IN THE COURT OF APPEALS OF IOWA

No. 1-191 / 90-1426

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IN RE THE MARRIAGE OF CAROL JEAN McCARTHY AND PATRICK JOSEPH McCARTHY

Upon the Petition of

CAROL JEAN McCARTHY,

Appellee,

And Concerning

PATRICK JOSEPH McCARTHY,

Appellant.

FILED
OCT 29 1991
CLERK SUPREME COURT

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson, Judge.

Patrick McCarthy appeals from the trial court's ruling in this modification proceeding ordering him to contribute to his daughter's higher education. **AFFIRMED AS MODIFIED.**

Tom Jenk of Jenk & Goen, Dyersville, for appellant.

C. J. May, III of Reynolds & Kenline, Dubuque, for appellee.

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

OXBERGER, L.

Carol and Patrick McCarthy were married on November 21, 1970. They have two children: Jody, born April 20, 1971, and Timothy, born April 18, 1974. The parties were divorced on June 25, 1981. Carol received custody of the children. Pursuant to their stipulation, Patrick agreed to pay child support at the rate of $350 per month per child until each child reached age eighteen. The stipulation was silent concerning advanced education.

Since their divorce Carol and Patrick have both remarried. Carol now makes $23,000 per year, and her current husband makes $118,000. At the time of their decree, Patrick worked for John Deere and had a yearly gross income of $41,755. Patrick continues to work for John Deere, and his gross annual income is routinely between $47,000 and $50,000.

During high school Jody decided to attend Loyola University, a private school whose expenses average over $12,000 per year. At the time of trial, Jody had completed her freshman year. Her expenses were paid by Carol and her husband.

Patrick stopped paying support for Jody when she graduated from high school. Carol filed her petition for modification seeking continued child support. The district court modified the original decree by ordering Patrick to continue paying $350 per month support for Jody until she reaches the age of twenty-two, or is no longer a full-time student. Patrick appeals.

Our scope of review of this modification action is de novo. Iowa R. App. P. 4.

DECISION TO ATTEND COLLEGE: Patrick asserts the trial court abused its discretion in determining a modification was warranted where the parties by a Stipulation and Agreement, incorporated into the original divorce decree, contained no provision requiring him to pay support related to college. We disagree.

The Iowa Supreme Court has held that a child's decision to attend college is a sufficient material, uncontemplated 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). We affirm the modification of the original support order to provide for Jody's higher education pursuant to Iowa Code section 598.1(2). We remand, however, for an adjustment in the trial court's support order.

MEASURE OF COLLEGE COSTS: We have limited the college support award to the board, room, books, and tuition to attend a state sponsored school in the state of the child's 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). Although Jody has chosen to attend a private school, Patrick's portion should be calculated utilizing the tuition costs for a state university in the state of Jody's residence.

There is evidence Jody earned approximately $5,000 in the year preceding the trial. She will be required to pay her personal living expenses while attending college which are not paid by her parents. We see no merit in requiring Jody to apply these earnings to the costs of her education.

CONSIDERATION OF FINANCIAL CONDITIONS: Carol's new husband earns a substantial income. Her remarriage has provided a substantial change in the household revenues. Regarding certain factors to be considered in the determination of child support, Iowa Code section 598.21(8) provides in relevant part;

> 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.

While her new spouse's obligation to support her children is limited, it is proper to consider Carol's overall financial condition in determining child support. In Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974), the Iowa Supreme Court stated:

> The trial court also considered the fact defendant's present wife is gainfully employed and contributes substantially to the family coffers. While she, of course, has no obligation to support defendant's daughter or his former wife, it is proper to consider defendant's overall financial condition in fixing the amount [of educational child support] he should pay.

Carol's overall financial condition includes her current husband's contributions to their home. Absent the remarriage, her costs of living would have been entirely

Carol's responsibility. The diminishing of that responsibility by the remarriage has the effect of creating more available resources for Carol. We see no reason to limit an inquiry into changes in a person's financial condition to their personal income alone.

We modify the trial court's order of modification to provide that Patrick shall pay two-thirds of the costs of Jody's college education at a state university in the state where Jody qualifies for in-state residence costs. The award shall include board, room, books, and lab fees. Carol shall pay one-third of the above college expenses for Jody.

We affirm the trial court on all other issues. Each party shall pay his or her own attorney's fees. Costs of this appeal assessed one-half to each party.

AFFIRMED AS MODIFIED.

Donielson, J., concurs; Sackett, J., specially concurs without opinion.