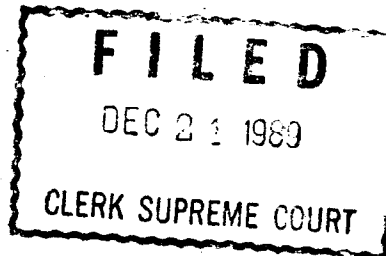


IN THE COURT OF APPEALS OF IOWA

No. 9-610 / 89-428



IN RE THE MARRIAGE OF COLEEN S. CUNNINGHAM AND
DENNIS A. CUNNINGHAM

Upon the Petition of
COLEEN S. CUNNINGHAM, n/k/a COLEEN S. POOLE,

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Appellee,

And Concerning
DENNIS A. CUNNINGHAM,

Appellant.

Appeal from the Iowa District Court for Black Hawk
County, George Stigler, Judge.

Appellant appeals the district court's granting of
appellee's motion for modification of child support.
AFFIRMED AS MODIFIED.

Paul T. Shinkle of Gottschalk & Shinkle, Cedar Falls,
for appellant.

Robert D. Fulton of Fulton, Frerichs, Martin & Andres,
P.C., Waterloo, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab,
JJ.

PER CURIAM

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Appellant Dennis A. Cunningham appeals the district court's granting of appellee's motion for modification of child support. We affirm as modified.

Dennis and Coleen Cunningham were married on October 24, 1970. Two children were born of this marriage, Shane and Sean. Shane was born in May 1971 and Sean in February 1973.

The marriage of the parties was dissolved by decree filed January 6, 1981. The decree provided that the primary care of the children would be with Coleen. The court ordered Dennis to pay child support of \$37.50 per week, per child, until each child "reaches the age of eighteen years (18), becomes emancipated, married, self-supporting or deceased," whichever first occurs.

The dissolution decree was modified by an order filed February 7, 1986. As a result, the physical placement of Shane was temporarily transferred to Dennis, and Dennis was relieved of his child support obligation to Coleen until Shane resumed residing with Coleen. The order required Dennis to file an affidavit with the court upon Shane's return to Coleen.

Around July 4, 1986, Shane moved back in with his mother. Dennis did not file an affidavit. In May 1987 Shane quit high school. As of December 1987, Shane began working at several jobs. Shane continued to live with his mother.

On July 18, 1988, Coleen filed an application to modify dissolution decree seeking a reinstatement of Dennis Cunningham's child support obligation for Shane effective July 4, 1986, and a determination that Dennis is in arrears for child support since that time. Dennis filed an answer seeking, in part, a reduction in his child support obligation.

Following a hearing, the district court entered its ruling on modification of dissolution decree. The court found that Shane was emancipated and self-supporting. The court further held that Dennis was obligated to pay \$37.50 per week for the support of Shane from July 4, 1986, until February 13, 1989. Support for Sean was set at \$37.50 per week from July 4, 1986, and continued pursuant to the January 6, 1981, dissolution decree. Later, judgment was entered against Dennis in the amount of \$958.80 for Coleen's attorney fees. Coleen's actual attorney fees, however, were only \$607.50 as confirmed by Exhibit "B" of the appendix. Dennis has filed this appeal.

I.

To resolve the issues presented by the parties we turn to well-established principles. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Iowa R. App. P.

14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision here primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II.

Appellant does not appeal the district court's reinstatement of his child support obligation retroactive to July 4, 1986.¹ Rather, the issue before us concerns whether the district court erred in ordering appellant to pay child support for Shane until February 13, 1989, some fourteen months after he was found to be emancipated.²

The apparent confusion in this case centers around Iowa's prohibition against retroactive reduction in child support payments. See In re Marriage of Shepard, 429 N.W.2d 145, 146-47 (Iowa 1988); In re Marriage of Harvey, 393 N.W.2d 312, 313 (Iowa 1988). The child support payments here, however, had not accrued as of the hearing date because of the February 7, 1986, modification order.

It is clear the circumstances of this case require the reinstatement of appellant's child support obligation. When we review the various agreements of counsel, we do not find

1. The parties agreed to permit the trial court the authority to reinstate child support as of July 4, 1986, rather than the filing date of the application to modify.

2. While the district court does not state the date of Shane's emancipation, for the purposes of this appeal we deem it to be December 1, 1987.

this issue to be seriously disputed. It is also clear that once reinstatement is ordered under the dissolution decree, its terms and provisions serve as the guide as to when the requirement to pay support terminates.

In this respect, we note the following findings made by the trial court:

The evidence further reflects that in May 1987 when Shane became 16 years of age he quit high school. As of December 1987 Shane became employed at jobs which he worked twenty to thirty hours per week earning between \$4.00 and \$5.00 per hour. The specific wording of the January 6, 1981, decree entitles respondent not to have to pay support when a child becomes emancipated or self-supporting. The court concludes that even though Shane continues to reside in his mother's home and by her choice does not help her with family expenses he is emancipated or self-supporting and support as to him shall end. The past due support being accrued judgments, the court has no authority to declare respondent to not be liable for Shane's support to time of this hearing. Support as to Shane shall end effective February 13, 1989.

We accept as our own those findings of the trial court except that part which fixes the termination date at February 13, 1989. Since the appellant's obligation to pay child support had been suspended by virtue of the February 7, 1986, order, we conclude the trial court did have the authority to terminate the support obligation as of the date of emancipation. In so ruling, we do not find this to be inconsistent with previous holdings of the appellate courts which prohibit retroactive reduction in child support for here the support payments did not accrue. We conclude the district court's reinstatement

of appellant's child support obligation for Shane shall be modified to run from July 4, 1986, until December 1, 1987.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show that the trial court abused its discretion. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We find no abuse of discretion in the district court's decision to award appellee attorney fees. When we review Exhibit B, which is an itemization of appellee's attorney fees, we note those fees totaled \$607.50. Accordingly, we reduce her attorney fee award to \$607.50.

III.

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 Hayne, 334 N.W.2d 347, 353 (Iowa App.

1983); In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

We decline to award either party attorney fees for this appeal. Costs of this appeal are to be divided equally between the parties.

AFFIRMED AS MODIFIED.