

IN THE COURT OF APPEALS OF IOWA

No. 0-430 / 09-1482
Filed October 6, 2010

**IN RE THE MARRIAGE OF HAMID KAKAVANDI
AND NARENDJ VAKILI-KAKAVANDI**

**Upon the Petition of
HAMID KAKAVANDI,**
Petitioner-Appellant,

**And Concerning
NARENDJ VAKILI-KAKAVANDI,**
Respondent-Appellee.

Appeal from the Iowa District Court for Page County, James S. Heckerman, Judge.

Hamid Kakavandi appeals from the modification of his child support and medical support obligations. **AFFIRMED AS MODIFIED.**

Seth E. Baldwin of Johnson Law, P.L.C., Shenandoah, for appellant.

Narendj Vakili-Kakavandi, Rockville, Maryland, pro se.

Thomas J. Miller, Attorney General, and Kevin E. Kaufman, Patricia R. Hemphill, and Tamara Lorenz, Assistant Attorneys General, for appellee Child Support Recovery Unit.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

DANILSON, J.

Hamid Kakavandi appeals from the modification of his child support and medical support obligations. Hamid voluntarily terminated his employment as a general surgeon, which provided medical insurance, and absented himself from this country without making any provision for the support of his two children. Having an earning capacity of \$337,500, we conclude it is appropriate to order Hamid to pay child support and cash medical support as calculated under the applicable child support guidelines. We affirm as modified.

I. Background Facts & Proceedings.

Hamid and Narendj Vakili-Kakavandi were divorced in April 2005. The dissolution decree awarded physical care of the parties' two children (son Rezza, born in August 1992, and daughter Rojahn, born in January 1995) to Narendj. In the dissolution decree, the court found Hamid's income in 2004 was \$325,707, which included deferred bonuses, with his average income over two years being \$270,000. Hamid voluntarily terminated his employment prior to the dissolution.¹ The court specifically found Hamid tried to deceive the court by stating he had no funds available to pay support. Hamid was ordered to pay child support of \$2092 per month and maintain child support for the minor children. Narendj was awarded rehabilitative alimony in the amount of \$2000 per month for three years.

In 2007, this court considered the appeal of a modification of the dissolution decree and found a substantial change of circumstances warranted

¹ The dissolution court found Hamid had directed his employer to forward his severance pay of \$93,000 to the agency holding his student loans. The court also found that Hamid sent large sums of money to his family in Iran to the detriment of his wife and children.

modifying physical care of Rezza to Hamid,² but leaving Rojahn in Narendj's care. *In re Marriage of Kakavandi*, No. 07-0083 (Iowa Ct. App. July 25, 2007). We remanded for a determination of child support. *Id.* On remand, the district court offset the parties' child support obligations³ and determined Hamid's monthly obligation to be \$2200 (with bi-weekly support payments of \$1015).

On January 13, 2009, Narendj filed a petition for modification of child custody and support asserting Rezza had moved back into her home in April 2008 and continued to live with her. On January 27, 2009, the court entered an order for temporary support in the amount of \$3500 per month based on Hamid's annual base salary of \$261,500 and Narendj's zero income.

New child support guidelines became effective and applied to all cases pending on July 1, 2009. Iowa Ct. R. 9.1 (2009). While the older guidelines allowed for the court in its discretion to determine an appropriate amount when net monthly income exceeded \$10,000, see Iowa Ct. R. 9.26 (2008), the 2009 Child Support Guidelines provide a presumptively correct proportionate share of the support obligation for combined adjusted net monthly incomes up to \$20,000. See Iowa Code § 598.21B(2)(c) (Supp. 2009); Iowa Ct. Rs. 9.4, 9.26.

A modification trial was held on August 7, 2009. According to Susan McGough, chief executive officer and president of Shenandoah Medical Center, Hamid was on contract as a general surgeon with the Shenandoah Medical

² We based this finding upon the deteriorating relationship between Narendj and Rezza, whom we described as "a very intelligent child with a strong will," and Rezza's stated preference.

³ Because his income placed him in the discretionary range of the guidelines effective at that time, the court found Hamid's appropriate monthly support obligation was \$2250, while Narendj's obligation was set at the minimum \$50.

Center through which he was provided medical insurance coverage, a salary of \$261,500 per year, plus a bonus based on gross revenue generated by his patients. She believed Hamid had been on contract beginning in about 2005, but she had not checked records prior to her arrival in 2007. McGough testified Hamid received a bonus of \$251,459 in 2007; \$80,527 in 2008; and (based on extrapolation had he continued to work at the same rate in the latter part of the year) \$37,772 in 2009.⁴ McGough testified the average general surgeon's income in the United States is about \$350,000 per year. McGough further testified that she had discussed and approved a leave of absence with Hamid because he "wanted to go home [to Iran] to care for his mother."

McGough testified that she later learned from the director of human resources that rather than take a leave of absence, Hamid voluntarily terminated his employment with Shenandoah Medical Center near the end of June 2009. McGough testified that upon terminating his contract with Shenandoah Medical Center, Hamid also cashed out his retirement plan (netting \$14,314.74 after taxes and penalties) and was paid for accumulated vacation time (gross amount \$33,812.72). Moreover, upon terminating his employment, his medical insurance for the children was terminated. McGough testified that had Hamid taken a leave of absence, (1) he would have qualified for the 2009 bonus and (2) he could not have cashed out his retirement plan. She also testified that Hamid was given COBRA notifications, but she was "not knowledgeable as to what elections he made."

⁴ All bonuses were paid the next year. Exhibits admitted at trial indicate Hamid's income was \$234,000 in 2006; \$307,000 in 2007; and \$514,000 in 2008. Projected income for 2009, based only on the 2008 bonus plus base salary, was \$342,000.

Narendj testified that to her knowledge, Hamid had gone to Iran and she did not know if he planned to return. Narendj testified that she had been notified that the children were no longer covered by health insurance after June 2009. She received child support payments through Hamid's wage assignment until July but had received nothing since. According to the Child Support Recovery Unit (CSRU), Hamid was in arrears on child support in the amount of \$5115.44 as of August 6, 2009.

Narendj testified that Rezza moved back in with her at the end of April 2008 and had limited contact with his father since then. She requested sole custody of both children and retroactive child support. She also testified she had not worked outside the home for eighteen years, except in a few very limited instances. She had received training at local youth detention facility, Clarinda Academy, but felt physically incapable of restraining the residents, which she testified would be required "at some point." She testified she had an associate of arts degree in medical assisting and another associate of arts degree in liberal arts. Narendj continued to search for employment without success and was considering moving out of state.

At the end of the hearing, the court granted Narendj sole custody of the children. The court also determined Hamid's earning capacity was \$337,000, imputed income to Narendj in the amount of \$18,000, ordered a payment of cash medical support, and asked the CSRU attorney to calculate child support according to the 2009 guidelines retroactive to April 2009.

Hamid's counsel attempted to introduce "an affidavit from my client not notarized" explaining his absence from the country. The court overruled the request stating, "Then that doesn't make it an affidavit." The court also stated,

I'm not making any finding that he—that the reason for him being out of the country was in good faith or bad faith. I don't care. . . . [H]e left the country without making any provision to provide support. Now he wants me to say he doesn't have to?

The court also considered Narendj's motion for an award of one-half the proceeds of the sale of the marital home pursuant to the dissolution decree, which sale had not occurred until 2009. The net proceeds from the sale of the house were \$14,000. She asked that the court award her \$7000. The court denied the motion because Hamid had been ordered to pay the mortgage payments pending the sale and was to receive credit for those payments. The court made a finding that Hamid was entitled to \$9000 in credit for mortgage payments, which exceeded Narendj's portion of the proceeds. The court thus deducted the \$2000 remaining credit from the amount Hamid was in arrears on child support, finding his arrearage was \$3115.44.

On August 24, 2009, the district court entered its written ruling on Narendj's petition for modification. The court found Hamid had "sold his house and removed himself to his native Iran and has effectively stopped supporting his family after quitting his job voluntarily." The court found Hamid "has established an average earning capacity of \$337,000 per year" and imputed an adjusted net monthly income of \$16,290, which included a deduction for cash medical support of \$1406 per month. The court also imputed a net monthly income of \$1231 to Narendj.

The court's order filed August 24, 2009, also provided for a deviation in the child support calculated pursuant to the guidelines and stated in part:

[Hamid's and Narendj's] combined monthly net incomes total \$17,571.00 of which [Hamid's] monthly net income comprises 93% and [Narendj's] monthly net income comprises the remaining 7%.⁵ Under the Iowa Child Support Guidelines (Chapter 9, Iowa Court Rules, "Guidelines"), this combined monthly net income results in a combined monthly child support figure for two children of \$2,822.00, of which [Hamid's] monthly child support obligation would be 93%, or \$2,616.00 per month. Additionally, [Hamid] would pay cash medical support of \$1,406.00 per month. A Guidelines Worksheet is concurrently entered with this order, and incorporated herein by this reference. The Court specifically finds that a deviation from the guidelines is justified by [Hamid's] \$500,000.00 plus 2008 income and his near \$300,000.00 income through his departure date this year. His unilateral decision to quit his job when a leave of absence was available to him further requires the court to deviate.

Consequently, the district court ordered Hamid to pay an ongoing monthly child support obligation of \$3100 and \$1400 per month as cash medical support beginning on April 1, 2009. Narendj was ordered to pay the first \$250 per year per child of uncovered medical expenses and seven percent of the remaining uncovered medical expenses; Hamid was ordered to pay ninety-three percent of the remaining uncovered medical expenses.

Hamid now appeals, contending the district court erred in (1) its upward variance from the child support guidelines; (2) including his bonuses when determining his average income; (3) finding Hamid's unemployment was not supported by good cause; (4) ordering the cash medical support for periods during which the children were covered by medical insurance; and (5) ordering

⁵ These percentages are rounded figures. Under the guidelines, Hamid's net monthly income comprises 92.71% and Narendj's net monthly income comprises 7.29% of the combined net monthly income. The child support worksheet uses these figures and not the rounded figures.

him to “double-pay for medical support and actual medical costs.” The CSRU has filed a brief responding to the last issue.

II. Scope and Standard of Review.

As an equitable action, our review of this modification proceeding is de novo. Iowa R. App. P. 6.907. We examine the entire record and decide anew the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). Especially when considering the credibility of witnesses, we give weight to the district court’s findings of fact, but are not bound by them. Iowa R. App. P. 6.904(3)(g). We need not separately consider assignments of error in the trial court’s findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968).

III. Child Support.

Child support may be modified if there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (Supp. 2009). Rezza is now living with Narendj, and Hamid does not contest that a substantial change of circumstances has been proved.

Hamid objects to the district court’s decision to impute income to him and to include bonuses in that determination. Hamid further asks that we temporarily reduce his child support obligation “based on hardship.” We reject this last contention outright. Simply stated, this record does not contain any evidence

that would support a finding of hardship.⁶ The status of his mother's health is not available. What is in this record is that Hamid had been granted approval for a leave of absence because he "wanted to go home to care for his mother."

We address Hamid's arguments of imputed income and bonuses together in our de novo review of his child support obligation. We note he does not affirmatively provide a calculation of what he contends is an appropriate child support obligation. Rather, Hamid infers that if any income is to be imputed, it should be limited to his contract income with Shenandoah Medical Center. We reject this contention.

"The court must determine the parents' income from the most reliable evidence presented." *In re Marriage of Wade*, 780 N.W.2d 563, 566 (Iowa Ct. App. 2010). "All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations." *In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997). Such things as overtime income, incentive pay, and bonuses are included in a party's income if reasonably to be expected. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). "If it is reasonably expected to be received, then it should be included in gross monthly income by averaging the extra income over a reasonable period of time so the amount included fairly reflects the amount that will be received." *Id.*

⁶ Hamid's attempts to include information in his brief that is not part of the record are inappropriate—we do not consider matters outside the record. See Iowa R. App. P. 6.801 (stating record on appeal consists of the "original papers and exhibits filed in the district court, the transcript of proceedings, if any and a certified copy of the docket and court calendar entries prepared by the clerk of the district court"); *Ranes v. Adams Labs.*, 778 N.W.2d 677, 697 n.4 (Iowa 2010) (excluding from discussion evidentiary facts proposed by plaintiff outside the record).

The dissolution decree contains a finding that Hamid's income in 2004 was \$325,707. As already stated, he quit his job and diverted funds before the dissolution trial. The evidence presented at the modification trial was that Hamid's income the past three years was \$234,000 in 2006; \$307,000 in 2007; and \$514,000 in 2008. Projected income for 2009,⁷ based only on the 2008 bonus actually received (\$80,527) plus Hamid's base salary of \$261,500 (and without regard to any 2009 bonus), was \$342,027. Using these figures, Hamid's average salary for the years 2006 through 2009 was \$349,257.

In spite of having been granted a leave of absence, Hamid voluntarily terminated his employment prior to the modification trial, just as he had done just prior to the dissolution proceeding. When a parent voluntarily reduces his income or decides not to work for personal reasons, as is the case here, it is appropriate for the court to consider earning capacity rather than actual earnings when applying the child support guidelines. *Nelson*, 570 N.W.2d at 106. After Hamid voluntarily quit his employment prior to the modification trial, he cleared out his retirement account, was paid for accumulated vacation time, and left the country. In doing so, he terminated his children's health insurance coverage and made no provision for their support. Under these circumstances, we find substantial injustice would occur if actual earnings were used. See Iowa Ct. Rs. 9.5, 9.11(4).⁸

⁷ The district court found Hamid had nearly \$300,000 in income before his voluntary departure date in 2009.

⁸ The final unnumbered paragraph of rule 9.5 provides in part:
To determine gross income, the court shall not impute income under rule 9.11 except: (a) pursuant to an agreement of the parties, or (b) upon

Using a parent's earning capacity rather than his or her actual income is appropriate where the parent's inability to earn a greater income is self-inflicted or voluntary. *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006) (citing *In re Marriage of Duggan*, 659 N.W.2d 556, 562 (Iowa 2003)). Hamid argues his bonuses should not be considered because they are anomalous, but we look to his overall earning capacity. Hamid has a medical degree and has been successfully employed for several years as a general surgeon. A general surgeon in a community similar to Shenandoah can expect an annual income of about \$350,000. Hamid's income, including bonus income, has ranged from \$234,000 to \$514,000 his past four full years of employment. As noted previously, his average income for 2006 through 2009 was \$349,257. While employed at the Shenandoah Medical Center he regularly received a bonus in varying amounts based on gross revenues. The smallest bonus he received was in excess of \$45,000. As observed by the district court, extrapolating his income in the partial year of 2009, for the full year, supports the conclusion that Hamid would have earned at least \$337,000.⁹ Accordingly, we find the district court's imputed annual gross income for Hamid in the amount of \$337,500 is reasonable.

request of a party, and a written determination is made by the court under Rule 9.11.

Rule 9.11(4) provides:

The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

⁹ We note this extrapolated figure apparently does not include the 2008 bonus of more than \$80,000, which the CEO of Shenandoah Medical Center testified was paid out in the following year—2009.

There is a rebuttable presumption that “the amount of child support which would result from the application of the guidelines prescribed by the supreme court is the correct amount of child support to be awarded.” Iowa Code § 598.21B(2)(c); Iowa Ct. R. 9.4; see *In re Marriage of Hilmo*, 623 N.W.2d 809, 811 (Iowa 2001) (“In determining child support, the court must first look to the child support guidelines.”). Application of child support guidelines first involves determination of the “net monthly income” of the custodial and noncustodial parent. *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004). “Net income is gross income less certain allowable deductions.” *Hilmo*, 623 N.W.2d at 811; see Iowa Ct. R. 9.5.

Based upon the earning capacity noted, Hamid’s gross monthly income is \$28,125. After allowable deductions, including cash medical support in the amount of \$1,406.25, his net monthly income is \$16,290.43.

Narendj is healthy and capable of employment. She testified she was actively seeking employment and had a medical assistant degree. We find the district court’s imputed annual income of \$18,000 reasonable, which after allowable deductions provides a net monthly income for child support guideline purposes in the amount of \$1,281.08.

Using the parties’ respective imputed incomes and applying the guidelines, the combined child support obligation for two children is \$2,822. Hamid’s income being 92.71% of the combined income, 92.71% of the support obligation of \$2,822 is \$2,616.28 per month.

The district court correctly determined Hamid's obligation under the guidelines, but concluded deviation "is justified" by Hamid's incomes in excess of \$300,000 and "require[d]" because of "[h]is unilateral decision to quit his job when a leave of absence was available." We do not believe these findings support a variance from the guideline obligation.

Iowa Code section 598.21B(2)(d) provides:

A variation from the guidelines shall not be considered by the court without a record or written finding, based on stated reasons, that the guidelines would be unjust or inappropriate as determined by the criteria prescribed by the supreme court.

Such a variation from the guidelines must be accompanied by a specific finding that "such adjustment [is] necessary to provide for the needs of the children or to do justice between the parties under the special circumstances of the case."

Iowa Ct. R. 9.4; see *also* Iowa Ct. R. 9.11.

Upon our *de novo* review, we cannot state that a variance from the guidelines is necessary to provide for the needs of his children or to do justice between the parties. As provided by the guidelines, Hamid shall pay \$1406 per month cash medical support and \$2616.28 per month child support. We therefore conclude the district court erred in ordering support in excess of the guidelines amounts.

IV. Cash Medical Support.

"An order or judgment that provides for . . . permanent support for a child shall include a provision for medical support for the child" Iowa Code § 252E.1A(1) (Supp. 2009). This applies to all initial or modified orders for support entered under chapter 598. *Id.* § 252E.1A (first unnumbered paragraph). "If a

health plan is not available at the time of the entry of the order, the court shall order a reasonable monetary amount in lieu of a health plan, which amount shall be stated in the order.” *Id.* § 252E.1A(3) (further providing that “a reasonable amount means the amount as determined by the standard specified by the child support guidelines”). This cash medical payment is “an obligation separate from any monetary amount of child support ordered to be paid.” *Id.* § 252E.1(9).

The guidelines provide a table for determining “a reasonable amount in lieu of a health benefit plan (cash medical support).” See Iowa Court Rule 9.12(1). Under rule 9.12(3), “multiply the parent’s gross income by the percentage in [the appropriate] cell to get the cash medical support amount.” According to the table found at rule 9.12(4), the applicable percentage here is five percent of Hamid’s gross income. The district court properly calculated Hamid’s obligation as \$1406.

Hamid argues that the court erred in its order to the extent cash medical support was retroactive to April 2009 because the children were covered by medical insurance through the end of June 2009. We agree. We modify the order to require that cash medical support payments begin July 1, 2009, rather than April 1, 2009. This ruling does not affect the retroactive child support order.

V. Uncovered Medical Expenses.

Finally, Hamid contends the district court did not address how the cash medical support should be “credited regarding Hamid’s obligation to pay 93% of the children’s remaining uncovered medical expenses.” Although Hamid cites no

authority for this proposition in his brief and the issue may be deemed waived, see Iowa R. App. P. 6.903(2)(g)(3), we observe there is no such “credit.”

As noted above, the cash medical support is in lieu of a health plan. Iowa Code § 252E.1A(3). “Medical support which consists of payment of a monetary amount in lieu of a health plan is also an obligation *separate from any monetary amount a parent is ordered to pay for uncovered medical expenses pursuant to the guidelines established pursuant to section 598.21B.*” *Id.* §252E.1(9) (emphasis added).¹⁰

VI. Summary.

We conclude it is reasonable to calculate Hamid’s child support obligation based upon his earning capacity because he voluntarily left his employment for personal reasons. Based upon an earning capacity of \$337,500, we conclude it is appropriate to order Hamid to pay child support and cash medical support as calculated under the applicable child support guidelines. We modify the order to require that cash medical support payments begin July 1, 2009, rather than April 1, 2009. We affirm as modified. Costs are assessed to Hamid.

AFFIRMED AS MODIFIED.

¹⁰ Hamid argues that *if* Narenj does not use the cash medical support payment to purchase insurance, then he *could* be paying twice for medical costs in the future. Hamid argues we should provide him a “credit” to avoid the possible injustice, but we decline to provide an equitable remedy on such a speculative claim. Even assuming such an issue could arise in the future, we are not permitted to render advisory opinions. *Nitta v. Kuda*, 249 Iowa 853, 858, 89 N.W.2d 149, 151 (1958). We also note that if Hamid had simply maintained insurance, any potential issue of double payment would not materialize.