

IN THE COURT OF APPEALS OF IOWA

No. 6-472 / 06-0028
Filed August 23, 2006

**IN RE THE MARRIAGE OF TERRY JOSEPH ANGLIN
AND MARLENE ANGLIN**

**Upon the Petition of
TERRY JOSEPH ANGLIN,**
Petitioner-Appellee,

**And Concerning
MARLENE ANGLIN,
n/k/a MARLENE FRANZEN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Clinton County, Mark J. Smith,
Judge.

Marlene M. Franzen (f/n/a Marlene M. Anglin) appeals from the district
court's order reducing child support. **AFFIRMED IN PART, VACATED IN PART,
AND REMANDED WITH INSTRUCTIONS.**

David Millage of Gallagher, Millage & Gallagher, P.L.C., Davenport, for
appellant.

Gary Rolfes of Mayer, Lonergan & Rolfes, P.C., Clinton, for appellee.

Considered by Sackett, C.J., and Huitink and Miller, JJ.

HUITINK, J.

Marlene M. Franzen (f/n/a Marlene M. Anglin) appeals from the district court's modification order reducing Terry J. Anglin's child support obligation.

I. Background Facts and Proceedings.

The April 16, 2001 decree dissolving the parties' marriage awarded Marlene physical care of the parties' two children. Terry was ordered to pay \$975 per month child support. The amount of Terry's child support was based on his \$47,000 annual income, including \$10,000 overtime and Marlene's approximate annual earnings of \$7200.

On April 7, 2005, Terry filed an application for modification of his child support obligations, citing a substantial increase in Marlene's income. The trial court's November 15, 2005 modification order included the following findings of fact:

Based on the testimony of the parties, Terry now earns the sum of \$19.50 per hour, as opposed to \$18.20 per hour at the time of the Decree. However, he has earned substantial overtime in the last three years. His income tax returns indicate that in 2004 he had a gross income of \$48,122, in 2003 he had a gross income of \$44,080, and in 2002 he had a gross income of \$41,840. In the year 2005, Terry has earned income as of September 30, 2005, in the amount of \$41,057.92, which annualizes to be \$54,743.89 Therefore, the Court finds that Terry's average gross income based on the current overtime and in view of the last three years' income and for the nine months of 2005 is \$47,196. . . . Marlene currently is employed by a dentist who has guaranteed her 28 hours per week at the rate of \$30 per hour. She started this employment in August of 2002 and made \$52,000 last year. Marlene indicates that since she is only guaranteed 28 hours per week and the dentist is having difficulties this year, she will earn less than she has earned in the past. The Court finds that this testimony is speculative and further finds that based on the past and present history of income, she averages \$51,000 per year in gross income.

The trial court rejected Marlene's argument that Terry's income should also include the value of a rent-free home he is furnished by his parents. The court also rejected Marlene's demand for more child support to cover the costs of the children's dance lessons and parochial school expenses. Based on those findings, the court reduced Terry's child support obligation to \$813.26 per month, effective July 20, 2005.

On appeal, Marlene argues the following:

- I. The court should not have used income averaging to determine Terry's income for purposes of calculating child support.
- II. The court erred in not considering the benefits Terry receives that are in addition to his income.
- III. The court failed to consider the extraordinary expenses of the children in calculating child support.
- IV. The court should not have made the child support retroactive.

II. Standard of Review.

"The standard of review accorded applications to modify support orders is *de novo*." *In re Marriage of Robbins*, 510 N.W.2d 844, 845 (Iowa 1994). We are not bound by the findings of the trial court, but we give those findings some weight, especially as to the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

III. Income Averaging.

"[A] determination of the net monthly income of the custodial and noncustodial parent" is necessary in applying the guidelines. *In re Marriage of Kupferschmidt*, 705 N.W.2d 327, 332 (Iowa 2005). In determining the income of a person who has fluctuating monthly income, "it generally is best to use an average of income from a period that accurately reflects the fluctuations in income." *Robbins*, 510 N.W.2d at 846. "[I]ncome averaging is not supported by

the facts where the noncustodial father was employed at a wage and the fluctuations in his income were the result of earnings from prior employments.” *Kupferschmidt*, 705 N.W.2d at 333 (quoting *In re Marriage of Hagerla*, 698 N.W.2d 329, 332 (Iowa Ct. App. 2005)). Where variations in income “come from the same long-term employment,” income averaging may be necessary. *Kupferschmidt*, 705 N.W.2d at 333. Overtime wages may cause the fluctuation in income. “Overtime wages are within the definition of gross income to be used in calculating net monthly income for child support purposes.” *Id.* We have previously concluded that a court does not have to “steadfastly adhere to the appropriate child support amount as determined by the guidelines using overtime pay if the amount results in injustice between the parties.” *Id.* Moreover, “a parent’s child support obligation should not be so burdensome that the parent is required to work overtime to satisfy it.” *Id.*

The record includes evidence from Terry’s employer indicating that planned shift changes will reduce the amount of overtime required or available to its employees. Although Terry’s annualized income for 2005, including overtime earnings through September 2005, would have been approximately \$54,000, the prospects for his continued earnings in that amount are uncertain. We, like the trial court, find the variations in Terry’s overtime compensation justify the use of a three-year average rather than annualized income for 2005. We affirm on this issue.

IV. Imputed Income.

The child support guidelines are to be followed unless their application would lead to an unjust or inappropriate result. *In re Marriage of Will*, 602

N.W.2d 202, 205 (Iowa Ct. App. 1999). “There is a rebuttable presumption the amount of child support determined according to the guidelines is the correct amount of child support to be awarded.” *Id.* at 205 (citing *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992)). The amount may be increased or reduced if necessary “to provide for the needs of the children and do justice between the parties” under the specific facts of the case. *Will*, 602 N.W.2d at 205.

Here, Terry lives in a home on his parents’ property and does not pay rent. In its ruling the district court found that there was no evidence concerning the rental value of the property. There was also evidence Terry buys groceries for his parents and helps maintain and renovate the property. The district court also found that Marlene receives a benefit from her boyfriend living with her and her daughters. Marlene does not have to pay for after-school daycare because Marlene’s boyfriend cares for the children after school when she is unavailable. The district court declined to impute income to either Terry or Marlene, because their current living situations offset one another. We agree and affirm on this issue.

V. Extraordinary Expenses.

Marlene argues the expenses for the children’s dance lessons and parochial school education justify an award of additional child support. We disagree.

Marlene must overcome the presumption that the amount of child support determined according to the guidelines is the correct amount of child support. *Id.* “[T]he guidelines balance the needs of the children against the legitimate needs

and expenses of the payor parent.” *In re Marriage of Gordon*, 540 N.W.2d 289, 292 (Iowa 1995). “They take into account the reasonable costs of living, including educational expenses, for dependent children.” *Id.* We have previously determined that “expenses for clothes, school supplies and recreational activities are considered under the guidelines, and a separate support order covering such expenses is improper absent a finding that the guidelines amount would be unjust or inappropriate.” *Id.* Attendance at a nonpublic school does not necessarily require an upward deviation from the child support guidelines. *In re Marriage of Fite*, 485 N.W.2d 662, 665 (Iowa 1992).

Marlene has failed in her burden to overcome the presumptive correctness of the guideline amount of child support awarded by the district court. The expenses she cites as extraordinary fall within the contemplation of the guidelines. We affirm on this issue.

VI. Retroactive Child Support.

In *In re Marriage of Barker*, 600 N.W.2d 321, 323-24 (Iowa 1999), the court said, “our cases have consistently held that although a support order may be retroactively increased, it may not be retroactively decreased.” (citations omitted). We accordingly vacate that portion of the trial court’s decree retroactively reducing Terry’s child support and remand to the district court for entry of an order establishing the effective date of Terry’s reduced child support obligation.

Costs of this appeal are assessed to Terry.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.