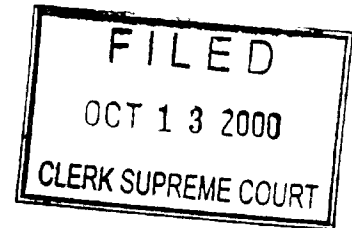


**IN THE COURT OF APPEALS OF IOWA**

No. 0-354 / 99-1724  
Filed October 13, 2000

**IN RE THE MARRIAGE OF RICHARD ALLAN PUTMAN  
AND MERSHELL SUZANNE PUTMAN**

Upon the Petition of  
**RICHARD ALLAN PUTMAN,**  
Petitioner-Appellant/Cross-Appellee,



And Concerning  
**MERSHELL SUZANNE PUTMAN,**  
Respondent-Appellee/Cross-Appellant.

---

Appeal from the Iowa District Court for Shelby County, J.C. Irvin, Judge.

Petitioner appeals from an order modifying his dissolution decree.

**AFFIRMED.**

Ken Sojka of Buckley & Sojka Law Offices, Harlan, for appellant.

Richard C. Schenck of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan,  
for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

**HECHT, J.**

Richard Putman appeals from the order modifying his dissolution decree. He contends the district court erred in (1) not ruling his daughter, Theresa Putman, had abandoned him, (2) ordering him to provide a post-secondary educational subsidy to Theresa, (3) computing child support for his younger daughter Charisse, and (4) ordering him to pay one-half of the children's medical bills. He also seeks an award of attorney fees and requests the respondent pay the costs of this appeal. Mershell Putman cross-appeals, contending the court should have ordered Richard to pay a greater post-secondary educational subsidy. She also seeks an award of trial and appellate attorney fees. We affirm.

**I. Factual Background and Proceedings.** Richard and Mershell Putman were married on August 15, 1972. They have two daughters, Theresa, born July 30, 1979, and Charisse, born April 25, 1981. A decree dissolving their marriage was entered on October 9, 1995, when Theresa was sixteen years old, and Charisse was fourteen years old. The decree granted the parties joint legal custody with Mershell having physical care of the girls and Richard having liberal visitation rights. The decree also ordered Richard pay \$316 per month in child support and maintain health and dental insurance for the girls. The decree further ordered the parties to share equally in medical expenses not covered by insurance.

On August 7, 1998, Richard filed a petition to modify the terms of the decree claiming a substantial change in circumstances had taken place since the

entry of the original decree. Specifically, Richard requested the district court to determine whether a post-secondary education subsidy was available to Theresa, who planned on entering college, and to adjust the amount of child support to only provide support for Charisse. On September 2, 1998, Mershell filed an answer and a counterclaim claiming Richard refused to pay his share of the girls' medical bills and failed to maintain insurance on them and requesting reimbursement for such expenses.

Theresa graduated from high school in the spring of 1998 and is currently enrolled as a full-time student at Des Moines Area Community College. She maintains average grades while working part-time during the school year and full-time during the summer. The record establishes the cost of tuition, books, and fees is \$2500 per year. Theresa receives some student loans to help cover these expenses. She pays for other expenses such as transportation, clothing, and personal items out of the money she makes through her employment. Mershell provides her with housing and food, which the record reflects amounts to approximately \$2700 per year.

The district court entered its order modifying the decree on September 23, 1999, ordering Richard to contribute \$400 per school year toward Theresa's education costs. The decree also increased the amount of child support for Charisse to \$342 per month and ordered Richard to pay his share of the medical expenses totaling \$7,437.72.

**II. Standard of Review.** Modification of dissolution decree actions are tried in equity and review is thus de novo. Iowa R. App. P. 4; *In re Marriage of*

*Trickey*, 589 N.W.2d 753, 756 (Iowa App. 1998). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Wood*, 567 N.W.2d 680, 681 (Iowa App. 1997).

**III. Postsecondary Educational Subsidy.** Iowa Code section 598.21(5A) allows the district court to order divorced parents to provide a postsecondary education subsidy for their children attending college if good cause is shown. Iowa Code § 598.21(5A). When determining whether good cause exists, the district court may consider, “the age of the child, the ability of the child relative to postsecondary education, the child’s financial resources, whether the child is self-sustaining, and the financial condition of each parent.” Iowa Code § 598.21(5A)(a). However, if the child has “repudiated the parent by publicly disowning the parent, refusing to acknowledge the parent, or acting in a similar manner,” a subsidy will not be awarded. Iowa Code § 598.21(5A)(c). Richard argues the district court erred by ordering him to pay any subsidy toward Theresa’s college education because she has “abandoned him as her father.”

We acknowledge the record indicates the relationship between Theresa and Richard has been strained since the divorce in 1995 when Theresa was sixteen years old. Richard testified he has had little contact with either one of his daughters since the divorce although he has attempted to set up visits with them. He stated he has exercised visitation with them on two occasions and spoken to

them on the phone occasionally. However, he feels most of the contact between them has been regarding financial matters. Theresa, Charisse, and Mershell testified Richard made very few attempts to arrange for visitation and often left responsibility of making contact to his other family members or to the girls themselves. Theresa testified she is interested in seeing her father but feels unwelcome because of his lack of communication with her. She testified he does not acknowledge their birthdays or other special times and does not include them in his life. This testimony is supported by evidence Richard did not invite his daughters to his wedding celebrating his marriage to his second wife. Recently however, Theresa invited Richard to her graduation from high school and he did attend.

We cannot conclude the evidence presented at trial shows Theresa has publicly disowned or refused to acknowledge Richard as her father. Richard and Theresa share responsibility for the lack of relationship between them. This is not a case where the child has publicly and repeatedly disowned the parent. See *In re Marriage of Pendergast*, 565 N.W.2d 354, 356-57 (Iowa App. 1997); see also *In re Marriage of Baker*, 485 N.W.2d 860, 862 (Iowa App. 1992). Richard bears some of the responsibility of the lack of contact between himself and his daughters and the circumstances he had a hand in creating do not excuse him from contributing toward Theresa's education. See *State ex rel. Tack v. Sandholdt*, 519 N.W.2d 414, 418 (Iowa App. 1994). We affirm the district court's determination Theresa has not abandoned her father.

Richard next argues Theresa has sufficient financial resources to cover her educational expenses and he should not be required to contribute a subsidy. We consider the following financial sources in determining the extent a child is self-sustaining and can pay part or all of her education expenses: (1) grants, awards, scholarships, and loans; (2) personal assets; and (3) the child's capability to maintain part-time employment. See *Wood*; 597 N.W.2d at 682 (citations omitted). We also consider the parent's financial means and ability to contribute to the child's education. See *id.* Theresa earned approximately \$8000 working part-time in 1998 and at the time of trial in July of 1999, she had earned \$5200 during the year. In addition, she receives \$2625 in subsidized federal loans each school year and Mershell provides for her room and board. Theresa uses both her earnings and the student loans to pay the \$2500 it costs her for tuition, books, and fees. In addition, she pays for her car payment, car repairs, clothing, and all of her personal items. Theresa's itemization of her monthly expenses indicates although she works hard and uses her earnings to help pay for her education, she is not self-sustaining. Mershell contributes room and board equivalent to \$2700 per year. See *generally id.* at 684 (holding when determining financial contributions of parents to a child's postsecondary education, the court may consider one parent's contribution to the child's room and board while the child is a full-time student and living at home). In addition, Richard has the financial resources and ability to contribute to Theresa's expenses. We have considered all of the relevant factors and determine the district court was correct in ordering Richard to contribute \$400 per year toward

Theresa's college education. We therefore affirm the district court's order requiring Richard to provide a postsecondary educational subsidy for his daughter, Theresa.

**IV. Child Support.** Iowa Code section 598.21(8) allows the court to modify an order of child support when a substantial change in circumstances is shown. The party seeking modification must establish there has been a substantial change in circumstances by a preponderance of the evidence since the entry of the decree. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992). The district court has reasonable discretion in determining whether modification is warranted, and we will not disturb that discretion unless there is a failure to do equity. *In re Marriage of Maher*, 596 N.W.2d 561, 565 (Iowa 1999).

The district court determined there had been a substantial change in circumstances given that Theresa entered college and both Mershell and Richard increased their incomes following the dissolution decree. Accordingly, the district court modified Richard's monthly child support payment from \$316 per month for two children to \$342 per month for one child. In addition to their regular employment, both Richard and Mershell work for the National Guard and occasionally perform duty overseas. Richard contends the district court erred by including his overseas duty pay in income because the amount of income he receives is too speculative. In the alternative, Richard argues if his National Guard income is included, Mershell's should be as well.

All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations. *In re Marriage of*

*Nelson*, 570 N.W.2d 103, 105 (Iowa 1997). We may include income received by a parent from the National Guard in calculating child support when the income is steady and voluntary. *State ex rel. Weber v. Denniston*, 498 N.W.2d 689, 691 (Iowa 1993). The district court found Richard regularly received income from the National Guard: \$1,948.65 in 1996, \$5,370.64 in 1997, and \$4,417.23 in 1999. The district court then averaged the amounts and included that amount in Richard's income for its child support calculation. The district court did not include Marshell's National Guard income because her overseas duty in the past has been "much less frequent than Richard's." Although Marshell did earn money from her service in the National Guard in 1999, she has not received such income on a regular basis in past years. We agree with the district court that Richard's National Guard income should be included in determining his net monthly income for the purposes of child support because he receives the income on a regular basis and it is not speculative. We also agree with the district court's determination Marshell's National Guard income is too speculative to include in her monthly income. We affirm the district court's modification of Richard's child support obligation.

**V. Medical Bills.** Richard next argues the district court erred by requiring him to pay for half of his daughters' medical expenses since the time of the original decree. The original decree entered on October 9, 1995, contained the following provision regarding medical expenses:

Richard shall maintain the existing levels of medical, dental, and optical insurance coverage, or their equivalent, on the minor children of the Parties. All non-covered doctor, hospital, dental, and optical bills for the minor children will be divided equally

**between the Parties. Richard is ordered to pay his share within 30 days of presentation of a provider bill/invoice.**

The evidence is undisputed Richard failed to maintain medical insurance for Theresa and Charisse after December of 1995. Mershell was forced to obtain insurance for the girls at her own expense. It is also undisputed Richard failed to pay his half of the medical expenses the girls incurred from the entry of the decree until the modification trial. Richard argues Mershell is equitably estopped from asserting her claim for half of the medical bills because she failed to raise such claim earlier. The Iowa Supreme Court has held the doctrine of equitable estoppel should be rarely applied in child support cases. *In re Marriage of Harvey*, 523 N.W.2d 755, 756 (Iowa 1994). In the few cases where it can be applied, the proponent must show (1) a clear and definite agreement; (2) proof the proponent acted to his detriment in reliance thereon; and (3) a finding the equities entitle the proponent to relief. *See id.* at 756-57; *see also In re Marriage of Masterson*, 453 N.W.2d 650, 654 (Iowa App. 1990). Richard has failed to demonstrate the first element, the existence of a clear and definite agreement to release his obligation to pay the medical bills, and therefore cannot rely on the doctrine of equitable estoppel.

Richard also contends Mershell is estopped from collecting his portion of the medical bills by the doctrine of estoppel by acquiescence. Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right. *In re Marriage of Fields*, 508 N.W.2d 730, 731 (Iowa 1993). Richard must show Mershell (1) knew of her right to pursue payment for

the medical bills and failed to pursue it; (2) led him to believe she intended to waive or abandon it; and (3) that he relied on her acquiescence. *See Anthony v. Anthony*, 204 N.W.2d 829, 834 (Iowa 1973) *overruled by statute on other grounds*, see *Harvey*, 523 N.W.2d at 756. The testimony at trial establishes Mershell knew Richard was obligated to pay for half of the non-covered medical expenses and to maintain insurance for Theresa and Charisse. However, the record shows she did pursue payment from him. She contacted him multiple times regarding payment of these expenses and sent him letters on a monthly basis with copies of the bills. She admitted she got so frustrated at one point that she just wanted to take care of it herself and did not want to deal with contacting Richard, who resisted her requests for payment, but she testified she continued to gather bills and send copies to Richard. Richard maintains he did not receive the letters Mershell sent to him containing copies of the bills and her failure to send bills is proof of her waiver of the right to enforce the provision of the decree. The district court explicitly found, however, that Richard's denial of receiving the letters was not credible. Giving deference to the court's credibility determinations, we agree.

We cannot conclude based on this record Mershell intended to waive or abandon her claim to payment for the medical bills. She continually contacted Richard regarding medical insurance and non-covered expenses. Richard has failed to maintain insurance on the girls or pay half of the non-covered medical expenses since December of 1995. We therefore affirm the district court's order for Richard to pay \$7,437.72 representing his share of the non-covered medical

expenses incurred for treatment of the children since the entry of the original dissolution decree.

**VI. Attorney Fees.** Richard requests an award of appellate attorney fees and on cross-appeal, Marshell requests an award of both trial and appellate attorney fees. Attorney fees are not awarded as a matter of right. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 867 (Iowa App. 1996). When determining whether to award attorney fees, we 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 district court's decision on appeal. *In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa App. 1999). After considering these factors, we determine Richard shall pay \$1000 toward Marshell's attorney fees on appeal. Each party shall pay fifty percent of the costs of this appeal.

**AFFIRMED.**