completed their income tax returns for the 1998 tax year, and they wished to use current income figures.

Michael's federal income tax return, filed with his child support guidelines worksheet, claimed a $5,454.00 vehicle expense on his Schedule C (Profit or Loss from Business). After other expenses, Michael's net profit from his self-employed business was $8,124.00, which he reported on line 12 of Form 1040. This was his only income reported for the year. After deducting one-half of the self-employment tax, his adjusted gross income for 1998 was $7,550.00, or $630.00 per month.

Pamela also filed a child support guidelines worksheet, which computed Michael's net monthly income as $1,252.00. In an addendum to the worksheet, she stated:

> Respondent challenges Petitioner's standard mileage deduction on Schedule C of his 1998 federal tax return. The mileage expense is for a van that Mr. Stambaugh transferred because he could not get plates in his name. See attached interrogatory answer. Respondent recomputed Petitioner's income without this deduction.

The attached interrogatory asked Michael to list all property transferred within the past sixty months. Michael responded, "1988 Ford van transferred to Deb Stambaugh. I could not get plates in my name."

Michael contends that Pamela did not preserve error concerning the issue of the deduction for business-related mileage. He points out that his interrogatory answer was not offered or received in evidence, and asserts it therefore was not properly before the trial court as evidence, and is not properly before this court. *Cf.* Iowa Civil Jury Instruction 100.4 (stating a jury may only consider testimony, admitted exhibits, stipulations, and other matter admitted by the trial court). Although Michael's argument concerning error preservation appears to be on solid ground, we need not decide that matter because, for the reasons stated below, we agree with the trial court's child support determination even if the answer to the interrogatory is considered.

Michael's answer to the interrogatory shows only that at some time in the sixty months before late October 1998 (and therefore in the fifty-five months before trial in late March 1999) he had transferred the 1988 Ford van for which he claims business related expenses to a "Deb Stambaugh," apparently his sister. It appears the transfer of title was solely because he could at that time not register the van in his name. Nothing indicates that as between Michael and his sister there was any intent that the van would become hers and remain hers. Michael apparently remained in possession of the van and continued to use it for both business and personal purposes.

The question before the trial court and this court is not one of what is a legal deduction from gross income under federal and state income tax laws. Rather, the questions are whether certain business-related expenses are appropriately deducted from gross income in determining a child support obligation, and, if so, what the appropriate amount of the deduction is.

Undisputed evidence shows that Michael used the van for 16,780 business-related miles in 1998. In determining his net income for child support purposes he estimated expenses of 32.5 cents per mile for such use. This was the rate allowed as a deduction for income tax purposes at that time, and therefore appears to be a reasonable rate to be used for estimating such expenses.

Our supreme court has noted that the child support guidelines do not mention depreciation deductions. *See In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991). They still do not, nor do they mention deductions for the various other components of the standard mileage deduction which may be taken in lieu of such actual expenses, such as gasoline, oil, repairs, etc. Nevertheless, courts have discretion under the guidelines themselves to vary from the guideline support amounts if such variance is supported by written findings. *Id.* We have affirmed disallowance of a standard mileage deduction where the evidence showed the vehicles in question were fully depreciated and the party's employer furnished his gas and oil. *See In re Marriage of Golay*, 495 N.W.2d 123, 126-27 (Iowa App. 1992). However, in this case there is no evidence the 1988 van is fully depreciated and no evidence that anyone other than Michael pays for the gas, oil, tires, maintenance, and repairs for the van that he uses in his self-employed business.

In allowing Michael the deduction for business related vehicle expenses, the trial court noted that the child support guidelines envision a wage earner, not a self-employed person, and do not provide deductions for a self-employed person's cost of generating gross income. The trial court made a written finding that "an adjustment [to Michael's gross income] is necessary to do justice

between the parties under the special circumstances of this case, viz., [Michael's] self employment." We agree and therefore affirm the trial court's order regarding the amount of child support Michael must pay.

Pamela next contends the trial court failed to set a visitation schedule that maximized Shea's contacts with her family. The trial court awarded Michael four full, nonconsecutive weeks of visitation with Shea during summer vacation from school, with Michael to give notification of the visitation to be exercised no later than May 15 immediately preceding the summer. During all other weeks of the summer, exclusive of special provisions for holidays and birthdays, the decree provides for Michael to have visitation with Shea every other weekend and on Tuesdays and Thursdays for four hours each day. The result is that the longest uninterrupted time Pamela will ever have Shea during the summer is for five days, from a Thursday evening until the next Tuesday evening. Pamela asks that the trial court's order be modified to allow her three weeks of uninterrupted time, not subject to Michael's right of visitation, during the summer months so Shea may take extended trips with his mother and two brothers.[1] Pamela requested the trial court, by way of a 179(b) motion, for this uninterrupted time, but the trial court rejected it, stating "the visitation schedule set out can be extended or modified by mutual agreement. . . . The Court expects the parties to communicate, to be reasonable. . . ."

We are guided by Iowa Code section 598.41(1) (1997) (a), which states in pertinent part, "The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where

[1] Pam is the mother of two other boys by another father.

appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents. . . . " Generally, liberal visitation is in a child's best interests. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa App. 1992). Such would appear to be true in this case, and the trial court's order provides for detailed, liberal visitation.

The trial court's belief that the parties should communicate and be reasonable regarding visitation (and other matters affecting their child) is well placed, for both parties are charged with cooperating concerning visitation. *In re Marriage of Ruden*, 509 N.W.2d 494 496 (Iowa App. 1993). However, the record shows, and the trial court found, that the parties have a great difficulty communicating with each other concerning Shea's needs. Further, the record shows substantial failures to cooperate with each other.

With respect to custodial issues, the court must make its decision on the particular circumstances unique to each case. *In re Marriage of* Rierson, 537 N.W.2d 806, 807 (Iowa App. 1995). In his testimony Michael acknowledged that Pamela should have at least one two-week block of time with Shea in the summer. Given the parties' past lack of communication and cooperation we find Pamela's request that the court order a period of uninterrupted time to be reasonable and appropriate. Such a provision appears necessary in order to allow her to plan any trips or vacations involving Shea. We modify the trial court's judgment and decree to provide that during Shea's annual summer vacation form school Pamela shall have Shea with her for a period of two consecutive weeks, uninterrupted by any visitation with Michael, provided

Pamela gives Michael notice of the particular two weeks no later than May 1 immediately preceding the summer.

AFFIRMED AS MODIFIED.