**IN THE COURT OF APPEALS OF IOWA**

No. 4-466 / 94-315

FILED
FEB 28 1995
CLERK SUPREME COURT

**IN RE THE MARRIAGE OF MARY RUTH GOURLEY AND DENNIS DUANE GOURLEY**

Upon the Petition of
**MARY RUTH GOURLEY,**

Petitioner-Appellee,

And Concerning
**DENNIS DUANE GOURLEY,**

Respondent-Appellant.

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Appeal from the Iowa District Court for Allamakee County, K.D. Briner, Judge.

Respondent appeals from a judgment of the district court modifying various economic provisions of the parties' dissolution decree. **AFFIRMED.**

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.C., Decorah, for appellant.

Richard D. Zahasky, Decorah, for appellee.

Heard by Donielson, C.J., Cady, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order of the Iowa Supreme Court.

**CADY, J.**

This is an appeal from the child support and attorney fee provisions of an order by the district court modifying the parties' prior decree for dissolution of marriage. On our de novo review, we affirm the trial court.

The sixteen-year marriage between Dennis and Mary Gourley was dissolved in 1991. Under the decree, Mary received physical custody of the parties' two children, John, born April 17, 1979, and Matthew, born August 6, 1982. Dennis was ordered to pay monthly child support for each child of $420.

Dennis is a veterinarian. At the time of the original decree, he was a partner in a veterinary practice in Waukon, Iowa. Mary was a school teacher with the Waukon school district. Dennis also owned a corporation known as Elite Genetics. The corporation was a side venture to his veterinary practice, and dealt with artificial insemination and cryogenetics of animal semen. Under the dissolution decree, earnings from Elite Genetics were excluded from the calculation of child support.

In 1993, Mary informed Dennis that she intended to remarry and accept a position with the Norwalk, Iowa school system. Dennis had already remarried. His new wife, Deb, worked full-time at Elite Genetics. Deb has a masters degree in reproductive physiology. Dennis and Mary's oldest son, John, informed his parents that he wished to remain in the Waukon area to finish his education and

sporting activities. In response to John's request, Dennis and Mary entered into an agreement which provided that the physical care of John would be transferred to Dennis, while the younger child, Matthew, would remain with Mary and move to Norwalk. Dennis and Mary agreed that in the event either child changed their minds, their physical placement could be changed by request of either parent without a showing to the district court of a substantial change in circumstances.

Dennis subsequently filed a petition for modification, requesting a change of placement of the children and a modification of his child support obligation. Since the divorce, Dennis had increased his partnership share in the veterinary business. At trial, both parties provided testimony regarding the financial circumstances of Elite Genetics. Although Dennis worked approximately twenty-five hours each week on Elite Genetics business, he did not receive a salary. Deb was paid $1,500 per month for her work for the business. The business paid Dennis' health expenses, health insurance, travel expenses and other fringe benefits. Elite Genetics had a gross income of $129,936 in 1992, but showed no profit. The business had expanded to fifteen states, and Dennis went on many trips on behalf of the business. Some trips were to foreign countries.

In its decree, the district court ruled that John would reside with his father while Matthew would reside

with Mary. The court ordered Mary to pay Dennis $399 per month in child support, while Dennis was ordered to pay $929 each month. The child support amounts were based on the court's finding that Dennis had an income from his veterinary practice of $3377 per month. Dennis' obligation was offset by the amount Mary was ordered to pay. Dennis' total child support obligation amounted to $530 per month. Dennis was ordered to continue adding $300 each year to the children's savings accounts. Dennis was additionally ordered to pay the $500 deductible under the children's medical insurance. He was also ordered to pay $2000 towards Mary's attorney fees. Dennis appealed.

Dennis argues the district court erred in increasing his child support obligation based on a mistaken belief that Elite Genetics was being used to mask income. He contends the only benefits he receives from the corporation are payment of some legitimate business expenses incurred on behalf of the company. He believes his net support obligation should be reduced to $361 per month, or 22.5% of his net monthly income from his veterinary practice. Dennis next asserts the district court erred in ordering him to pay the $500 deductible for both children under a split custody arrangement. He also maintains that he should not be required to pay $300 per year to each child's savings account, since these payments were based on the parties' agreement that Elite Genetic's income would not be used to determine child support. Dennis lastly argues the

district court erred in ordering him to pay $2000 towards Mary's attorney fees.

## I. Child Support

The uniform child support guidelines establish the framework for courts to follow to determine the amount of child support a noncustodial parent should pay. The guidelines generally provide for monthly child support based on a fixed percentage of the net monthly income of the noncustodial parent in relationship to the number of children and the net monthly income of the custodial parent. When the non-custodial parents' net monthly income exceeds $3000, however, the amount of child support rests within the sound discretion of the court. The only restriction within the range of discretion is that the amount cannot be less than the dollar amount as provided under the guidelines for a non-custodial parent with a monthly net income of $3000.

In this case, the amount of child support fell within the discretionary range. This is because Dennis' net monthly income exceeded $3000.

Discretion conveys the idea of choice, and necessarily allows latitude. In exercising discretion under the guidelines, courts are permitted to consider the statutory child support factors formerly used to determine child support prior to the adoption of the guidelines. In re Marriage of Gehl, 486 N.W.2d 284, 287 (Iowa 1992). The objective is to find an appropriate level of child support

commensurate with the ability of each parent to contribute. In re Marriage of Van Ryswyk, 492 N.W.2d 728, 731 (Iowa App. 1992). Moreover, support is not limited to actual needs of the children, but includes the standard of living the children would have enjoyed in the absence of the dissolution. In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991).

Dennis argues the level of support determined by the trial court exceeded its discretionary parameters. He asserts the trial court impermissibly increased the support obligation to 27.5 percent of his net monthly income by considering the non-income benefits of his genetics corporation and the income of his current wife.

We believe the corporation was properly considered in establishing child support even though it provided no income to Dennis. Dennis is the sole owner of the corporation, and derives some personal benefits from its legitimate business expenses, such as health insurance. Furthermore, the income paid by the corporation to Dennis' current wife was properly considered in determining Dennis' ability to contribute child support. The income of a stepparent may be considered in a modification action as it relates to the payor's overall financial condition. In re Marriage of Linberg, 462 N.W.2d 698, 701 (Iowa App. 1990). More importantly, Dennis acknowledged he worked twenty-five hours each week for the corporation. In considering the true income of a payor who owns a business which employs

the payor's current spouse, the court may consider whether the allocation of salary between the payor and current spouse is fair. In re Marriage of Mueller, 400 N.W.2d 86, 88 (Iowa App. 1986). In this case, Dennis received no compensation for his work, while his current wife received $1500 each month. It is fair to attribute some of that income to Dennis.

The level of support set by the trial court amounted to 27.5 percent of Dennis' net monthly income from his veterinary practice and rental property. The minimum permissible level of support under the guidelines was $675.00. The level established by the trial court exceeded that amount by $254. Considering all the circumstances, we conclude the trial court properly exercised its discretion. On our de novo review, we affirm the level of child support.

Dennis also challenges that portion of the trial courts order which required him to pay the $500 deductible under the medical insurance policy. He further objects to the continued requirement that he place $300 each year into a college savings account for each child.

Support orders must include provisions for medical support when available to the parents through employment. Iowa Code section 598.21(4)(a) (1993). Courts may also set aside a portion of the child support into a separate fund for the support, education and welfare of the child. Iowa Code section 598.21(5) (1993). The trial court,

accordingly, was authorized to impose obligations relating to the payment of medical and education costs of the children. Furthermore, a non-custodial parent's financial obligation to his or her child does not necessarily end with the monthly support payment. Variable or non-fixed expenses, such as medical costs, must often be separately considered.

We find no error, in our de novo review of the evidence, in requiring Dennis to be solely responsible for the deductible portion of the medical insurance. It is part of his overall obligation of support, and will not impose an unfair burden under the circumstances. There was no evidence that the children are in ill-health or will likely require substantial medical care each year. The requirement will only impact Dennis in those years the children require medical care.

We also find no error in requiring Dennis to continue making the annual payments into the children's college accounts. Like the medical deduction obligation, this requirement is based on Dennis' overall obligation to support his children, and is not overly burdensome. Moreover, one of the original purposes of the obligation was to provide for the children's future. That purpose remains unaltered.

We have considered all the claims raised by Dennis. We conclude the overall level of support, including the college fund and responsibility for the deductible portion

of the medical insurance, was properly set by the trial court.

**II. Attorney Fees**

The trial court is authorized to award reasonable attorney fees to the "prevailing party" in a modification action. Iowa Code, section 598.36 (1993). The amount of any award made rests with each party's ability to pay. In re Marriage of Kimmerle, 447 N.W.2d 143, 145 (Iowa App. 1989).

Dennis argues he was the "prevailing party" at trial because more issues were decided in his favor than in favor of Mary. The trial court found Mary prevailed on the most substantial issues.

An award of attorney fees under section 598.36 is discretionary. In re Marriage of Roerig, 503 N.W.2d 620, 622 (Iowa App. 1993). We believe this discretion extends to the determination of the "prevailing party." See Wymer v. Dagnillo, 162 N.W.2d 514, 519 (Iowa 1968); McGarey v. Mathis, 226 Iowa 37, 46, 282 N.W. 786, 790 (1938). Clearly, the concept of "prevailing party" in an equity case is flexible, and extends well beyond the number of issues litigated or how the final judgment may read. The trial court did not abuse its discretion in awarding attorney fees to Mary. Nor did the trial court abuse its discretion in determining the amount of the fees. We award $750 to Mary for appellate attorney fees. Costs to Dennis.

**AFFIRMED.**