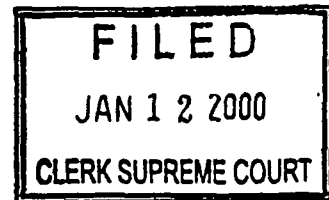


IN THE COURT OF APPEALS OF IOWA

No. 1999-259 (9-489) / 98-1426
Filed January 12, 2000

**IN RE THE MARRIAGE OF SANDRA JEAN THEISEN
AND RONALD JOSEPH THEISEN**



Upon the Petition of
SANDRA JEAN THEISEN,

Appellant,

And Concerning
RONALD JOSEPH THEISEN,

Appellee.

Appeal from the Iowa District Court for Dubuque County, Lawrence H.
Fautsch, Judge.

Sandra Jean Theisen appeals the spousal support provisions of the parties'
dissolution decree. **AFFIRMED AS MODIFIED.**

Robert L. Day, Jr., Dubuque, for appellant.

Frank D. Gilloon, III of Fitzsimmons, Beckman & Gilloon, Dubuque, for
appellee.

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

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ZIMMER, J.

The petitioner-appellant, Sandra Theisen, appeals the spousal support provisions of the parties' dissolution decree. She claims the district court erred in retroactively terminating her accrued temporary support. She also requests trial and appellate attorney fees. We affirm the decree as modified.

Background. Ronald and Sandra Theisen married in 1976. Sandra filed a petition for dissolution of marriage in January 1996. In February 1996 the district court ordered Ronald to pay temporary child support. In October 1996 Sandra filed a request for temporary spousal support, alleging her full-time employment had been terminated and she was working only part time. Ronald resisted the request. The district court entered a temporary order requiring Ronald to pay \$600 per month in spousal support, but reserved "the right to make corrections to this at time of final Decree in the event Petitioner's termination of employment was voluntary." Sandra filed applications for rule to show cause in December 1996 and February 1997, claiming Ronald had violated the temporary order by failing to pay temporary support. In February 1997 after a hearing, the district court found Ronald in contempt and gave him a suspended sentence on the condition he liquidate a specific investment account and pay off \$3600 of temporary support accrued through March 1997.

Ronald filed a motion in March 1997 requesting his temporary support obligation be retroactively adjusted because of a miscalculation of his net income. There is no indication any action was taken on this motion. After being set for trial several times in 1997, the case was dismissed for want of prosecution in January 1998

under Iowa Rule of Civil Procedure 215.1. Later that month the case was reinstated and set for trial in February 1998. Following trial in February and March 1998, the court entered a short decree dissolving the marriage but leaving in place all temporary orders until it entered a supplemental order resolving all disputed issues.

On April 2, 1998 the court issued a supplemental decree. The court cited the language from the temporary support order quoted above. Its findings include:

The Petitioner is requesting alimony. There appear to be two relevant matters in this regard. First, did the Petitioner terminate her full-time employment at Amicare at the Respondent's request or did she terminate her full-time position simply because she did not want to work full time. The Court concludes that the Petitioner did not leave her full-time position at Amicare at the Respondent's request that she do so in order to assist him in his income tax business but rather that she terminated her full-time employment at Amicare because she did not desire to work on a full-time basis.

* * *

Respondent stated that Petitioner worked full-time for several months but then went part time shortly after the marriage. She did not work on a full-time basis until 1992 at Amicare. She continued to work full time at Amicare in 1993. She grossed approximately \$26,000 per year while working full time at Amicare.

* * *

The court concludes for the purpose of determining the appropriateness of alimony that the Petitioner has the ability and the opportunity to work full time as a registered nurse.

In its ruling, the court made only the following conclusion concerning alimony:

As to the issue of alimony, the Court has considered all the factors set out under Iowa Code §598.21(3). Based upon the Petitioner's earning capacity and the property division herein, the Court concludes that the Petitioner is not entitled to any spousal support.

Sandra filed a rule 179(b) motion, requesting the court reconsider its decision to deny permanent alimony. Sandra additionally filed a garnishment action, seeking

to collect \$7800 in accrued temporary support. Ronald filed an application to quash the garnishment, quoting the finding in the supplemental decree that Sandra terminated her full-time employment because she did not desire to work full time and stating:

The order granting temporary spousal support was reserved to final hearing; and the award was conditioned upon a finding that Petitioner's termination of employment was not voluntary.

Ronald also filed a rule 179(b) motion, more than thirty days after the supplemental decree was entered. His motion requested clarification of the temporary support issue.

Sandra resisted Ronald's application to quash the garnishment. She stated the employment referred to in the temporary order was a short-term, full-time position in an administrative job, which she lost in 1996 during the pendency of the dissolution action, *not* the Amicare position she had in 1992-93. She also claimed, since the temporary support due had been reduced to "full and complete judgment," that there was no authority for taking away her rights to the judgment amount.

The district court held a hearing on both 179(b) motions and concluded Ronald was obligated to pay \$3600 in temporary support set forth in the February 1997 order. However, the court also ruled it would be unfair to require him to pay additional temporary support accrued after the February 1997 ruling because Ronald's March and October 1997 requests for a hearing on the temporary support were denied. The court also denied Sandra's request for attorney fees. Sandra appealed.

Claims on appeal. Sandra claims the district court erred in retroactively terminating Ronald's support obligation which accrued after February 1997. She contends the district court had no authority to rescind the accrued judgments for temporary support retroactively. She also argues that even if it did have authority, there was no evidence in the record to support its action because the "voluntary termination" findings in the decree did not relate to the position contemplated in the temporary support order. Sandra also requests an award of trial and appellate attorney fees.

Discussion. We review cases in equity de novo. Iowa R. App. P. 4. Iowa Code section 598.14 specifies how a temporary order is made and modified in a dissolution. Modifications are based on "demonstrating a substantial change in the circumstances." Iowa Code § 598.14 (1997). It further states, "If the order is not so modified it shall continue in force and effect until the action is dismissed or a decree is entered dissolving the marriage." *Id.*

The order setting temporary spousal support mentions the issue of voluntary termination, but does not specify which job. However, in her request for temporary support, Sandra stated:

At the commencement of this divorce, Petitioner was employed, but was receiving limited hours of employment. For approximately one month, the Petitioner obtained full-time employment at a good income, but that employment was terminated.

It is clear the district court intended to consider Sandra's full-time employment in assessing the propriety of spousal support. The testimony offered at trial

concerning this full-time employment was that Sandra was told she “wasn’t working out.” She requested and was granted the opportunity to resign rather than have a firing on her record. Because her resignation was in lieu of dismissal, her termination was not voluntary. Consequently, the district court’s reserved “right to make corrections” never became active. Under the facts in this record, there was no basis for the court to modify or terminate Sandra’s spousal support before the final determination regarding permanent support in the dissolution decree. We therefore modify the trial court’s decision and reinstate the temporary spousal support order so that Ronald’s obligation to pay support runs from the temporary support order until the supplemental decree of dissolution.

Even if we did not find Sandra’s termination was involuntary, we would reinstate the support award because the court did not base its determination that Ronald did not owe support beyond the amount set in the February 1997 hearing on the right-reserved language in the temporary order. Rather, the court expressly based its decision on the fact that Ronald’s two requests for hearing on the temporary support award were never addressed by the court.

Sandra claims the trial court abused its discretion in not awarding her any attorney fees. Ordinarily an award of attorney’s fees rests in the sound discretion of the trial court and we will not disturb it on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Given the trial court’s division of property and Sandra’s earning capacity, we find no abuse of discretion.

Finally, Sandra seeks an award of appellate attorney fees. 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 Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). 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 trial court's decision on appeal. *In re Marriage of Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). We award Sandra \$500 in appellate attorney fees.

AFFIRMED AS MODIFIED.

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