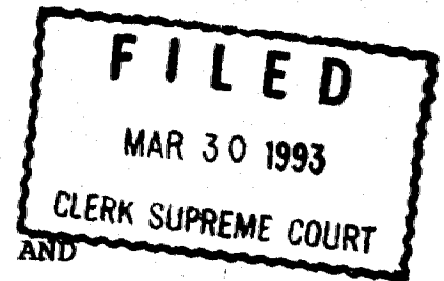


IN THE COURT OF APPEALS OF IOWA

No. 2-396 / 91-1583

IN RE THE MARRIAGE OF LYNNE ANN PEDERSON AND
ALAN RICHARD PEDERSON



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Upon the Petition of

LYNNE ANN PEDERSON,

Appellant,

And Concerning

ALAN RICHARD PEDERSON,

Appellee.

Appeal from the Iowa District Court for Marshall
County, Timothy J. Finn, Judge.

Lynne appeals and Alan cross-appeals the district
court's ruling which modified the child support provisions
of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

W.J. Latham, Jr. of Johnson, Sudenga, Latham & Peglow,
Marshalltown, for appellant.

James D. Robertson of Haupert, Robertson & Weis,
Marshalltown, for appellee.

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

HABHAB, J.

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Lynne and Alan Pederson were married in September 1972 and divorced on May 28, 1986. They had two children during the marriage, Tamara Lynne Pederson, born March 26, 1973, and Ryan Alan Pederson, born October 27, 1976. The dissolution decree was based on the parties' stipulation. They agreed to joint legal custody, with Alan having primary physical care. Lynne was not required to pay any child support.

The dissolution decree was modified on May 14, 1987, by the joint consent of the parties. At that time Alan had decided to move to California with his fiancée, Sherri. The parties agreed the children should remain in Marshalltown with Lynne. By agreement, Alan was to pay \$200 per month per child in child support. At the time of the modification Alan was earning \$39,504 at Fisher Controls. Lynne had income of \$9,756 from her employment at Wal-Mart.

Lynne filed the present application for modification of Alan's child support obligation on January 18, 1991. The district court found Lynne had not sufficiently shown a substantial change in circumstances to increase Alan's child support obligation for Ryan, who was then almost fifteen years old and attending high school. The court did modify Alan's support obligation for Tamara, who was then eighteen years old and attending her first semester of college. The court ordered Alan to continue paying \$200

per month for Tamara while she was attending college and under the age of twenty-two.

Lynne appealed and Alan cross-appealed.

I. Our review of this equitable action is de novo. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992). We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. Id.

II. Lynne first contends the court should have modified the dissolution decree to increase Alan's child support obligation for Ryan. She claims there has been a substantial change in circumstances since the prior modification in May 1987 and the child support guidelines should be applied.

Pursuant to Iowa Code section 598.21(8), a court of competent jurisdiction may subsequently modify a decree of dissolution where there has been a substantial change in circumstances. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991). To justify a modification, some material change must be shown in the circumstances of the parties, financial or otherwise, making it equitable that other or different terms be imposed. Id. A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of the changed conditions. In re Marriage of Dawson, 467 N.W.2d 271, 274 (Iowa 1991).

In our de novo review of the record we agree with the trial court that there has not been a substantial change in circumstances since the May 1987 modification.

III. Lynne contends Alan should be required to contribute more than \$200 per month for Tamara's college education expenses. Tamara's expenses for her freshman year at the University of Northern Iowa were expected to be about \$5,000.

A child's intention to attend college constitutes a material unanticipated change of circumstances necessary to modify child support to include college expenses. In re Marriage of Holcomb, 457 N.W.2d 619, 622 (Iowa App. 1990). Therefore, we agree with the district court that Tamara's decision to attend college was a substantial change in circumstances which allows the modification of the dissolution decree in such manner as to order Alan to contribute to her college expenses.

Under Iowa Code section 598.1(2), a court may require a parent to pay support for college expenses. In re Marriage of Lindberg, 462 N.W.2d 698, 701 (Iowa App. 1990). A court should consider: (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. at 702.

Looking at these factors, we affirm the trial court on this issue. We order Alan to make these payments to Lynne for Tamara's benefit, rather than directly to Tamara.

IV. Lynne claims the district court should have retroactively increased Alan's child support obligation from the date Alan was served notice of the application to modify, February 20, 1991.

Our prior decisions have granted the court authority to make an increase in child support payments retroactive to the date of filing the petition to modify. In re Marriage of Shepherd, 429 N.W.2d 145, 147 (Iowa 1988). Payments may be required from the time of the filing of the modification decree since the right to modification dates from the application for modification. In re Marriage of Stanley, 411 N.W.2d 698, 702 (Iowa App. 1987).

The trial court determined not to make the payment retroactive. We agree and affirm on this issue.

V. Lynne claims the district court should have awarded her attorney fees for the trial. She also contends the court erred in assessing one-half of the court costs to her.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). To overturn an award, the complaining party must show that the trial court abused its discretion. Id.

We find no abuse of discretion in the trial court's refusal to award trial attorney fees to Lynne. We also affirm the court's assessment of costs.

VI. In his cross-appeal, Alan contends the district court should not have required him to contribute to the children's post-high school education. We have already addressed this issue and need not discuss it further.

Alan also asks to be awarded both of the children as dependents for income tax purposes. The district court did not address this issue. We may award a noncustodial parent a dependency exemption where the circumstances warrant such an award. In re Marriage of Walsh, 451 N.W.2d 492, 493 (Iowa 1990). We determine Alan should be entitled to claim Ryan as a dependent on his income tax returns as long as he is current in his child support payments at the end of the taxable year.

VII. Finally, both parties seek attorney fees for this 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). 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. Id. at 104.

We conclude each party should pay his/her own attorney fees for this appeal. Costs of this appeal are assessed half to Alan and half to Lynne.

AFFIRMED AS MODIFIED.