

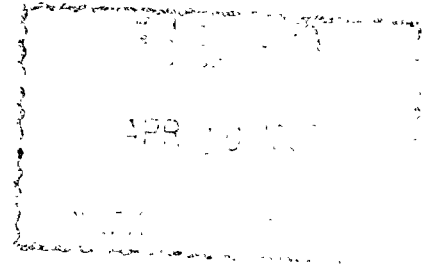
IN THE COURT OF APPEALS OF IOWA

No. 6-446 / 95-1008

**IN RE THE MARRIAGE OF MICHAEL J. O'NEAL
AND CHRISTINE S. O'NEAL**

Upon the Petition of
CHRISTINE S. O'NEAL,
Petitioner-Appellee,

And Concerning
MICHAEL J. O'NEAL,
Respondent-Appellant.



Appeal from the Iowa District Court for Scott County, Bobbie M. Alpers,
Judge.

Michael O'Neal appeals from the district court's ruling on Christine's petition
for educational expenses. **AFFIRMED AS MODIFIED.**

Paul J. Bieber of Gomez, May, Cartee & Schutte, Davenport, for appellant.

James L. Tappa of Spector, Tappa & Nathan, Rock Island, Illinois, for
appellee.

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

STREIT, J.

Michael O'Neal appeals from the district court's ruling on Christine O'Neal's modification petition for educational expenses. He contends the district court erred in ordering him to both continue to pay child support for his eighteen-year-old daughter and to pay one-half of her educational expenses. He also complains that the court improperly calculated the educational expenses, improperly divided those expenses between the parties, and failed to set a limit on his contribution.

Michael and Christine O'Neal were divorced in 1985. They had two children, Lizbeth and Marc. The dissolution decree ordered Michael to pay \$400 per month child support until each child attains the age of twenty-two years and is a student in an institution of higher learning.

Christine filed a "Petition for Educational Expenses" on July 11, 1994. Following a hearing, the district court ordered Michael to pay the child support provided in the original decree. The court also directed Michael to reimburse Christine for one-half (\$3698) of the amount she had paid for Lizbeth's college expenses at Augustana College, a private school, for the 1994-95 academic year. The court also ordered that Michael and Christine "shall each pay one-half of Lizbeth's college expenses for tuition, room and board, after application of any scholarships, grants and loans which are available to Lizbeth."

Michael appeals. He contends the district court order improperly modified the dissolution decree without a finding of a substantial change of circumstances. He claims the district court contemplated the children attending college at the time of the decree and awarded child support accordingly. Christine seeks an award of appellate attorney fees in the amount of \$2500.

We review the record de novo in a proceeding to modify the child support provisions of a decree for dissolution of marriage. *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996). At the same time, we recognize the virtues inherent in listening to and observing the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*; *see also* Iowa R. App. P. 14(f)(7).

Courts are empowered to modify the custodial terms of a dissolution decree only when there has been a substantial change in circumstances since the time of the decree, not contemplated by the court when the decree was entered, which was more or less permanent, and relates to the welfare of the children. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The cost of raising older children is such a change of circumstances that there should be a modification of the child support award. *In re Marriage of Linberg*, 462 N.W.2d 698, 701 (Iowa App. 1990).

Michael contends under the district court's order he is paying "double child support" since he is required to pay one-half of the college expenses for one child in addition to previously ordered child support for two children. While this characterization is not sufficiently precise, we find the monthly child support should be modified.

The original decree provided for Michael to pay \$400 per month child support until both Lizbeth and Marc graduate from high-school or college, until the age of twenty-two years. When only one of the children is entitled to support, the amount of support decreased by thirty-five percent.

Michael has been current in paying \$400 per month child support for the children's benefit since the decree. In December 1994, Michael began paying \$470 per month, which he attributed as \$313 per month for child support and \$157 per month toward college expenses. The modification court ordered Michael to continue paying \$400 per month child support and each parent pay one-half of Lizbeth's college expenses.

The child support guidelines are not applicable to determine support for an unmarried adult child under twenty-two years of age who is a student. *Id.* We look to section 598.1(6) of the Iowa Code to determine a divorced parent's obligation to support his or her adult offsprings who are students. *See* Iowa Code § 598.1(6) (1997). Under the district court's order, Michael is paying \$400 for child support for the minor

child. This amount is too high according to the child support guidelines and should be modified. Following the calculation of support for Marc, Michael's ability to pay for expenses for college for Lizbeth should be determined. *See In re Marriage of Byall*, 353 N.W.2d 103, 108 (Iowa App. 1984).

Christine earns \$35,326 gross income per year and is single. Michael's income since 1991 has fluctuated. In 1991 and 1992 he earned approximately \$16,500 each year. In 1993 his income jumped to \$28,282 and in 1994 he earned \$22,668. Michael is remarried and files a joint tax return with his wife. Except for 1993, when he and his wife earned \$65,100, their adjusted gross income has been approximately \$54,000.

Using the parties' individual net monthly incomes, according to the child support guidelines, we order Michael to pay \$347 in child support for the benefit of Marc.¹ Child support owed is dated back to the date of the modification hearing. We do not disturb the district court's order awarding Michael the dependancy deduction for the children. *See In re Marriage of Lee*, 486 N.W.2d 302, 306 (Iowa 1992).

In assessing Michael and Christine's obligation toward Lizbeth's college expenses, we first consider whether Lizbeth is a child that requires support. *In re*

¹ We determine net monthly income by deducting federal and state income, social security, and Medicare taxes from the parents' gross monthly income. Christine's and Michael's net monthly income is \$2120 and \$1603, respectively. (Michael's net monthly income was calculated by averaging his last two years of gross income. *See In re Marriage of Cossel*, 487 N.W.2d 679, 682 (Iowa App. 1992).) Utilizing the child support guidelines, the child support varies in excess of ten percent and should be modified. Iowa Code § 598.21(9) (1997); *Schuler v. Rodberg* 516 N.W.2d 902, 903 (Iowa 1994).

Marriage of Byall, 353 N.W.2d at 108 (amount of support for adult child is based on need and ability to contribute to their higher education). The criteria is based on: (1) the ability of the child for college; (2) the age of the child; (3) the financial conditions of the parents; and (4) whether the child is self-sustaining. *Id.* The district court found from all the surrounding circumstances, Lizbeth was in need of support for her college expenses. We affirm the district court on this issue.

The question becomes what are Lizbeth's needs and what are her parent's financial resources and abilities to pay. *Linberg*, 462 N.W.2d at 702 (citations omitted). Michael argues in assessing the obligation for support of college expenses, the district court should have included all the money available to Lizbeth, including loans she chose to forego, in calculating his educational expense obligation.

The duty to provide college support extends to both parents. *Byall*, 353 N.W.2d at 107. In determining the level of support Lizbeth should receive, we consider the parties' age, present earning capacity, future prospects, amount of resources owned by each of the parties, contribution of each to the joint accumulations, the children, duration of the marriage, indebtedness of each or both, and any other relevant facts. *Locke v. Locke*, 246 N.W.2d 246, 251 (Iowa 1976). We also consider the child's resources, including loans, in determining the need for support. *See In re Marriage of Lieberman*, 426 N.W.2d 683, 685 (Iowa App. 1988).

Lizbeth has decided to attend a private college. Tuition, room, and board is approximately \$17,619. Total costs, including books, may exceed \$18,000. Lizbeth received a \$14,245 total financial package which included scholarships, grants and loans. She accepted the entire package except for a \$2625 Stafford loan. Christine and Lizbeth were left with \$6400 to cover college expenses for the 1994-95 school year.

Michael and Christine were married thirteen years. Christine has a bachelor's degree in dental hygiene and earns over \$25,000 net income per year. Michael has a Ph.D. in English. He only earns net income in excess of \$19,000. Michael and his wife together gross approximately \$54,000. *See In re Marriage of Gehl*, 486 N.W.2d 284, 287 (Iowa 1992) (new spouse's income can be considered as it relates to the divorced custodial parent's overall financial condition and ability to support the child). Both parties have equity in their homes, money invested in IRAs, and some money in savings.

Upon reviewing the particular circumstances of this case, we order both parties should provide equal financial support for Lizbeth's college expenses. Each parent is obligated to pay forty percent of Lizbeth's college expenses.² For the 1994-95 school

² Expenses include tuition, room/board, and books.

year each parent should contribute \$2600.³ We also determine Lizbeth is able to contribute twenty percent towards her college education expenses. She has worked part-time jobs in the past and has managed to save \$3000. She also has the availability to apply for Stafford loans to cover her contribution. The formula 40/40/20 should be used for the remaining years of college in determining the amount of contribution toward Lizbeth's expenses.

Finally, Michael contends the district court should have set a limit on the total expenses for college the parents would share. When parents are of limited financial means there is no need to obligate them for college expenses beyond those for attending a state-supported institution in the state of the student's residence. *Lieberman*, 426 N.W.2d at 686. There was no evidence presented by the parties how much it would have cost Lizbeth to attend a state-supported institution in Iowa. The district court stated it appeared the actual costs of Lizbeth attending Augustana were no more than anticipated costs to attend a state university. We defer to the district court on this issue. However, in the event Lizbeth's financial aid package at her private school changes, Michael's obligation for support shall not exceed forty percent of the amount of expense Lizbeth would have incurred, had she attended a state-supported institution. *Id.*

³ The amount each parent should pay was determined as follows: \$18000 tuition, room/board, and books minus \$11,620 financial aid package without the Stafford loan = \$6380. Forty percent of \$6400 = \$2560.

Christine requests appellate attorney fees in the amount of \$2500. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we do not find equity warrants an award of appellate attorney fees to Christine.

AFFIRMED AS MODIFIED.