

IN THE COURT OF APPEALS OF IOWA

No. 2-472 / 11-1923
Filed August 22, 2012

KEVIN J. PETERSEN,
Petitioner-Appellee/Cross-Appellant,

vs.

KATHERINE KELLER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve,
Judge.

A mother appeals and a father cross-appeals from the district court's
rulings concerning child custody, visitation, and support. **AFFIRMED ON
APPEAL AND CROSS-APPEAL.**

Stephen W. Newport of Newport & Newport, P.L.C., Davenport, for
appellant.

Dennis D. Jasper, Bettendorf, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

EISENHAUER, C.J.

A mother appeals and a father cross-appeals from the district court's rulings in this paternity case. The mother challenges the district court's refusal to order retroactive child support, its allocation of the income tax exemption, and its order she pay part of the father's attorney fees. The father challenges the court's visitation schedule, medical support determination, and child support calculation. He also seeks appellate attorney fees. We affirm on appeal and cross-appeal.

The child was born in 1996 while both parents were in high school. The mother later married, had another child, and divorced. The father also married and has two young children. In 2009 the father filed a petition to establish paternity, custody, visitation, and support. At the time he filed the petition, the father was voluntarily paying monthly child support of \$400. In May 2010 the mother filed an application for temporary support. The parties agreed the father would continue to pay \$400 monthly as temporary child support. The petition came on for contested trial and the court issued its ruling in September 2011.

The court made extensive, detailed findings of fact and conclusions of law, including explicit credibility assessments. The court, after considering post-trial motions, ordered joint legal custody, placed physical care with the mother, set a visitation schedule, ordered the father to pay child support of \$532.10 a month commencing on December 1, 2011, ordered the mother to maintain health insurance, divided uncovered medical expenses in proportion to the parties' incomes, provided for the parties to alternate the tax exemption, and determined no retroactive child support was owed over the \$400 monthly the father had paid from June 2008 through the date of the order.

In paternity actions, our review of “issues ancillary to the question of paternity, such as support,” is de novo. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005). We give weight to the findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g). This is because the trial court has a firsthand opportunity to hear the evidence and observe the witnesses and their demeanor. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). “Prior cases have little precedential value, except to provide a framework for analysis, and we must base our decision on the particular facts and circumstances before us.” *Id.*

I. Mother

A. Income Tax Exemption. The mother contends the court erred in ordering the parties to alternate taking the income tax exemption. She argues she should take the exemption as the custodial parent and because the father did not provide any evidence his taking the exemption would free up more money for the child’s care. The district court initially ordered the alternating schedule without any discussion. In its ruling on the parties’ cross motions to amend or enlarge, however, the court set forth the rationale for its exercise of discretion. It found the father had been paying child support for most of the child’s life, but the mother had always taken the tax exemption, so the alternating schedule for the few remaining years of child support was “only equitable.” We agree and affirm on this issue. See *In re Marriage of Okland*, 699 N.W.2d 260, 269 (Iowa 2005) (noting “courts have the authority to award tax exemptions to the noncustodial parent to achieve an equitable resolution of the economic issues presented” (internal quotation marks omitted)).

B. Attorney Fees. The mother contends the court erred in ordering her to pay part of the father's attorney fees and in determining he was the "prevailing party." The court may award reasonable attorney fees to the prevailing party. See Iowa Code § 600B.26 (2009). The court should make an award of attorney fees that is fair and reasonable in light of the parties' financial positions. See *In re Marriage of Miller*, 532 N.W.2d 160, 163 (Iowa Ct. App. 1995). The court has considerable discretion to award attorney fees, and such awards are not disturbed on appeal absent an abuse of discretion. See *Markey*, 705 N.W.2d at 25. As is clear from the rulings, neither party was entirely successful, however the father did achieve the primary purpose of his petition; to establish paternity of the child. The court carefully considered the issues raised, the results achieved, and the relative incomes of the parties in determining the mother should pay part of the father's attorney fees. We find no abuse of discretion and affirm on this issue.

C. Retroactive Child Support and Application of Iowa Code Section 598.21C. The mother contends the court erred in not ordering the father to pay for past maintenance of the child. She sought retroactive child support based on the guidelines amount from the date of the child's birth. The father argues this issue was not preserved, and also that estoppel/waiver and laches apply. We agree with the district court's findings on this issue, especially concerning credibility, and adopt them as our own.

The court calculated the child support under the guidelines and amended the amount in its order on the parties' post-trial motions to reflect the parties' net monthly incomes. It also determined there was no support debt accrued, except

the \$400 per month between June 2008 and September 2011. See Iowa Code § 252A.3. The court exercised its discretion in not making the \$532.10 a month obligation retroactive because the delays in getting the matter heard were attributable in part to the mother. As to making the support retroactive to three months after the father filed the petition, see Iowa Code § 598.21C(5), that code provision does not apply, because this was not a modification of court-ordered support, but an original determination. We affirm the district court on these issues.

II. Father

A. Summer Visitation. The father contends the court erred in not granting his request his visitation include the time during the summer when the mother is at work, because the child is home alone during that time and should have parental supervision. He is a teacher and testified he can be available during the summer. He argues it is in the child's best interests to have maximum contact with the noncustodial parent. See *id.* § 598.41(1)(a). The district court continued the normal visitation rotation during the summer with the addition of Monday visitation being overnight. As to the father's request to supervise the child's time while the mother is at work, the court found the child was old enough and responsible enough to manage her own time during the mother's work hours.

Although section 598.41(1)(a) mentions a custody determination with liberal visitation that "will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents," it is in the context of what "is reasonable and in the best interest of the child." We agree with the district court's determination and affirm on this issue.

B. Medical Insurance. The father currently has family medical coverage that includes his spouse and the children of their marriage. The incremental monthly cost to him for family coverage over single coverage is just over \$300. He could add the child at issue here at no additional cost. Instead, he asked the court to order him to cover the child and, therefore, to credit the incremental cost of family coverage to him, which would reduce his child support obligation. The child currently is on the mother's insurance, which costs half as much and provides better coverage. We conclude the district court did not abuse its discretion in determining which parent would be ordered to provide insurance. See *id.* § 252E.1A(2) (giving the court the choice between parents). We affirm on this issue.

C. Appellate Attorney Fees. The father seeks an award of \$5000 in appellate attorney fees and that the costs on appeal be taxed to the mother. Appellate attorney fees are not a matter of right, but rest in the appellate court's discretion. *Markey*, 705 N.W.2d at 26. We consider the parties' needs, ability to pay, and the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Considering those factors, we determine no award of attorney fees is appropriate. Costs of this appeal are to be divided equally between the parties.

AFFIRMED ON APPEAL AND CROSS-APPEAL.