

IN THE COURT OF APPEALS OF IOWA

No. 0-329 / 89-1448

FILED

SEP 26 1990

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DANA JO DAWSON AND
JAMES REX DAWSON

82

Upon the Petition of
DANA JO DAWSON,

Appellant/Cross-Appellee,

And Concerning
JAMES REX DAWSON,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Guthrie County,
Dale B. Hagen, Judge.

Both parties have appealed from the modification order
of the district court reducing the amount of the husband's
child support obligation. **AFFIRMED AND REMANDED.**

Mike Christensen, Des Moines, and Edward Ronwin,
Urbandale, for appellant.

Joseph G. Bertogli, Des Moines, for appellee.

Considered en banc.

PER CURIAM

James and Dana Jo Dawson were married in 1970. They had two children: a girl, Anne Denise Dawson, born in August 1974, and a boy, James Diccon Dawson, born in July 1976.

The marriage was dissolved in 1980. The 1980 dissolution decree placed the children in Dana's custody and directed James to pay child support. According to a rather complicated schedule, James's total child support obligation started at \$550 every two weeks and then dropped; first to \$400 every two weeks and then to \$250 every two weeks. The decree provided the total child support obligation would remain at \$250 every two weeks for as long as both children remained eligible for support; when only one child remained eligible, James's support obligation would drop to \$125 every two weeks.

In 1989, James filed the present application to modify the 1980 dissolution decree. James requested that his child support obligation, then standing at \$250 every two weeks, be reduced. The district court modified the decree by reducing James's child support obligation to \$200 every two weeks while both children remain eligible for support and \$125 every two weeks when only one child remains eligible. The modification order also provided each party could claim an income tax dependency exemption for one child. We note the original dissolution decree was silent on the subject of dependency exemptions. James had

previously claimed both children as dependents, but the IRS disallowed James's practice.

Dana has appealed from the modification order. She contends the district court erred by reducing her child support award. She also contends she should be allowed to claim both children as dependents on her income tax forms; she asserts this is mandated by federal income tax laws under the circumstances of this case. In addition, she claims the district court should have awarded her attorney's fees.

James has cross-appealed, contending his child support obligation should be reduced still further.

Each party requests attorney's fees on appeal.

Our review of this case is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings of facts, but give them weight. Iowa R. App. P. 14(f)(7).

I. Modification of Child Support

Hearing on the application for modification of dissolution of marriage was held before the trial court on July 26, 1989. The trial judge filed his order modifying the decree in the clerk's office of the Guthrie County District Court on August 17, 1989. On September 29, 1989, the Iowa Supreme Court adopted permanent child support guidelines, effective October 12, 1989. That order defined net monthly income in exhibit "A" attached to it as follows:

In the guidelines the term "net monthly income" means gross monthly income less deductions for:

- 1) Federal Income Tax
- 2) State Income Tax
- 3) Social Security Tax
- 4) Mandatory Pension Deductions
- 5) Union Dues
- 6) Dependent Health Insurance Coverage
- 7) Individual Health/Hospitalization Coverage or Medical Expense Deductions not to exceed \$25.00 a month.

Other items, such as credit union payments, charitable deductions, savings or thrift plans and voluntary pension plans, are to be added back into a parent's income, since the needs of the children must have a higher priority than voluntary savings or payment of indebtedness.

The supreme court's order also provides "the court shall not vary from the amount of child support which would result from application of the guidelines without a written finding the result would be unjust or inappropriate as determined under the following criteria:

- (1) Substantial injustice would result to the payor, payee or child;
- (2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case; and
- (3) Circumstances contemplated in Iowa Code § 234.39 (1989)."

This matter is remanded to the trial court to conduct a hearing pursuant to the Iowa Supreme Court order of the 29th day of September, 1989.

II. Tax Deductions

The trial court granted one tax exemption to each party. Previously the Internal Revenue Service had disallowed James's taking both deductions.

The general rule is the custodial parent is allowed to claim the exemption. 26 U.S.C. § 152(e)(1) (1988). The custodial parent is treated as having furnished over one-half of the child's support. Three exceptions exist:

- 1) [W]hen there is a multiple support agreement that allows the child to be claimed as a dependent by a taxpayer other than a custodial parent;
- 2) when the custodial parent releases his or her right to the child dependency exemption to the noncustodial parent by executing IRS Form 8332;
- and 3) when a pre-1985 divorce decree or separation agreement between the parties and the noncustodial parent provides at least \$600 for the support of the child for the year in question.

In re Marriage of Kerber, 433 N.W.2d 53, 55 (Iowa App. 1988) (referring to 26 U.S.C. §§ 152(e)(2), (3), and (4) (1988)).

The court is vested with the authority to decide which parent shall be entitled to the income tax dependency exemption. See Kerber, 433 N.W.2d at 55. However, the court can only exercise this authority by ordering the custodial parent to execute IRS Form 8332. Id.

We determine it is equitable to award James one child income tax exemption. Accordingly, we award one exemption

for the youngest child, James Diccon Dawson, to James for as long as he makes support payments for the child. Dana is hereby ordered to execute IRS Form 8332 in favor of James for the child support income tax exemption for the child James Diccon Dawson.

We affirm the trial court on the award of one child exemption to each of the parties. We also affirm the trial court's order the parties are to pay their own attorney fees at trial. Likewise, each party is to pay his or her own attorney fees on appeal.

This court does not retain jurisdiction.

Costs of this appeal are assessed one-half to James and one-half to Dana.

AFFIRMED AND REMANDED.

All judges concur except Habhab, J., who concurs in part and dissents in part.

HABHAB, J. (concurring in part and dissenting in part)

I concur with the majority except that part that remands this cause for hearing pursuant to the Uniform Child Support Guidelines. As to that part, I dissent.

This cause was tried to the court on July 26, 1989. The temporary child support guidelines were not adopted as permanent child support guidelines by the supreme court until September 29, 1989. Under the circumstances here, I see no reason to remand for the guidelines were nonexistent at the time of trial.

The supreme court order that adopted the guidelines provided that when the amount prescribed was used by the trial court as the basis of an award, a rebuttable presumption of correctness was established. Since it is a rebuttable presumption, the litigants should be afforded the opportunity to make their record as to why the amount as prescribed should serve as the amount to be awarded as child support or whether that amount, because of the special circumstances of the case, should be adjusted either upward or downward. I believe that when an amount is granted that is inconsistent with the guidelines, the trial court, if it does not employ the guidelines, should be afforded the opportunity to explain by written findings why the guidelines are unjust or inappropriate. For these reasons we, as an appellate court, should not for the first time impose those guidelines.

However, under the circumstances here, I see no reason to remand. The trial court fixed child support under the law as it existed at trial time. The support issue was litigated in accordance with the then statutory and case law. Merely because the guidelines were adopted after trial and during the course of the appeal is not sufficient reason to remand for rehearing on the issue of child support. I, of course, would require adherence to the supreme court's order of September 28, 1989, on all cases tried on and after the date of its adoption.

To the extent that In re Marriage of Jennings, 455 N.W.2d 284 (Iowa App. 1990), conflicts with this dissent, I would overrule Jennings.