IN THE COURT OF APPEALS OF IOWA

No. 1999-378 (9-631) / 98-2059
Filed February 9, 2000

IN RE THE MARRIAGE OF BARBARA LOU STEFFEN AND ROBERT ARLON STEFFEN, II

Upon the Petition of
BARBARA LOU STEFFEN,
Petitioner-Appellee,

And Concerning
ROBERT ARLON STEFFEN, II,
Respondent-Appellant.

FILED
FEB 09 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Respondent appeals the child support provisions of the parties' dissolution decree. Respondent contends that the trial court erred in ordering him to pay half the tuition and costs of the children's private, religious school, in addition to the amount mandated under the child support guidelines, because petitioner failed to establish that a deviation from the child support guidelines was required, the trial court failed to make a record or written finding of the reasons that the guideline amount was unjust or inappropriate, and the court's order violated his rights under the Establishment Clause of the First Amendment of the United States Constitution or article one, section three of the Iowa Constitution. **AFFIRMED AS MODIFIED.**

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for appellant.

Barbara Durden Romar, Des Moines, Catherine K. Levine, Des Moines, for appellee.

Heard by Sackett, C.J., and Miller and Vaitheswaran, J.J.

MILLER,

Respondent Robert Steffen (Robert) appeals that part of the trial court's decree in a dissolution of marriage case which orders him to pay above the child support guidelines for his children's private parochial school tuition and attendant educational costs. He argues that the petitioner Barbara Steffen (Barbara) failed to carry her burden to establish that a deviation from the child support guidelines was required, that the trial court made no written finding of special circumstances that would warrant a departure from the guidelines, and a requirement that he pay one-half the costs of sending the parties' children to a private religious school is impermissibly violative of the Establishment Clause of the First Amendment to the United States Constitution and Article 3, Section 1 [sic] of the Iowa Constitution. We affirm as modified herein.

Robert and Barbara were married in Delmar, Iowa on June 26, 1981. Of this marriage, there were two children, Tyler, born May 14, 1989, and Morgan, born October 18, 1991. Barbara filed a petition for dissolution of marriage on March 4, 1998. The parties entered a into a stipulation with respect to all parts of the dissolution decree, except for the matter of Robert paying one-half of the children's private parochial school tuition and attendant educational costs, and the exchange of tax information. Their stipulation, and the court's decree, provided in part that they would have joint legal custody of their two children, that Barbara would be "the primary physical custodian" of the children, and that in accordance with the child support guidelines Robert would pay $843.60 per month child support. Robert

appeals only the district court's decision making him responsible for one-half the parochial school tuition and attendant costs.

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994).

Our supreme court has established child support guidelines that are to be strictly followed unless their application would lead to an unjust or inappropriate result. Iowa Code 598.21(4)(a) (1999). There is a rebuttable presumption the amount of child support determined according to our guidelines is the correct amount of child support to be awarded. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992). The guidelines balance the needs of the children against the legitimate needs and expenses of the payor parent, and take into account the reasonable costs of living, including educational expenses, for dependent children. *In re Marriage of Gordon,* 540 N.W.2d 289, 292 (Iowa App. 1995). The amount may be adjusted upward or downward if the court finds an adjustment necessary to provide for the needs of the children and do justice between the parties under the special circumstances of the case. *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). To justify a variation from the guidelines a court must make a record or written finding based on stated reasons that the guidelines would be "unjust or inappropriate" under the criteria established by the supreme court. Iowa Code 598.21(4)(a) (1999).

The issue presented in this case does not involve a deviation from the guideline amount, but the imposition of additional child support payments for private

parochial school tuition and attendant educational costs. A separate support order covering such expenses is improper absent a finding that the guidelines amount would be unjust or inappropriate. *In re Marriage of Gordon,* 540 N.W.2d at 292.

In addressing the issue of the separate support order covering parochial tuition expenses, the trial court stated on the record during the final hearing:

> Then concerning the question of parochial school, I also thought that that was in the benefit of the children. And the reason for that is because you have in the past decided that the children should go to parochial school. Tyler has gone for, I think, four years now or possibly five, and so I think that that pattern is good to continue . . . .
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> . . .
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> And therefore, I feel that the child support should be increased above the guidelines to accommodate for the parochial school.

The trial court then made a written finding of fact that "[t]he parties have historically enrolled their children in Catholic schools. Therefore the parents should share equally in the tuition and attention educational costs for the children through the eighth (8^{th}) grade." There were no further written findings made on the issue.

Robert's claim that Barbara failed to carry her burden of proof, and his claim concerning the lack of a trial court finding of special circumstances, are closely related and we will treat them together.[1]

In *In re Marriage of Fite*, 485 N.W.2d 662 (Iowa 1992), the supreme court addressed the issue of whether a dissolution decree could be modified to order the non-custodial parent to pay 45% of his daughter's private parochial school costs. In the facts presented by that case, the supreme court found that, considering the non-

[1] Barbara, at oral argument, urges that we not consider the issue of a lack of a trial court finding, as she feels it was not raised until Robert's reply brief. However, Robert did discuss this issue in his opening brief, as well as his reply brief. We will therefore consider it.

custodial parent's net monthly income, there was not any basis for requiring him to pay support above the guideline amount. *Id.* at 665. Our reading of *Fite* leads us to conclude that the non-custodial parent's ability to pay is a pre-requisite to any provision ordering payment of private parochial school costs in addition to child support pursuant to the guidelines. *See also State ex rel. Dept. of Human Services v. Burt*, 469 N.W.2d 669, 670 (Iowa 1991) (holding that "[i]n establishing the guidelines, the court undertook to balance the needs of the children against the legitimate needs and expenses of the payor parent.").

The record in this case shows that at the time of dissolution Robert had a net monthly income of $2747.89, and Barbara had a net monthly income of $1561.84. Based on these incomes, Robert was ordered to pay $843.60 per month in child support pursuant to the child support guidelines. However, the record does not disclose how much the parochial school tuition is, or how much the "attendant educational costs" are. It further appears that the children will be attending a new parochial school, as they have moved from the Des Moines area to Bettendorf while the dissolution case was pending. Not only are we not provided with the costs of the private schooling at the time Barbara and the children lived in the Des Moines area, but we also do not know how much attending a new parochial school will cost. The record is therefore inadequate for us to determine, upon our de novo review, that Robert has the ability to pay the expenses in question. We therefore modify the dissolution decree by striking the provision that requires Robert to pay one-half the tuition and attendant educational costs at a private school.

We also note that, as claimed by Robert, the trial court made no finding that the guidelines amount would be unjust or inappropriate under the criteria set forth in the guidelines, as required by section 598.21(4)(a) and the guidelines before a deviation from the guidelines can occur. Further, on our de novo review, we are unable to make such a finding. This is not only because the lack of evidence concerning the amount of expenses in question leaves us unable to determine Robert's ability to pay, but also because that lack of evidence leaves us unable to determine whether or not Barbara needs a contribution from Robert toward those expenses. Under these circumstances an order concerning such expenses is not appropriate. *See In re Marriage of Gordon*, 540 N.W.2d at 292. We modify the decree as set forth above on this second ground as well.

Because of our disposition of the issues discussed above, we need not reach Robert's constitutional argument. We affirm the trial court as modified.

AFFIRMED AS MODIFIED.