

IN THE COURT OF APPEALS OF IOWA

457

No. 1-135 / 90-1333

IN RE THE MARRIAGE OF JUDITH MAXINE WILCOX AND
CARLYLE DUANE WILCOX

Upon the Petition of

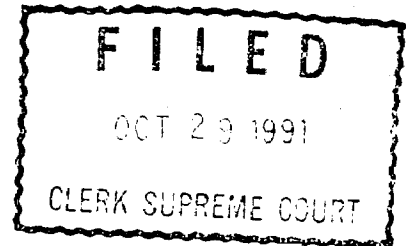
JUDITH MAXINE WILCOX,

Appellee,

And Concerning

CARLYLE DUANE WILCOX,

Appellant.



Appeal from the Iowa District Court for Linn County,
Larry J. Conmey, Judge.

Husband appeals a district court modification action
declining to require the wife to pay child support.
REVERSED AND REMANDED.

David P. McManus and William Olinger of Olinger and
McManus, Cedar Rapids, for appellant.

Eugene J. Kopecky, Cedar Rapids, for appellee.

Considered by Oxberger, C.J., and Donielson and
Sackett, JJ.

OXBERGER, C.J.

Judith and Carlyle Wilcox were divorced in 1980. The dissolution decree placed the parties' four children in Carlyle's primary physical care. Judith was not required to pay any child support, due to her limited resources and Carlyle's higher earning capacity. Carlyle was awarded the marital residence, subject to a lien in favor of Judith in the amount of \$11,565.

In February 1990 Carlyle filed the present application to modify the dissolution decree. He asked that Judith pay child support for the two children who remained unemancipated. At that time, one of the two children was sixteen years old, and the other was a nineteen-year-old college student. Carlyle requested that Judith pay child support either directly or by accepting a reduction in her lien against the marital residence.

After a hearing, the district court denied Carlyle's request for a modification. The district court noted that Judith's employment income had risen only modestly (from \$15,157 to \$16,185) since a 1985 modification order in which a court had previously declined to award child support to Carlyle. The district court also noted that Judith had voluntarily provided support directly to the children in various ways over the years.

Carlyle has appealed from the district court order refusing to modify the decree. He contends there are

sufficient changes of circumstance, including his son's increased educational needs and Judith's 1987 remarriage to a man who earns over \$44,000 per year. Carlyle requests attorney's fees on appeal.

It is well established that both parents have a legal obligation to support their children. In re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1976). The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). Iowa Code section 598.21(4)(a) states in relevant part:

Upon every judgment of...dissolution...the court may order either parent or both parents to pay an amount reasonable and necessary for supporting a child.

Iowa Code section 598.21(8) provides in pertinent part:

The court may subsequently modify orders made under this section when there is a substantial change in circumstances. In determining whether there is a substantial change in circumstances, the court shall consider the following:

- a. Changes in the employment, earning capacity, income or resources of a party.
- d. Changes in the number or needs of dependents of a party.
- g. Remarriage of a party.
- h. Possible support of a party by another person.
- i. Changes in the ...educational needs of a child whose support is governed by the order.

CHILD SUPPORT: We first consider whether Judith should pay child support. The trial court in making its determination focused upon the modest increase in Judith's income and her voluntary contributions to the minor

children. The court concluded there was no material or substantial change in circumstances not contemplated by the court in the original dissolution or in the modification ruling of July 2, 1985. We disagree.

The primary concern for the father in this case is support for their son's college education. The Iowa legislature has said that a change in a child's educational needs shall be considered in determining whether there is a substantial change in circumstances sufficient to modify a decree. Iowa Code §598.21(8)(i). The Iowa Supreme Court has held that a child's decision to attend college was a sufficient material, unanticipated change of circumstances to warrant a modification of an original decree to provide support. In re Marriage of Peiper, 369 N.W.2d 439, 440 (Iowa 1985). Iowa Code section 598.1(2) defines "support" in part as:

...support for a child who is between the ages of eighteen and twenty-two years who is...in good faith, a full-time student in a college, university, or community college....

No one disputes that Dustin has been and is in good faith a full-time student at the University of Iowa.

Judith argues that because her financial condition has only modestly changed there is no substantial change in circumstances. She points to the increase in the father's income and argues her income since 1985 had only increased from \$15,157 to \$16,185 in 1989. She relies upon Mears v. Mears, 213 N.W.2d 511 (Iowa 1973), for the proposition that

where a change in financial condition of one or more parties is relied upon as a basis for a modification of child support provisions, it must be substantial. Carlyle asserts that a consideration of changed financial conditions includes not only the employment income of a spouse but certain relevant considerations provided for under Iowa code section 598.21(8). We agree. Relevant sections from section 598.21(8) provide:

- a. Changes in the...resources of a party.
- g. Remarriage of a party.
- h. Possible support of a party by another person.
- i. Changes in the...educational needs of a child....

In 1987, Judith remarried. Her second husband had a gross income of \$44,901. Judith's remarriage provided a substantial change in the household revenues. While her new spouse has no obligation to support her children, it is proper to consider Judith's overall financial condition in determining child support. See Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974). Judith's overall financial condition includes her second husband's contributions to their home. Absent the remarriage, her costs of living would have been entirely Judith's responsibility. The diminishing of that responsibility by the remarriage has the effect of creating more available resources for Judith. We see no reason to limit an inquiry into the changes of a person's financial condition to their employment income alone.

INDEPENDENCE OF THE CHILD FROM THE CUSTODIAL PARENT:

We next consider whether a spouse can be required to pay child support for educational needs where the child has filed a separate income tax return. Judith argues that she should not be responsible for support of her son's education because he is no longer a dependent of Carlyle. In support of her argument, she asserts Dustin has filed a separate income tax return and considers himself independent for financial purposes.

In In re Marriage of Pieper, 369 N.W.2d 439 (Iowa 1985), the issue was considered whether a court has authority to modify for college expense if the child has become of age before the modification is requested. In that case, a father's child support obligations had terminated because the child had reached the age of majority. The father asserted that because the child had reached majority, the court lacked authority to modify child support for college expenses. We find the principle behind Judith's argument to be similar.

When the dissolution of the marriage took place, the court could have included a special provision for educational costs of the children. The dissolution court could have then modified the support upon a proper showing, at any time until Dustin became twenty-two. We see no reason why modification for child support could not be done at any time until Dustin is twenty-two years of age. His

current status as a taxpayer and whether he considers himself independent financially is not determinative of Judith's responsibility to provide support for his education.

The trial court, in determining there was no material or substantial change in circumstances, focused upon the voluntary support Judith provided for the minor children. That support consisted of cosigning for loans, helping with car repairs, gasoline, spending money, buying clothes, school pictures, graduation announcements, and prom money. Carlyle asserts that such voluntary contributions should not be credited as expenses to mitigate her responsibility for child support. He argues were Judith to have been ordered originally to pay child support she would have been prevented by section 598.22 from receiving such credit. Section 598.22 says in part:

Payments to persons other than the clerk of the district court and the collection services do not satisfy the support obligations created by the orders or judgments....

We find Carlyle's argument persuasive. Judith's voluntary contributions do not relieve her from the responsibility to help with the costs of her son's education. The voluntary contributions to the children as noted above can hardly be considered an offset for the costs associated with a college education. We therefore find the trial court erred in holding there was no material or substantial change in circumstance. We reverse the trial court.

Based upon the overall financial conditions of Carlyle and Judith, we direct Judith to pay twenty-five percent of Dustin's college related expenses beginning with his enrollment as a freshman and extending to the time he graduates or reaches the age of twenty-two, whichever occurs first. We arrive at this percentage based on the ratio of incomes of the parties. Dustin's college expenses are to be measured by the cost to a public university in the state of residence. See In re Marriage of Richards, 439 N.W.2d 876, 880 (Iowa App. 1989); In re Marriage of Lieberman, 426 N.W.2d 683, 686 (Iowa App. 1988).; In re Marriage of Frink, 409 N.W.2d 477, 481 (Iowa App. 1987).

Iowa does allow child support to be ordered paid or increased as of the date of the filing of an application for modification. See Willcox v. Bradrick, 319 N.W.2d 216, 219 (Iowa 1982); Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973); Cappel v. Cappel, 243 Iowa 1363, 1367-68, 55 N.W.2d 481, 482-83 (1952).

We therefore direct that Judith's child support is to be measured as of February 7, 1990, the date upon which the application for modification was filed. A future modification of child support for Tom's educational need is to remain available in the event he should decide to seek further education.

Judith's financial statement of March 28, 1990, showed a net income of \$876. Carlyle's net income was \$1,163.

Based on the Supreme Court Child Support Guidelines in effect from February 7, 1990 through December 1990, we direct Judith to pay child support in the amount of \$130 per month for the support of her youngest son Tom for the period from February 7, 1990 through December 1990. We direct Judith to pay child support in the amount of \$196 per month for the support of Tom from the period of December 31, 1990, until he reaches the age of majority or becomes emancipated. This increase reflects the Supreme Court Child Support Guidelines which took effect December 31, 1990.

SUPPORT OFFSET BY JUDITH'S LIEN: We next consider whether Judith's responsibility to pay child support should be offset by her lien on the parties' homestead. Equity in a house may be charged for child support payments where the party whose equity has been set off is unable to pay the payments. See In re Marriage of Vetterneck, 334 N.W.2d 761 (Iowa 1983). During trial, Judith stated she was willing to have child support taken out of the lien that was due her. We find, in the event Judith is unable to pay her designated amount of support for Dustin's college expenses, she may offset her payments with the lien. In addition, she may offset child support payments for Tom which are in arrearage with the lien, provided again she cannot pay otherwise.

ATTORNEY'S FEES: The controlling factor in fixing attorney fees is ability to pay. In re Marriage of Muelhaupt, 439 N.W.2d 656 (Iowa 1989). Each party will pay his or her own attorney fees. Costs are taxed to the appellee.

REVERSED AND REMANDED.

Donielson, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority the record supports modifying the decree to provide Judith pay one-fourth of the college expenses at a public university in the state of residence for the nineteen-year-old. But I would order the college expenses be paid, and they not be allowed to be used to discharge the lien.

I do not find Carlyle has made the requisite showing to modify support for the sixteen-year-old. I disagree with the majority's modification of support for the sixteen-year-old.