

IN THE COURT OF APPEALS OF IOWA

No. 6-146 / 95-310

000207

IN RE THE MARRIAGE OF GERALD JUDKINS
AND LINDA JUDKINS

Upon the Petition of

GERALD JUDKINS

Petitioner-Appellant\Cross-Appellee,

And Concerning
LINDA JUDKINS,

Respondent-Appellee\Cross-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan,
Judge.

Petitioner appeals, and respondent cross-appeals, from the district court's
ruling in petitioner's action to modify the parties' dissolution decree. **AFFIRMED
AS MODIFIED.**

Robert H. Laden and Ann Calhoun of Hyland, Laden & Pearson, P.C., Des
Moines, and Teresa A. Beyer, West Des Moines, for appellant.

Mark H. Rettig of Hines, Pence, Day & Powers, P.C., Cedar Rapids, for
appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

CADY, J.

Gerald Judkins appeals and Linda Judkins cross-appeals certain provisions of the parties' dissolution decree. We affirm the decree as modified.

Gerald and Linda dissolved their marriage in June, 1989. The decree awarded Gerald primary physical care of the parties' two minor children, Jeremy, born June 1, 1978, and Amanda, born June 10, 1982, during the school year and Linda primary physical care during the summer months. The decree also provided the noncustodial parent with visitation rights. No child support was ordered, but the decree required Linda to obtain health insurance for both children through her employment, with the parties' splitting the cost. Linda worked as a school teacher in Cedar Rapids, and Gerald worked as a veterinarian and farmer in Lacona.

In 1992, Linda's petition to modify the decree was voluntarily dismissed when the parties mutually agreed Linda would have primary physical care of the children during the school year and Gerald would have primary physical care during the summer. However, in late 1993, Amanda and her mother began having problems. Amanda **refused** to return to her mother's home, expressing her desire to live with Gerald.

In December, 1993, Linda filed again for a modification of the original decree. Following a hearing, the decree, dated December 1, 1994, ordered a split custody arrangement with Gerald having primary physical care of Amanda and Linda having primary physical care of Jeremy. The decree also granted Gerald visitation with

Jeremy one weekend per month, and Linda visitation with Amanda one weekend per month, with additional three week visitation periods during the summer months. The decree ordered Gerald to furnish all transportation for Jeremy's visits and the parties to meet in Grinnell for Amanda's visits.¹

The modified decree also ordered Gerald to pay \$399.99 per month for child support, retroactive to December 1, 1994. The district court, in its child support determination, found Gerald's gross income to be \$53,000. The decree also ordered Gerald to pay Linda \$9100.74 for insurance premiums paid by Linda's employer, and to pay one-half of all future insurance premiums. The court did not award attorney fees, and assessed costs to Gerald.

Gerald appeals contending the district court erred in determining weekend visitation, summer visitation, and transportation arrangements, ordering him to pay one-half the insurance premiums, determining his gross income for child support, and assessing attorney fees and costs. Linda cross-appeals contending the district court erred in establishing a holiday visitation schedule, not ordering the child support be retroactive to the date the January 1, 1994, not including a provision for contributions to the children's college education expenses, and not ordering Gerald to pay her attorney fees. Both parties seek appellate attorney fees.

I. Standard of Review

¹ The decree also allowed Linda to choose Ames as a different meeting point if notice was given to Gerald seven days prior to the visit.

In this equity action, our review is de novo. Iowa R. App. P. 4. 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); *In re Marriage of Blume*, 473 N.W.2d 629, 631 (Iowa App. 1991).²

II. Child Visitation

A. Transportation

It is permissible to allow a child's primary custodian to choose a designated location for a child to be picked up and dropped off for visitation. *In re Marriage of Fite*, 485 N.W.2d 662, 664 (Iowa 1992). However, the designated locations must be based on geographic considerations and be reasonable. *Id.*

We find requiring Gerald to provide the entire transportation for his visitation with Jeremy and a significant portion of the transportation for Linda's visitation with Amanda to be unreasonable. We, therefore, modify the decree to require Gerald and

² **Gerald** argues less weight should be given the district court's findings of facts since it adopted, with a few modifications, Linda's proposed findings of fact and conclusions of law. We disagree. We encourage district court judges to refrain from adopting findings and conclusions prepared by counsel, and to record their independent thought processes and interpretations of the evidence in their decisions. See *Care Initiatives v. Board of Review*, 500 N.W.2d 14, 16 (Iowa 1993). However, our standard of review does not change merely because the district court modified findings and conclusions prepared by a party. See *id.* (separate standard of review will not be applied to district court's adoption of twenty-one page proposed findings and conclusions when court requested proposals from both parties).

Linda to each provide one-half of the transportation for visitations. Gerald will provide transportation to pick up Jeremy for his visitations, and to drop off Amanda for Linda's visitations. Linda will provide transportation to pick up Amanda for her visitation, and to drop off Jeremy for Gerald's visitations.

B. Weekend and Summer Visitation

In determining visitation rights, the governing consideration is the best interest of the children. Iowa Code § 598.41 (1993). Liberal visitation rights are to be awarded, where appropriate to provide the children with the opportunity for maximum continuing physical and emotional contact with both parents. *Id.*; *In re Marriage of Muell*, 408 N.W.2d 774, 777 (Iowa App. 1987). However, geography is an element to be considered for visitation. Iowa Code § 598.41. *See also In re Marriage of Hunt*, 476 N.W.2d 99, 103 (Iowa App. 1991) (reasonable, equitable, and in the child's best interest to reduce visitation from two weekends a month to one weekend a month, in light of the 130 mile distance between the households, and the child's increasing school and friendship related activities).

Gerald proposes the parties receive visitation with the noncustodial child every other weekend. The parties live approximately 140 miles apart. The children are in junior high and high school. In light of the children's ages, school activities, and the significant distance between the parties, we find, as did the district court, visitation one weekend a month for each parent to be fair, reasonable, and in Amanda and Jeremy's best interests.

C. Summer and Holiday Visitation

Gerald contends the children should be able to decide the location and period of visitation for the summer months. Testimony at the modification hearing indicated Amanda did not wish to spend any time with her mother during the summer, due to problems they were having with each other. Gerald also stated Jeremy wished to spend his entire summer with his father to work on the farm. Neither Amanda nor Jeremy testified at the hearing.

We allow the custody wishes of children of sufficient age, intelligent, and discretion to exercise enlightened judgment to be a relevant factor to be considered by a court. *Hunt*, 476 N.W.2d at 101. However, regular summer visitation between Amanda and Linda is necessary in order for them to deal with their problems. We agree with the district court allowing Amanda to “dictate when that visitation is to occur places Amanda in the middle of the controversy and courts further dispute and conflict” Requiring both Amanda and Jeremy to determine their own summer visitation will not afford maximum contacts with both parents. We find the district court’s ~~summer~~ visitation arrangement providing each ~~party with~~ three weeks with the noncustodial parent to be in the children’s best interest.

The district court alternated visitation for Linda and Gerald for the major holidays, with one exception. The decree provides Gerald with visitation every Thanksgiving weekend. We find this to be inequitable and not in the children’s best interests. We therefore modify the decree to allow Gerald visitation for the

Thanksgiving holiday weekends in the even-numbered years, and Linda visitation during the odd-numbered years.

III. Health Insurance Premiums

The original dissolution decree provided all health insurance costs be split between the parties. Linda's employment through the Cedar Rapids Community School system allows her to elect between certain flexible benefits. These benefits include life insurance, health insurance, dental insurance, prescription drug card, dependant care, or additional salary taxable to the employee. We find the election to keep the children on Linda's health and dental insurance flexible benefits plan is a cost to her to which Gerald should contribute.³ The record reflects an \$18,201.44 difference between the single person plan and the family plan. We agree with the district court Gerald should reimburse Linda \$9100.72 for costs incurred under her plan. We also agree with the district court Gerald is require to contribute one-half of all future health insurance costs under Linda's flexible benefits plan.

IV. Child Support

A. Determination of Gross Income

A *noncustodial* parent must provide child support in accordance with the child support guidelines, unless a deviation is warranted. Iowa Code § 598.21(4); *In re*

³ We reject Gerald's argument the health and dental insurance premiums are not "costs" to Linda since she does not pay for them and is not taxed on the benefit. Linda could have elected to receive additional salary if she had not elected the health and dental benefits. As such, the premiums are a "cost" to Linda.

Marriage of Van Zee, 488 N.W.2d 721, 723 (Iowa App. 1992). The amount of child support under the guidelines is based upon the parties' net incomes. *Id.* at 723.

Gerald is self-employed as a veterinarian and also farms. His 1993 tax return listed his gross income as \$36,200. He testified he needed to keep additional income in the business for operating expenses, and his monthly gross income would be around \$3000. Evidence presented indicated Gerald took accelerated depreciation on certain business assets connected to his business expenses, and his income from his veterinary practice has steadily increased over the past few years.

We find no error in the district court recalculating the depreciation method, using straight-line depreciation, to determine a more accurate reflection of his gross income. *See In re Marriage of Starcevic*, 522 N.W.2d 855, 856-57 (Iowa App. 1994). We also find no error in including additional income from Gerald's veterinary practice, which he stated was left in the business for operating expenses for the next year. Gerald's operational expenses were also taken into account in determining gross income, and the court also attributed some income to Gerald's present wife. The district court properly determined Gerald's net monthly income to be \$3507.75 for child support purposes.

The district court also appropriately did not attribute additional summer income to Linda. *See In re Marriage of Griffin*, 525 N.W.2d 852, 854 (Iowa 1994) (speculative to include summer income for child support where no evidence professor, who had obtained summer employment in the past, planned to or could obtain

summer income). The district court's child support determination is fair and well supported by the evidence presented.

B. Retroactivity of Child Support

The district court has discretion to make an award of child support retroactive to the date of service of the notice of the application for modification. Iowa Code § 598.21(8) (1993); *In re Marriage of Phares*, 500 N.W.2d 76, 79 (Iowa App. 1993). However, such retroactivity is not mandatory. *State ex rel Welter v. Kitner*, 512 N.W.2d 309, 313 (Iowa App. 1993). We find no error in the district court's award of retroactive child support from the date of the modification hearing.

V. College Expenses

By statute, divorced parents have an obligation to support their children while attending college. *In re Marriage of Byall*, 353 N.W.2d 103, 107 (Iowa App. 1984). This obligation depends largely on the circumstances of each case. *In re Marriage of Hoak*, 364 N.W.2d 185 (Iowa 1985); *In re Marriage of Vrbanc*, 293 N.W.2d 198, 203 (Iowa 1980). We find the issue of college expenses to be premature. The district court properly retained jurisdiction to determine this issue at a later time.

VI. Attorney Fees

District courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App.

1987). 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 district court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

We find no error in the district court denying attorney fees for Linda and Gerald and assessing costs to Gerald. On appeal, each party raised issues which forced the other party to defend the district court's decision. Both parties work earning adequate salaries to enable them to pay their own appellate attorney fees. Costs are divided equally.

AFFIRMED AS MODIFIED.