IN THE COURT OF APPEALS OF IOWA

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No. 8-013 / 97-0148
Filed March 27, 1998

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF SHERRY JEAN CROSSER AND HAROLD LAVERNE CROSSER

Upon the Petition of
SHERRY JEAN CROSSER n/k/a SHERRY JEAN KUBALSKY,
Appellant,

And Concerning
HAROLD LAVERNE CROSSER,
Appellee.

Appeal from the Iowa District Court for Hardin County, Carl E. Peterson, Judge.

Petitioner appeals a district court ruling declining to determine respondent's obligation to contribute toward their children's college expenses by including undistributed corporate profits and invoking the doctrine of issue preclusion. **REVERSED.**

Michael J. Cross of Coonley & Coonley, Hampton, for appellant.

Lynn J. Wiese of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellee.

Heard by Huitink, P.J., and Streit and Vogel, JJ.

STREIT, J.

A mother appeals the district court's refusal to modify the child support and college support obligations of respondent. The trial court held res judicata principles prevented the court from including the respondent's Subchapter S corporation income for purposes of calculating his child support and college support obligations. Because we find res judicata principles inapplicable here, we reverse and increase the respondent's payments.

I. Background & Facts.

Harold and Sherry Crosser were divorced in June 1986. They had three minor children, Shyla, Stephanie, and Annette. In 1993, the parties stipulated to a modification to their divorce decree. The court approved the modification and ordered Harold to pay child support of $1050 per month, effective April 1, 1993. As each child reached the age of eighteen and graduated from high school, the child support would terminate and the court would reassess Harold's obligation consistent with the applicable child support guidelines. The question of Harold's and Sherry's respective obligations for contribution toward college expenses was reserved for future determination.

In 1995, Shyla enrolled at the University of Northern Iowa. Sherry filed an application for determination of contribution toward Shyla's college expenses and to set the child support for the two remaining minor children. Harold's wage was approximately $36,400 from his Subchapter S corporation, Countryside Turf and

Timber. He received additional income from the corporation of approximately $53,000. The court used only his wage of $36,400 in calculating his child support and college support obligations. Sherry's gross income was $22,080 per year. The court determined the percentage of each party's obligations toward college expenses by calculating the percentage of their combined income. Using this method, Sherry was ordered to contribute thirty-eight percent of Shyla's expenses per semester, $1140, and Harold was ordered to pay sixty-two percent of Shyla's expenses per semester, $1860. Sherry's rule 179(b) motion and motion for new trial were denied. Sherry did not appeal.

In 1996, Stephanie enrolled at Hawkeye Community College. Sherry filed an application for hearing to modify the parties' obligations toward college support. Following the hearing, the district court concluded the 1995 ruling fully litigated the issue of whether Harold's Subchapter S income should be included in his income for child support and college support obligations. The court held the doctrine of res judicata barred Sherry from raising the issue. Using the same wages as the 1995 court, the 1996 court determined Sherry's contribution toward Stephanie's yearly college expenses should be $1316, and Harold's obligation, $2393. Sherry appeals.

II. Standard of Review.

The provisions for child support payments in a divorce decree are final as to circumstances then existing. *In re Marriage of Bethards*, 526 N.W.2d 871, 874 (Iowa App. 1994). Accordingly, the power of the court to modify child support exists only

when there has been a material and substantial change in circumstances since the date of the original decree, or since the date of any subsequent proceeding which considered the rights of the parties upon application for the same relief. *Id.* The changed circumstances relied upon must be material and substantial, not trivial, more or less permanent or continuous, not temporary, and must be such as were not within the knowledge or contemplation of the court when the decree was entered. *Id.* We review this case de novo, deciding the case on its own peculiar facts. Iowa R. App. P. 4. Although we give weight to the findings by the district court, especially those concerning credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7); *Sandler v. Sandler*, 526 N.W.2d 871, 874 (Iowa App. 1969).

In 1993, a modified decree required when each child reached the age of eighteen and graduated from high school, the child support for the child would terminate and the parties would redetermine Harold's child support obligations for the remaining minor children. Thus, Sherry was entitled to seek a modification of Harold's child support obligation once Stephanie left home, leaving Annette as the only remaining minor child. The decree also ordered the parties' college support obligations would be determined in the future by a court of competent jurisdiction. Under this agreement, when Stephanie went to college Sherry was entitled to have the decree modified to calculate Harold's college support obligation.

III. Application of Res Judicata to Modification of Child Support Proceedings.

Sherry argues the income Harold receives from his Subchapter S corporation, other than his wages, should be used in determining his obligation to pay college support for Shyla and Stephanie and his child support obligation for Annette. Harold contends Sherry is barred from asserting this argument under the theory of res judicata. He claims that because a previous trial court calculated his support obligations without including his Subchapter S income in his net income, the present court must, by using the doctrine of res judicata, employ the same methodology of calculation.

When examining whether an issue is barred by res judicata or issue preclusion, we examine the four prerequisites of the doctrine:

(1) The issue concluded must be identical;
(2) The issue must have been raised and litigated in the prior action;
(3) The issue must have been material and relevant to the disposition of the prior action; and
(4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Audas v. Scearcy, 549 N.W.2d 520, 523 (Iowa 1996). The party asserting issue preclusion has the burden of proof on all four prerequisites. *In re Marriage of Delmege*, 501 N.W.2d 562, 563 (Iowa App. 1993).

The fact that a previous trial court calculated Harold's support obligations without including his Subchapter S income does not judicially establish a methodology of calculating net income in all subsequent proceedings. The ruling was

on the weight and effect of the evidence in that proceeding. It was not the type of judicial legal conclusion subject to res judicata in a later proceeding.

In this case, the issues were not identical in the two proceedings. In the first proceeding Shyla's college support was being determined. In the later proceeding the issues were what Shyla's college support should be in light of the fact Stephanie is now attending college also, what Stephanie's college support should be, and whether Annette's child support should be modified. None of these issues were raised or litigated in the previous proceeding. Further, the issue of whether Harold's income from his Subchapter S corporation should be included to calculate his college support obligations for Shyla was not specifically raised or litigated. These questions, therefore, were neither material and relevant, nor necessary and essential to the judgment.

This is not like *In re Marriage of Bolick* in which the Iowa Supreme Court held that when a district court orders child support within the discretionary range of the guidelines, a modification of the amount is no more than a substitution of one judge's discretionary call for another's. Such practice is prohibited by res judicata principles. 539 N.W.2d 352, 360 (Iowa 1995). Although we recognize Harold's obligation for Shyla's college support was determined in an earlier proceeding, in this context, res judicata does not prohibit the court from modifying that obligation. The facts that Stephanie is now attending college and Annette is the only minor child left in the home are substantially different from the facts existing at the time of the previous

proceeding. Modification of Harold's obligations was appropriate under the circumstances. The doctrine of res judicata does not bar the court from including Harold's Subchapter S income in determining his modified obligation.

Furthermore, the court has continuing jurisdiction over proceedings brought to compel support and to increase or decrease the amount thereof until the judgment of the court has been completely satisfied, and also has continuing jurisdiction to determine the custody in accordance with the interests of the child. *Audas*, 549 N.W.2d at 523. Statutory law expressly makes a dissolution of marriage decree subject to modification as to future child support payments. *See* Iowa Code § 598.21(8). In addition to the express statutory law, public policy dictates that a custodial parent has a right to bring a modification proceeding to increase future child support payments. *In re Marriage of Stutsman*, 311 N.W.2d 73, 75 (Iowa 1981). As a matter of equity, the noncustodial parent should pay the right amount of support. *Id.*

Even if we were to ignore section 598.21(9), Annette proved a substantial change in circumstances under section 598.21(8)(a). That section provides the court shall consider changes in the income of a party when deciding if a substantial change in circumstances exists. Harold's income increased substantially since the child support was originally set. There is nothing in the dissolution decree to indicate that the trial court set the amount of child support in contemplation of such a significant increase in Harold's income. *See In re Marriage of Feustel,* 467 N.W.2d 261, 263

(Iowa 1991) (the change in circumstances must not have been within the contemplation of the court when the decree was entered).

IV. Harold's Child Support and College Support Obligations.

Harold argues only his wage of $36,400 should be used in calculating his obligation toward child support for Annette and college support for Stephanie and Shyla. Using only the income Harold chooses to pay himself from his Subchapter S corporation would be a deviation from the child support guidelines and would be an inequitable result to Shyla, Stephanie, and Annette.

Because Harold owns his own business, he is in the unique situation of determining his own wages. He argues the $59,472 profit from his business is not available for use in paying child support payments or making college support payments. This argument is flawed.

Harold and his wife do not live the lifestyle of people who earn $36,400 and $16,200 respectively. For example, the couple paid $2451 in real estate taxes on his home. This gives a fair approximation of the value of their home. They donated nearly $13,000 dollars to charity in 1995. They own three vehicles, a 1994 Ford Ranger, a 1995 Suburban and a 1995 Dodge Ram, all of which he is depreciating through his business. There was no evidence Harold had vehicles other than the three he used in the business. Harold should not be allowed to designate a percentage of his income unavailable for use in paying his child support obligations. In calculating his obligations, the amount he is entitled to collect and is required to report as income

on his tax return should be considered by the court. This is a more equitable method of determining his true income.

Our decision requires us to recalculate Harold's college support obligation to Shyla, his college support obligation to Stephanie, and his child support obligation to Annette.

In determining Harold's college support obligations to Shyla and Stephanie, we must apply Iowa Code section 598.21(5A) which became effective July 1 of 1997.[1] *See In re Marriage of Griffin*, 1997 WL 732129, at *1-2 (Iowa App. 1997). The section limits Harold's obligation to one-third the total cost of reasonable

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[1] That statute provides in part:

5A. The court may order a post-secondary education subsidy if good cause is shown.

a. In determining whether good cause exists for ordering a post-secondary education subsidy, the court shall 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. If the court determines that good cause is shown for ordering a postsecondary education subsidy, the court shall determine the amount of subsidy as follows:

(1) The court shall determine the cost of postsecondary education based upon the cost of attending an in-state public institution for a course of instruction leading to an undergraduate degree and shall include the reasonable costs for only necessary postsecondary education expenses.

(2) The court shall then determine the amount, if any, which the child may reasonably be expected to contribute, considering the child's financial resources, including but not limited to the availability of financial aid whether in the form of scholarships, grants, or student loans, and the ability of the child to earn income while attending school.

(3) The child's expected contribution shall be deducted from the cost of postsecondary education and the court shall apportion responsibility for the remaining cost of postsecondary education to each parent. The amount paid by each parent shall not exceed thirty-three and one-third percent of the total cost of postsecondary education.

Iowa Code § 598.21(5A) (1997).

expenses of postsecondary education.[2] *Id.* Under section 598.21(5A), the reasonable cost of postsecondary education is based on the cost of attending an in-state public institution. *Id.* The child's expected contribution from scholarships, loans, and earnings is to be deducted from this amount. *Id.* The remaining amount is apportioned to the parents whose shares shall not exceed thirty-three and one-third of the total cost. *Id.*

The change to section 598.21 imnposing a one-third of the cost limitation is a substantive law change which is applied prospectively. *Id.* (citing *Frideres v. Schiltz*, 540 N.W.2d 261, 264 (Iowa 1995)). Thus, in this case, the higher education financial expenses incurred prior to July 1, 1997, are subject to the former statutory and case law and expenses accruing after July 1, 1997, are determined according to the new statute. *Id.*

Harold's income for purposes of calculating his child support and college support obligation is approximately $95,872. Sherry's gross income is approximately $22,080. Harold is ordered to pay $936 per month in child support for Annette. He is ordered to pay eighty-one percent of Stephanie's and Shyla's yearly college

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[2] Prior to enactment of Iowa Code section 598.21(5A) on July 1, 1997, a divorced parent's obligation to support his or her child past the age of eighteen years was determined by section 598.1(6). *See In re Marriage of Griffin*, 1997 WL 732129, at *1-2 (Iowa App. 1997). This section gave a court discretion to impose an obligation on divorced parents to support their children while they are attending college, as long as the children are not married and are not yet twenty-two years of age. *Id.* Case law construed section 598.1(6) as requiring a divorced parent to assume only a reasonable portion of the child's education expenses. *Id.*

expenses for the 1996-97 school year, $3127 and $2805, respectively. Sherry is ordered to pay nineteen percent of Stephanie's and Shyla's yearly college expenses, $734 and $658, respectively. The payments are payable in ten monthly installments commencing in August 1998. Any party's college support obligation is limited to one-third of the cost of attending University of Northern Iowa ($9456) for each child for those amounts accruing after July 1, 1997.

We deny Sherry's request for appellate attorney fees.

REVERSED.