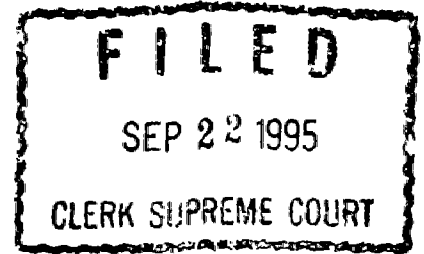


IN THE COURT OF APPEALS OF IOWA

No. 5-313 / 93-1776



**IN RE THE MARRIAGE OF DENNIS R. DYER
AND MELODY J. DYER**

Upon the Petition of
DENNIS R. DYER,

Appellee/Cross-Appellant,

And Concerning
MELODY J. DYER,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Melody Dyer n/k/a Laake appeals and Dennis Dyer cross-appeals a modification
of the parties' dissolution decree: **AFFIRMED AS MODIFIED.**

Bob Siddens of Siddens Law Office, Des Moines, for appellant.

Robert a. Wright, Jr., of Wright & Wright, Des Moines, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

HUITINK, J.

Melody Dyer n/k/a Laake appeals and Dennis Dyer cross-appeals a modification of the parties' dissolution decree. We affirm the decree as modified.

Dennis and Melody Dyer's marriage was dissolved in 1984. At that time, Dennis received primary care of the parties' three children: Jason, born May 11, 1977; Benjamin, born December 3, 1978; and Christmas, born December 13, 1980. Melody was ordered to pay \$875 child support per month. This amount was reduced to \$224 per month by court order in 1985 pursuant to agreement of the parties.

Beginning in 1985, the parties periodically engaged in disputes regarding the amount of child support Melody was to pay to Dennis. Dennis claims that from 1985 through 1993 Melody refused to pay child support but would pay for the children's expenses as she felt they were warranted. Dennis also contends that Melody threatened to seek custody of the children if he tried to enforce the child support order and that, as a result, he did not seek the support allocated by the order. Melody denies making such threats and says instead the parties had an oral agreement that she would pay one-half of the children's day-care and other expenses such as clothing and groceries. Dennis denies the existence of such an agreement.

Because of the ongoing conflict between the parties, Jason and Benjamin have become alienated from Dennis. In 1992 Jason began living with Melody, and Benjamin followed in 1993. Dennis then filed an application for rule to show cause alleging

Melody was delinquent in her child support. He later filed an application for modification requesting sole custody, supervised visitation, and increased support. Melody filed a counterapplication for modification requesting custody.

Pursuant to agreement by the parties the district court awarded primary care of Christmas to Dennis and primary care of Jason and Benjamin to Melody, with visitation for the parties. Melody was ordered to provide medical insurance for the three children and ordered to pay \$14,403 as back child support for the period from October 15, 1985, to August 31, 1993. Both parties agreed that this amount accurately reflected the delinquent support, \$21,280, with \$7,237 credit given for prior payments. The court further determined that while the parties were also obligated to pay child support to each other, their obligations offset one another. Thus, neither party was ordered to pay current child support. Finally, the district court ordered that each party pay his or her own attorney's fees.

Our review in equity actions is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially when considering the credibility of the witnesses, but we are not bound by them. Iowa R. App. P.(f)(7).

Melody contends the district court erred in finding that she owes Dennis \$14,403 in delinquent child support. She claims the alleged oral agreement between the parties relieves her obligation to pay the back child support. We agree with the district court that no such agreement existed between the parties. Our review of the

trial record shows that Melody was unable to establish any definitive and firm agreement relieving her of her duty to pay the delinquent support. We further recognize the effect of Iowa Code section 598.21(9)(l) (1991) on Melody's contention. The section provides: "A modification of a support order entered under . . . this chapter between parties to the order is void unless the modification is approved by the court, after proper notice and opportunity to be heard is given to all parties to the order, and entered as an order of the court." This provision establishes that even if Melody and Dennis did have an agreement in lieu of child support, its enforcement would be precluded by statute. *See In re Marriage of Harvey*, 523 N.W.2d 755 (Iowa 1994).

Melody further asserts that her alleged agreement with Dennis is enforceable on a theory of promissory estoppel. We, like the district court, disagree. The Iowa Supreme Court has recently held that private child support agreements are occasionally enforceable through promissory estoppel, but only in the rarest cases. *In re Marriage of Harvey*, 523 N.W.2d at 756. Iowa courts have established that for promissory estoppel to apply there must be (1) a clear and definite oral agreement, (2) proof that the plaintiff acted to his detriment in reliance thereon, and (3) a finding that the equities entitle plaintiff to relief. *Merrifeld v. Troutner*, 269 N.W.2d 136, 137-38 (Iowa 1978) (quoting *Johnson v. Pattison*, 185 N.W.2d 790, 795 (Iowa 1971)). The burden of proving promissory estoppel is on the party asserting it. *Colthurst v. Colthurst*, 265 N.W.2d 590, 598 (Iowa 1978).

Here, Melody has not sustained her burden. She has failed to show the existence of an agreement between herself and Dennis and has provided the court with no evidence that she relied on any "agreement" or that Dennis was unjustly enriched. In fact, the district court's \$14,403 award was adjusted to credit Melody for the support she gave the children from 1985 through 1993. Therefore, promissory estoppel is not an appropriate remedy in this case.

Melody asserts on appeal and Dennis on cross-appeal that the district court erred in its determination of their respective child support obligations. We, following our de novo review, find the district court's determination on this issue necessitates modification on appeal.

Our child support guidelines are to be strictly followed unless their application would lead to an unjust or inappropriate result. *In re Marriage of Swan*, 526 N.W.2d 320, 325 (Iowa 1995) (quoting *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994)). We first determine the amount owed under the guidelines and decide whether an adjustment of that amount is warranted. In determining the amount each party owes we begin by determining the amount of each party's net monthly income. Dennis's only source of income is \$929 per month he receives from social security for his disability. Social security disability is properly considered in determining child support. *In re Marriage of Lee*, 486 N.W.2d 302, 305 (Iowa 1992).

With regard to Melody's child support, we agree with the district court that the proper income basis for determining her support obligation is \$1276. This is the amount of her net monthly income she earned while working at Ingram Industries before quitting her employment in June 1993. The record indicates Melody quit because Dennis successfully garnished her wages at Ingram to collect past due child support. A party voluntarily leaving his or her employment cannot use the resulting reduction of income as a basis for paying less child support. *In re Marriage of Dawson*, 467 N.W.2d 271, 275 (Iowa 1991); *In re Marriage of Wahlert*, 400 N.W.2d 557, 560 (Iowa 1987). We, like the district court, reject Melody's assertion that her child support obligation should be based on something less than her earnings at Ingram.

Application of these income figures to the applicable guidelines indicates Dennis should pay \$278 and Melody should pay \$290. This determination does not, however, end our inquiry. We must next determine whether there are circumstances requiring an equitable adjustment of these amounts.

All of the parties' children receive \$161 a month as the result of Dennis's disability. A child support award may be offset by a child's social security benefits during the period in which the benefits are received. *Newman v. Newman*, 451 N.W.2d 843, 844 (Iowa 1990). We believe equity requires Dennis's support obligation be offset by the \$322 benefit Melody receives for the two children residing with her. As a result, Dennis owes no child support

Melody's departure from Ingram resulted in a substantial increase in the cost of medical insurance for the children. Although she is entitled to maintain coverage, the cost of coverage has risen from \$119 per month to \$298 per month. The child support guidelines provide:

[a]ny premium cost of a health benefit plan or medical support plan which has not been considered in computing net monthly income may be considered by the court as a reason for varying from the guidelines.

Melody has been ordered to provide medical insurance for the children. The record indicates that only \$119 of the \$298 of its monthly cost was considered in computing her monthly net income. We, pursuant to the foregoing guidelines provision, conclude Melody's \$290 support obligation should be reduced by the \$179 additional premium cost she is required to pay. Melody's child support is accordingly set at \$117 per month.

We, contrary to the district court's conclusion, do not find it appropriate to offset Melody's obligation by the amount of Dennis's obligation to her. As we have already determined, Dennis owes no child support because of the children's social security benefits. There is therefore nothing to offset.

Finally, both parties claim a right to attorney's fees in this matter. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

We agree with the district court that neither party has the ability to pay for the significant attorney's fees incurred throughout the course of this litigation. Thus, we find that each party should be responsible for his or her own attorney fees as well as one-half of the court costs.

In summary, we find that Melody is required to pay Dennis \$14,403 in delinquent child support and that Dennis is not estopped from collecting this amount. We further find that Dennis currently owes Melody no child support and that Melody currently owes Dennis \$117 per month for support of Christmas. Finally, we find each party responsible for his or her attorney's fees and one-half of the court costs.

We have carefully considered all of the parties' claims and find them to be either covered by this opinion or without merit. The decision of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.