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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

No. 3-519 / 92-1759

**IN RE THE MARRIAGE OF CONNIE JO LARSON AND LARS J. LARSON**

Upon the Petition of
**CONNIE JO LARSON,**

Appellant,

And Concerning
**LARS J. LARSON,**

Appellee.

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Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

Connie Jo Larson appeals the district court's denial of her petition to modify the parties' dissolution decree. **REVERSED AND REMANDED.**

Henry E. Nathanson of Johnston, Larson, Potterfield, Zimmermann & Nathanson, P.C., Cedar Rapids, for appellant.

James G. Thomas, Anamosa, for appellee.

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

**DONIELSON, C.J.**

Connie and Lars Larson were divorced in March 1983. There are three children of the marriage: April, born in 1974, Sally, born in 1978, and Jay, born in 1981. The dissolution decree awarded primary care of the children to Connie and ordered Lars to pay child support in the amount of $210 per week. The decree also provided that Lars "shall be liable to pay support pursuant to the provisions of section 598.1(2) [1983] for any child who is regularly enrolled in any post-high school training."

In July 1989 Lars filed a petition, pro se, to modify the child support provisions of the dissolution decree. He claimed there had been a change in circumstances because he had remarried, had three dependent stepchildren, and his income had decreased because of a change in employment. The district court, ruling in February 1990, reduced Lars's child support obligation to $500 per month. The modification order also provided for automatic reduction of child support as each child "reaches the age of eighteen, or graduates from high school, whichever occurs last, or . . . marries, dies, or becomes self supporting, whichever occurs first." The court did not mention the provision for support of "post high school training."

The parties' oldest child, April, graduated from high school in May 1992 and enrolled full-time as a student at Central College in Pella. Connie filed a petition to modify the decree, requesting that child support from Lars,

for April, continue while April remained a full-time student. Connie further requested the court order Lars to pay child medical support and her attorney fees.

The district court determined Lars's net worth was $9,500 and his net monthly income was $1,361.36. The court stated Connie's net monthly income was $935.98, to which child support was added. The district court denied Connie's petition for modification "based on a failure to demonstrate a substantial and material change in circumstances." The district court found (1) April knew she planned to attend college a year before the 1989 modification hearing, so the issue was within the contemplation of the court; (2) the 1989 modification did not mention, and thus deleted, Lars's obligation to pay support for college expenses as provided in the original decree; and (3) April had disenfranchised herself from her father's support because she purposely alienated herself from Lars and rejected his efforts to reunite.

Connie appeals. We reverse the decision of the district court denying Connie's petition for modification.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties

presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983). Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

By statute, divorced parents have an obligation to support their children while attending college. In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa App. 1984); see Iowa Code § 598.1.(6) (1993). This obligation depends largely on the circumstances of each case. In re Marriage

of Hoak, 364 N.W.2d 185 (Iowa 1985); In re Marriage of Vrban, 293 N.W.2d 198, 203 (Iowa 1980). The obligation may be placed on a parent when the child enters college, but also may be imposed before that time. Id. (citing In re Marriage of McFarland, 239 N.W.2d 175, 180 (Iowa 1976)). The statute does not require support, but gives the district court discretion. Id. "Among the factors to be considered are the financial conditions of the parents, ability of the child for college work, age of the child, and whether the child is self sustaining or not." Id. Since the district court has continuing authority to modify the decree, specific language concerning college support need not be included in the decree. In re Marriage of Mott, 444 N.W.2d 507, 509 (Iowa App. 1989).

Our de novo review of the record before us convinces us the 1990 modification of Lars's support obligation was based on his reduced income. The order reduced his obligation from $210 weekly to $500 monthly. The order also provided for automatic reductions in child support as each child reached eighteen, married, became self-supporting, or died. College support in the future was not at issue; Lars's current inability to pay his existing obligation was the focus of the order. Lars's 1989 petition for modification makes no mention of future college support, only an inability to pay current support. We find nothing in the 1990 order which gives any hint the court considered whether or not the children would go to

college. We find no evidence in the record that, even though April thought about college when she was in eighth or ninth grade, the court knew her thoughts or considered them in its order in 1990. We conclude the 1990 order only modified the current amount of Lars's support obligation. It did not delete the language concerning the statutory obligation to pay college support from the original decree.

The district court concluded Connie's application for modification should be denied because she did not show a substantial and material change in circumstances. Iowa Code section 598.21(8), dealing with modifications, lists among the factors to be considered (1) changes in the employment, earning capacity, income or resources of a party, (2) changes in the number or needs of dependents of a party, and (3) changes in the physical, emotional, or educational needs of a child whose support is governed by the order. Automatically reducing the child support paid to Connie when April turned eighteen or graduated from high school reduced Connie's income or resources. April's enrollment in college changed her needs and the cost of her education. We conclude Connie demonstrated a substantial change in circumstances as required by statute.

Lars argues he should not have to contribute to April's college support because she is self-sustaining through grants, scholarships, and loans. We disagree. The evidence at the modification hearing shows April has scholarships, grants, and work-study which pay all but

approximately $2500 of her college expenses. She must borrow to cover that amount. She also has some incidental expenses not covered in her college financial aid budget. Lars should contribute a portion of the amount needed to repay the loan and to provide for some incidental expenses.

Lars also argues April has disenfranchised herself as a beneficiary under Iowa Code section 598.1(2) (now 598.1(6)) (1993). Letters from April and the other children to Lars and his new wife reveal a severely-damaged relationship between the children and Lars. While this is a tragic situation, we do not find this a sufficient reason to relieve Lars of his obligation to his children.

Finally, Lars argues he should not have to pay college support for April because any support ordered would not increase the money paid to Connie. Lars was approximately $65,000 in arrears on his child support at the time of the hearing. He asserts the maximum is being withheld from his wages so any additional support ordered would only extend his payments, not increase the current amount paid. We cannot agree a parent's past failure to pay child support in a timely manner should serve as a basis for avoiding future support obligations.

Connie assert the district court should have awarded her attorney fees in the modification proceeding. She also asks for attorney fees on appeal. Iowa Code section 598.36 provides the trial court may award reasonable attorney fees to the prevailing party. Connie was not the prevailing

party in the original modification proceeding. We understand Connie's argument the modification proceeding would have been unnecessary if Lars had agreed to pay what Connie requested. This argument is not sufficient to permit us to disturb the district court's exercise of its discretion in not awarding attorney fees.

On appeal, 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). Connie and Lars are similarly situated financially. Her need for an award of appellate attorney fees is about as great as his inability to pay. Connie was not obligated to defend the district court's decision on appeal. We determine no award of appellate attorney fees is appropriate in this case.

For the reasons stated, we reverse the decision of the district court denying Connie's petition for modification of the support provisions of the decree of dissolution. Connie has demonstrated a substantial change in circumstances warranting a modification. We therefore remand this case to the district court for a determination of the appropriate and equitable amount of April's college

expenses Lars should pay. We also direct the district court to consider the other issues in Connie's petition for modification which were not part of this appeal. We do not retain jurisdiction.

Costs of this appeal are taxed equally to the parties.

**REVERSED AND REMANDED.**