**IN THE COURT OF APPEALS OF IOWA**

No. 6-196 / 05-1510
Filed August 23, 2006

**IN RE THE MARRIAGE OF BEN MICHAEL REEVES AND JULIA MARIE REEVES**

**Upon the Petition of**
**BEN MICHAEL REEVES,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning**
**JULIA MARIE REEVES, n/k/a**
**JULIA MARIE DEMARTINO,**
Respondent-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, K. D. Briner, Judge.

Ben Reeves appeals, and Julia Reeves cross-appeals, from the child support provisions of the decree entered by the district court dissolving the parties' marriage. **AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.**

Carter Stevens of Roberts & Stevens, P.L.C., Waterloo, for appellant.

Craig Ament of Ament Law Firm, Waterloo, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

**MILLER, J.**

Ben Reeves appeals the child support provisions of the decree entered by the district court dissolving his marriage to Julia Reeves. He claims the court erred in ordering him to pay Julia child support for their minor child as if he were a noncustodial parent, arguing the parties have joint physical care of their child. Julia cross-appeals, claiming the court's method of determining the parties' net incomes and thus Ben's child support obligation was erroneous. Julia also seeks appellate attorney fees. We affirm on the appeal, reverse on the cross-appeal, and remand for further proceedings.

## I. BACKGROUND FACTS AND PROCEEDINGS.

Ben and Julia were married July 11, 2001. They have one child, Madisen, born January 7, 2002. Ben filed a petition for dissolution of marriage on September 22, 2003. The parties entered into a "Stipulation re Custody and Visitation" which provided for "joint care and custody" and "joint physical placement" of Madisen. The stipulation included a detailed "joint parenting plan" which provided for "joint legal custody" and "shared physical placement" and set forth, among other things, a parenting schedule for each of the parties. The joint parenting plan provided that Madisen would be with Ben every other weekend from Friday at 5:00 p.m. through Sunday at 7:00 p.m., every Tuesday and Thursday from 3:00 p.m. to 7:00 p.m., and overnight on Tuesday one week and Thursday the next. Ben would also have her four weeks in the summer and, among other times, specified holidays, time during spring break from school every other year, and time during Christmas vacation from school each year.

The district court approved the stipulation and parenting plan and incorporated them into a dissolution decree. In the decree the court noted the parties could not agree as to child support and property distribution and thus set a hearing on the disputed issues. Following the hearing the court entered a supplemental decree addressing these disputed issues.

At the time of the dissolution trial Ben was thirty-six years of age and self-employed as an electrician. He owned and operated Current Electric, paying himself an hourly wage of thirteen dollars per hour. The district court found Ben had a gross annual income of $27,040. After deducting twenty percent for "typical average deductible expenses" the court concluded Ben had a net monthly income of $1,803 for purposes of calculating child support.

Julia was thirty-nine years old at the time of trial and working as a self-employed massage therapist. At trial she claimed to be "building a client base for herself" as a massage therapist and that she was "on pace" to make $7,000 in 2005. The district court imputed income to Julia for full-time employment at minimum wage, or $893 per month gross income and thus $714 net income per month for child support purposes, after deducting the same average twenty percent for typical expenses it did for Ben. The court further concluded:

> The visitation schedule to which the parties have consented shows that Ben's court-ordered visitation equals 123.5 days of overnight visitation annually. Ben is therefore not entitled to an extraordinary visitation credit. Child support for Madisen should therefore [be] $342 per month ($1802 x 19.0 percent).

The court thus implicitly denied Ben's request to use the method of computing a child support obligation for each party and then offsetting them, as provided by Iowa Court Rule 9.14 in cases of joint physical care, and instead computed his

child support obligation with Julia as Madisen's "custodial parent" and Ben as Madisen's "noncustodial parent."

Julia filed a motion to reconsider pursuant to Iowa Rule of Civil Procedure 1.904(2) arguing, in relevant part (1) the court should not have assumed a twenty percent reduction in gross income for both parties in calculating child support, (2) the court had apparently switched the rows and columns in the child support guidelines table when calculating support, and (3) the court erred in not taking into account her necessity for child care and the attendant expenses if she were working forty hours per week, fifty-two weeks per year. Ben filed a "Resistance and Response" to Julia's motion, contending the court should have used the offset method to calculate child support. In the alternative he contended that if the court determined not to use the offset method his support obligation should be reduced fifteen percent for extraordinary visitation, arguing he would have Madisen 138 overnights per year.

In ruling on the motions to reconsider the district court (1) corrected its inadvertent transposition of rows and columns from the child support guidelines, setting Ben's monthly child support obligation at $423.70; (2) found there was no evidence in the record documenting the child care expenses claimed by Julia of $4,680 per year or any other specific amount, and thus the twenty percent average used by the child support recovery unit was the fairest estimate; and (3) determined the average number of days per year Ben would have Madisen was the 123.5 agreed upon in the pretrial stipulation, not the 138 argued by Ben, and thus Ben was not entitled to an extraordinary visitation reduction. The court

again implicitly denied Ben's contention that his child support obligation should be calculated in the manner provided by Iowa Court Rule 9.14.

## II. SCOPE AND STANDARDS OF REVIEW.

In this equity case our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith,* 573 N.W.2d 924, 926 (Iowa 1998). In such proceedings, we give weight to the district court's findings of fact, especially when considering the credibility of the witnesses, but we are not bound by those findings. Iowa R. App. P. 6.16(6)(*g*); *In re Marriage of Anliker,* 694 N.W.2d 535, 539 (Iowa 2005).

## III. MERITS.

### A. Appeal.

Ben contends the district court erred in ordering him to pay child support as if he were a noncustodial parent, arguing the parties have joint physical care of Madisen.

Generally, in instances of joint physical care we use the offset method approved in *In re Marriage of Fox,* 559 N.W.2d 26, 28 (Iowa 1997), and followed in *In re Marriage of Swanson,* 586 N.W.2d 527, 529 (Iowa Ct. App. 1998), *overruled on other grounds by In re Marriage of Denly,* 590 N.W.2d 48, 50 (Iowa 1999)). In the offset method each parent should be deemed the noncustodial parent on the guidelines chart for purposes of calculating the support each would owe the other. *Fox,* 559 N.W.2d at 28. One child support obligation is offset against the other parent's child support obligation, rather than requiring a monthly exchange of child support payments. *Id.* Iowa Court Rule 9.14 speaks directly to

the calculation of support when the parties have joint physical care and provides for the computation and offsetting of child support obligations in such cases. Rule 9.14 provides:

> In cases of court ordered joint (equally shared) physical care, child support shall be calculated in the following manner: compute the child support required by these guidelines for each party assuming the other is the custodial parent; offset the two amounts as a method of payment; and the net difference shall be paid by the party with the higher child support obligation unless variance is warranted under rule 9.11.

Here, the parties have joint legal custody. Their joint parenting plan, which is part of their stipulation, provides for "joint legal custody" and the district court's decree orders that "judgment regarding custody and visitation is rendered as provided in the stipulation." However, we are left with the question of whether the decree provides for joint physical care. For several reasons we conclude it does not.

First, the term "joint physical care" does not appear anywhere in the district court's decree, its supplemental decree, its order concerning post-trial motions, or the parties' stipulation and joint parenting plan. The term "joint physical care" is a well-established term, provided and defined by statute. *See* Iowa Code § 598.1(4) (2005). If the court, or the parties, had intended that the parties have joint physical care of Madisen the various documents of the parties and the court would surely have so provided by the use of the term "joint physical care."

Second, "joint physical care" contemplates parenting that at least approaches equally shared parenting. *See* Iowa Ct. R. 9.14. In this case Ben will have Madisen with him overnight an average of approximately one-third of

nights and an average of approximately one-third of the hours of a year. We do not suggest joint physical care requires that parenting time be exactly equal, or nearly exactly equal. Nor do we in this case find it necessary to define the outer limits of what shared parenting may qualify as joint physical care. We do, however, conclude that this case presents facts typical of situations in which one parent, here Julia, has physical care, and the other parent, here Ben, has liberal visitation.

Third, consistent with cases providing for physical care in one parent and liberal visitation in the other, the parties' joint parenting plan refers to "[h]oliday visitation," the district court's decree refers to "visitation . . . as provided in the stipulation," the supplemental decree refers to "Ben's court-ordered visitation," and the court's order on posttrial motions speaks in terms of Ben's "visitation."

We conclude that in determining a child support obligation the district court correctly concluded the parties did not have joint physical care.

**B. Cross-Appeal.**

Julia contends the district court's method of determining net incomes was erroneous because (1) it inappropriately used a twenty percent deduction from gross incomes to determine net incomes, and (2) it attributed to her the ability to work full-time without considering attendant necessary child care expense. For the reasons that follow, we agree.

At trial on the contested matters the parties presented to the district court a certain "pretrial stipulation" with two attached and incorporated child support guidelines worksheets. One worksheet assumed Ben would claim Madisen as a tax dependent and the other assumed Julia would claim her. In resolving the

contested matters the court found Ben's gross income to be somewhat less than as stipulated to by the parties, and imputed to Julia a gross earning capacity substantially greater than her gross income as stipulated to by the parties. Neither party claims error by the court with respect to these findings.

At trial Julia testified her child care expense was three dollars per hour. The parties' child support guidelines worksheets listed a child care expense deduction of $4,680 per year for Julia, apparently based on a thirty-hour week for fifty-two weeks per year. In determining the parties' net incomes the district court did not deduct from what it found to be Ben's gross income and Julia's gross earning capacity amounts for the items allowed by the child support guidelines. Instead, it deducted what it described as "typical average deductible expenses of 20 percent." In ruling on Julia's posttrial motion the court found, in part: "Nothing in the trial evidence documents childcare expenses of $4,680 per year or any other specific amount." It concluded: "The 20 percent average used by the Child Support Recovery Unit reflects average tax deduction," and eighty percent of imputed gross income was the fairest estimate of Julia's present earning capacity.

The district court apparently utilized Iowa Code section 252B.7A(1)(e). This statute provides:

> When the income information obtained pursuant to this subsection does not include the information necessary to determine the net monthly income of the parent, the unit may deduct twenty percent from the parent's gross monthly income to arrive at the net monthly income figure.

By allowing a deduction from gross income the statute implicitly presumes that the child support recovery unit has information from which the parent's gross

income can be determined. We thus conclude the statute is intended to provide for administrative convenience and efficiency in cases in which information concerning appropriate deductions to arrive at net income is lacking.

Our supreme court, in a paternity and support action filed by the State, declined to state that the district court may never estimate the amount of deductions in arriving at a net income figure, and stated the district court could have applied section 252B.7A(1)(e) where a support obligor's claimed deductions were based on less than his actual gross income. *See State ex rel. Shoars v. Kelleher*, 539 N.W.2d 189, 190-91 (Iowa 1995). We believe, however, that the statute ordinarily does not relieve the district court of its responsibility to determine net monthly incomes of the parties to a dissolution of marriage case through appropriate deductions from gross incomes.

Ben and Julia stipulated to their gross incomes and the deduction Julia should be allowed for child care expense. They also stipulated to the amounts of other deductions, based on their stipulated gross incomes, and nothing in the record suggests these amounts were incorrect if the parties' incomes were as stipulated. However, the district court did not accept the parties' stipulations as to their incomes. It appears the court applied a twenty percent deduction from gross incomes because after it had determined a different figure for Ben's gross income and a different figure for Julia's imputed gross income the evidence presented at trial was not adequate to allow it to make proper deductions pursuant to the child support guidelines. We agree the evidence does not show what deduction amounts would be appropriate under the facts found by the court as to the parties' gross incomes. However, this inadequacy of the evidence is

the result not of a failure by the parties to present evidence but rather of the court not accepting certain undisputed evidence. We conclude that under such circumstances the court should have entertained such additional evidence as necessary to determine appropriate deductions rather than resorting to section 252B.7A(1)(e). We thus conclude the court erred in deducting twenty percent from the parties' gross incomes to arrive at net incomes.

We are convinced the question of child support cannot be properly adjudicated on the record before us. Under such circumstances, remand to the district court to redetermine child support based on appropriate deductions from previously determined gross incomes is necessary. *See Locke v. Locke*, 246 N.W.2d 246, 253-55 (Iowa 1976) (remanding to trial court, in dissolution of marriage case in which record was inadequate to determine value of certain assets, to reopen the record for presentation of evidence concerning values of those assets and thereafter address issues of property division, alimony, and attorney fees); *Lessenger v. Lessenger*, 258 Iowa 170, 175, 138 N.W.2d 58, 61 (1965) ("The general rule is where an equity case is not in a condition for a final decree, none will be made by this court, but the case will be remanded."); *See also Cablevision Assocs. VI v. Bd. of Review*, 424 N.W.2d 212, 215-16 (Iowa 1988) (holding, in tax assessment case in which record was inadequate to determine property value, that remand to district court for additional evidence concerning valuation was required).

We are also convinced the district court, having imputed full-time, minimum-wage income to Julia, should have allowed some deduction for necessary child care expense. The appropriate amount of the deduction will of

course depend upon various facts, including but not necessarily limited to whether the imputed income is based upon an assumed forty-hour work week at minimum wage or a work week of substantially less than forty hours employed as a massage therapist at a much higher hourly rate as shown by the evidence, and what hours Ben would have Madisen with him while Julia is working. Absent agreement of the parties additional evidence concerning Julia's childcare expense will in all likelihood be required upon remand.

**C. Appellate Attorney Fees.**

Julia seeks appellate attorney fees from Ben. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Kurtt,* 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). In determining this question, we 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 on appeal. *Id.* Julia successfully defended against Ben's appeal and was successful on her own cross-appeal. After considering relevant factors we conclude Julia is entitled to an award of appellate attorney fees.

## IV. CONCLUSION AND DISPOSITION.

We affirm on Ben's appeal, reverse and remand for further proceedings consistent with this opinion on Julia's cross-appeal, and award Julia $1,500 in appellate attorney fees. Costs on appeal are taxed to Ben.

**AFFIRMED ON APPEAL; REVERSED AND REMANDED ON CROSS-APPEAL.**