IN THE COURT OF APPEALS OF IOWA

No. 5-597 / 95-044

IN RE THE MARRIAGE OF DUANE ALLAN DAVIS AND CAROL ANN DAVIS

Upon the Petition of
DUANE ALLAN DAVIS,

Petitioner-Appellant,

And Concerning
CAROL ANN DAVIS,

Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

Duane Allan Davis appeals the district court's order modifying the parties' dissolution of marriage decree. **AFFIRMED.**

Jennifer A. Bicknese of the Boliver Law Firm, Marshalltown, until her withdrawal; then Christopher Clausen of the Boliver Law Firm, Marshalltown, for appellant.

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellee.

Considered by Sackett, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

Duane and Carol Davis were divorced in January 1990. They have two children from their marriage, Lori, born December 31, 1978, and Adam, born September 19, 1980. The dissolution decree granted the parties joint legal custody and Carol primary physical care of the children. Duane was ordered to pay child support in the amount of $260 per month.

In May 1994, Carol filed an application to modify the dissolution decree alleging a substantial change in circumstances. She requested the amount of child support be increased and Duane be required to pay one-half of the children's medical insurance premiums and one-half of their medical bills.

Following a December 1994 hearing, the district court found that in 1990, when the parties were divorced, Carol earned $24,800 per year as a clerk-typist at Fisher Controls, and in 1992 and 1993 Carol earned approximately $27,000 per year at this job. During her employment at Fisher, she has accumulated a vested pension benefit of $61,000.

The district court further found Duane's income had fluctuated widely since the divorce. It noted Duane operates a car repair and car rental business and reported a net operating loss in 1991 of $4705, income of $14,845 in 1992, and income of $14,404 in 1993. The district court found Duane sold the car repair portion of his business for $50,000 in 1994 and received an initial $25,000 payment in October 1994 with the balance payable in April 1995. For the months of January through

October 1994, the district court found Duane received income from the car rental business of $18,000.

Using Duane's 1993 income, the district court determined his monthly child support obligation under the child support guidelines was $250. However, the district court determined the "wide fluctuations in Duane's income since 1991 constitute a material and substantial change in circumstances" requiring a reassessment of his child support obligation. It further determined, due to the income fluctuations, the "calculations of Duane's monthly support obligation should not fall under the guidelines." The district court concluded Duane should pay child support in the amount of $360 per month. Additionally, the district court ordered Duane to pay one-half of the children's uninsured medical, dental, orthodontic, and optometric expenses.

Duane appeals.

I.

Review is de novo since a petition for modification of child support is at equity. *In re Marriage of Gilliam*, 525 N.W.2d 436, 438 (Iowa App. 1994). 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).

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. *Mears v. Mears*, 213 N.W.2d 511, 514-15 (Iowa 1973). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)).

II.

The child support guidelines are to be strictly followed unless their application would lead to an unjust or inappropriate result. *In re Marriage of Swan*, 526 N.W.2d 320, 325 (Iowa 1995); *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). Deviation from the child support guidelines is discouraged. *State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 697 (Iowa 1993); *State ex rel. Schaaf v. Jones*, 515 N.W.2d 568, 570 (Iowa App. 1994).

A court should first determine the child support obligation under the child support guidelines and then decide whether an adjustment is warranted. *Swan*, 526 N.W.2d at 325. In order to deviate from the guidelines, a court must make a written finding the application of the guidelines would be unjust or inappropriate under the "special circumstances" of the case. *In re Marriage of Gehl*, 486 N.W.2d 284, 286-87 (Iowa 1992).

The situation of using a fluctuating income to determine a child support obligation is not unique. It has previously been held an average income should be calculated when there is fluctuating income and this calculated average should be used to determine the child support obligation. *In re Marriage of Robbins*, 510 N.W.2d 844, 846 (Iowa 1994); *In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991); *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996); *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa App. 1992); *see also In re Marriage of Blume*, 473 N.W.2d 629, 633 (Iowa App. 1991) (averaging annual income for a farmer with fluctuating income would be appropriate); *In re Marriage of Hoag*, 380 N.W.2d 8, 10 (Iowa App. 1985) (five-year period of farming was considered in determining income).

III.

Like the trial court, we decline to accept what purports to be Duane's fluctuating income or to the amount he represents as his net monthly income. We reach this conclusion, for it is beyond dispute that Duane is paying a substantial part of his personal expenses from his business account. For this same reason, we also believe it would be inequitable to attempt to average his income.

Before applying the guidelines, we must first determine the net monthly income of the custodial and noncustodial parent. We make this determination from the most reliable evidence presented. *Powell*, 474 N.W.2d at 533. In addition, if a parent pays personal living expenses and deducts those expenses from a business account, we can and should take this fact into consideration when determining net monthly income of that parent from that business. *In re Marriage of McKamey*, 522 N.W.2d 95 (Iowa App. 1994).

The district court determined Duane's monthly net income in 1993 to be $833.[1] When we take into consideration the fact that Duane has deducted personal living expenses from his business, we conclude a more accurate computation of his net monthly income is an amount equal to $1200. We adopt the district court's determination of Carol's net monthly income as $1395. Using the child support guidelines for two children, we calculate Duane's monthly child support obligation to be $360. This amount varies by more than ten percent from the court-ordered payment of $260; thus by statute, there is a substantial change in circumstances since the original dissolution decree. We affirm the trial court when it fixed the child support obligation to $360 per month.

IV.

Carol requests attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *Gilliam*, 525 N.W.2d at 439. We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision. *In re Marriage of*

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[1] We are not using the tax year 1994 since a 1994 tax return was not available to the district court at the time of its decision.

Miller, 524 N.W.2d 442, 445 (Iowa App. 1994). We determine each party should pay his or her own attorney fees for this appeal.

In conclusion, .we affirm the trial court's ruling fixing the child support obligation at $360 per month. Since Duane does not challenge the district court's ruling on medical expenses on appeal, we also affirm that part of the district court's ruling.

AFFIRMED.