

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF STEPHEN P. HANSEN
AND JANE T. MEREDITH

FILED

FEB 25 1987

SENK SUPREME COURT

Upon the Petition of	)	
STEPHEN P. HANSEN,	)	
Petitioner-Appellant,	)	62
	)	Filed February 25, 1987
And Concerning	)	
JANE T. MEREDITH,	)	<u>6-431</u>
	)	<u>86-69</u>
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Polk County (Eq. No. CD49-28819),
Rodney J. Ryan, Judge.

The petitioner appeals from a district court award of attorney fees to the respondent in her successful action to vacate a dissolution decree. **REVERSED.**

Steven C. Jayne of Des Moines, for petitioner-appellant.

James W. Carney and Rebecca C. Reznicek of Carney, Hudson, Williams
& Green of Des Moines, for respondent-appellee.

Considered by Oxberger, C.J., Snell and Hayden, JJ.

OXBERGER, C.J.**63**

Petitioner Stephen P. Hansen appeals from a judgment entered in favor of respondent Jane T. Meredith for \$3,760.62 awarded as attorney's fees for the respondent's representation in her successful action to vacate the decree dissolving the parties' marriage. The question presented in this appeal is whether section 598.11 of the Iowa Code authorizes a trial court to order the payment of fees and costs incurred in a proceeding to vacate a dissolution decree. We conclude that it does not, and reverse the judgment of the district court.

The underlying decree dissolving the parties' marriage was entered on May 21, 1985. The decree granted the petitioner sole custody of the parties' minor child. Several months after the entry of the decree, the respondent filed a motion to vacate pursuant to Iowa Rule of Civil Procedure 252(b), in which she alleged that the decree had been obtained without her knowledge and by fraud. The district court granted the motion to vacate and transferred temporary custody of the parties' child to the respondent. In addition, the court ordered the petitioner to pay \$3,760.62 in attorney's fees sustained by the respondent in maintaining the motion.

The petitioner argues that the trial court had no authority to order the payment of attorney's fees incurred in connection with the motion to vacate because such an award is not explicitly authorized by statute. The courts of this state have repeatedly recognized that attorney's fees are not allowable in the absence of a statute or an agreement by the party to be charged. Bethards v. Shívver, Inc., 355 N.W.2d 39, 47 (Iowa 1984); In re Marriage of Jensen, 251 N.W.2d 252, 254 (Iowa 1978). Although there is no statutory provision explicitly allowing the recovery of attorney's fees in an action to vacate a dissolution decree, the respondent argues that such authority inheres in the language of section 598.11. That section empowers a court to "order either party [in a dissolution

proceeding] to pay . . . a sum of money for the separate support and maintenance of the other party . . . and to enable such party to prosecute or defend the action." Iowa Code § 598.11 (1985). The respondent asserts that, in maintaining the motion to vacate, she was in essence "defending the action" within the meaning of section 598.11. We cannot agree.

Although a number of jurisdictions have recognized the theory espoused by the respondent, see 24 Am.Jur.2d Divorce and Separation § 595 n.97 (1983), the prevailing majority rule is that, absent an explicit statutory provision, a party may not obtain an allowance for attorney's fees in a suit brought to impeach the validity of a dissolution decree. 27B C.J.S. Divorce § 344 (1986). We think that the latter rule is prevalent in this jurisdiction.

Although the supreme court has not addressed the precise issue presented in this case, the court did consider, albeit tangentially, the propriety of a fee award in an action to vacate a dissolution decree in In re Marriage of Maskel, 225 N.W.2d 115 (Iowa 1975). At issue in Maskel was a trial court's decision vacating the division of property formulated in the original decree and the court's entry of a different property division. Id. at 116. The parties appealed and cross-appealed the court's decision to vacate the original decree and the court's redistribution of the property. Id. Mrs. Maskel requested attorney's fees both for the costs incurred in setting aside the original decree and in appealing from the court's resolution of the property division. The court held that she was not entitled to recover fees in the action to set aside the original decree. Id. at 120.

Similarly, we think that the respondent's contention is analogous to requests for the recovery of attorney's fees in modification proceedings prior to the enactment of Iowa Code section 598.36. Section 598.36 now explicitly provides for the recovery of fees in modification actions. Before section 598.36 was enacted, however, parties frequently sought to recover fees in modification proceedings

under section 598.11. See Arnold v. Arnold, 258 Iowa 850, 855, 140 N.W.2d 874, 880 (1966). The supreme court repeatedly rejected such claims, noting that section 598.11 did not explicitly provide for the recovery of attorney's fees in such actions. Id See also Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974) (attorney's fees available in contempt proceedings because recovery is explicitly provided for in section 598.24).

In light of our current policy disallowing the recovery of attorney's fees absent explicit authorization, we decline from extending section 598.11 to actions attacking the validity of dissolution decrees. Our existing case law is contrary to the respondent's urged extension of the statute, and accordingly, we conclude that the trial court erred in awarding her attorney's fees in the present case. We reverse the judgment of the trial court, and conclude that both parties are responsible for their individual costs incurred in connection with this appeal.

REVERSED.