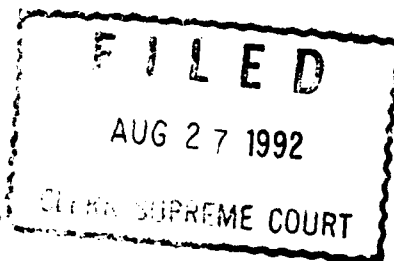


IN THE COURT OF APPEALS OF IOWA

No. 2-049 / 91-1024



IN RE THE MARRIAGE OF CHRISTENE ELAINE NEWHOLM AND
CRAIG ROGER NEWHOLM

Upon the Petition of

CHRISTENE ELAINE NEWHOLM, a/k/a CHRISTENE ELAINE HURLBERT,

Appellant,

And Concerning

CRAIG ROGER NEWHOLM,

Appellee.

Appeal from the Iowa District Court for Linn County,
William R. Eads, Judge.

The wife appeals from a district court order modifying
the parties' 1989 dissolution decree. **AFFIRMED.**

Franklin R. York of Ackley, Kopecky & Kingery,
Cedar Rapids, for appellant.

Linda H. Robbins of Irvine & Robbins, Cedar Rapids, for
appellee.

Considered by Oxberger, C.J., and Donielson and
Sackett, JJ.

DONIELSON, J.

Christene and Craig Newholm were divorced on December 19, 1989. They had two children: Carolyn, born in November 1970, and Cayle, born in May 1973.

The December 1989 dissolution decree incorporated a stipulation reached by the parties on several issues. The decree awarded Christene and Craig joint legal custody of Cayle, who was still a minor at that time. Christene was the physical custodian. The decree directed Craig to pay child support both for Cayle, who was a minor, and for Carolyn, who was not a minor but qualified for support as a full-time college student.

After the dissolution decree, Cayle dropped out of high school. His mother gave him an ultimatum that he must either return to high school or move out of her home. Cayle chose to move out of Christene's home, and he did so in November 1990, before his eighteenth birthday. Christene has had little contact with Cayle since that time.

Shortly after Cayle moved out of her home, Christene filed an application to modify the dissolution decree's child support provisions. She acknowledged that support should end for Cayle, but filed her application to secure support payments for Carolyn.

The district court modified the decree to eliminate support for Cayle, after finding Cayle was emancipated within the meaning of the parties' 1989 stipulation.

However, the district court also eliminated monthly support for Carolyn, relying on the language of the 1989 stipulation. The stipulation provided that Craig's monthly child support obligation would cease when Cayle turned eighteen or became emancipated, among other conditions. The district court held no judgment for monthly child support for either child could survive Cayle's emancipation, but Carolyn was still covered by a separate provision of the stipulation which obligated each party to pay one-third of her college fees.

Christene has appealed from the district court's modification order.

Christene argues the district court misinterpreted the parties' 1989 stipulation by eliminating monthly support for Carolyn. Christene also contends the district court should have awarded her attorney fees of \$592.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Child Support for Carolyn. Christene first argues the district court erred and misinterpreted the parties'

1989 stipulation by eliminating monthly support for Carolyn. Christene asserts Craig should continue to pay \$400 per month in support for Carolyn as long as Carolyn qualifies for support as a full-time college student. Christene argues the parties' 1989 stipulation was not intended to eliminate college support for Carolyn automatically upon the emancipation of Cayle.

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 Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983)).

We agree a substantial change of circumstances occurred when Cayle became emancipated before graduating from high school and before Carolyn turned twenty-two years of age. Once Cayle became emancipated, the stipulation no longer provided for any outstanding judgment for child support. Paragraph 4 of the stipulation stated:

While Carolyn qualifies for support under Section 595.1 of the Iowa Code but is not living primarily with the Petitioner, support shall be in the amount of \$450.00 per month. Said support amounts shall continue until Carolyn [] is no longer a full-time student . . . , no longer living with the Petitioner, or attains twenty-two years of age

whichever shall first occur. Thereafter, said support shall be in the amount of \$400.00 per month and such monthly obligation shall continue until Cayle [] obtains the age of eighteen or graduates from high school which shall occur last or until he becomes emancipated, married or deceased, whichever shall occur first.

(emphasis added). Paragraph 4 does not address the unforeseen change of circumstances. The only provision in the stipulation which provides Carolyn with support is Paragraph 5.

We agree with the district court's conclusion that Paragraph 5 appropriately applies to Carolyn. Paragraph 5 provides that each party shall be responsible for the payment of one-third of normal college expenses, limited to education at a public institution within the State of Iowa.

We further hold the district court did not err by not providing any further child support for Carolyn. Iowa Code section 598.1(2) (1991) states:

The obligations [for support] may include support for a child who is between the ages of 18 and 22 years . . . [who] is, in good faith, a full-time student in a college, university, or community college; or has been accepted for admission . . . and the next regular term has not yet begun.

We find Paragraph 5 of the stipulation provides any support which section 598.1(2) might have included. As Carolyn earned some \$6000.00 in one year, she has demonstrated that she can be self-sufficient. We also agree with the district court's observation:

Although a child may voluntarily chose to live at either the home of her mother or father and the

parent may voluntarily choose to keep that child at [his or her] home while the child is attending [a] post-high school institution of learning, there is no obligation or duty of either parent to do so.

We do not agree any further support, in addition to that provided by Paragraph 5, is necessary. The district court did not err in its modification of the decree by not providing further child support for Carolyn.

II. Attorney Fees. Christene also argues the district court erred in failing to require Craig to pay Christene's attorney fees.

Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). Under Iowa Code section 598.36 (1991), "[i]n a proceeding for the modification of an order or decree . . . the court may award attorney fees to the prevailing party" We agree with the district court's finding that Christene was not the prevailing party. We do not find an abuse of discretion.

The costs of this appeal are taxed to Christene.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

Sackett, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I do not interpret paragraph 4 of the parties in the same manner as the majority. The pertinent provisions of paragraph 4 are:

The respondent shall pay child support to the petitioner in the amount of \$576.00 a month for the support of the two children of the parties' . . . While Carolyn qualifies for support under Section 595.1 of the Iowa Code, but is not living primarily with the petitioner, support shall be in the amount of \$450.00 per month. Said support payments shall continue until Carolyn Marie Newholm is no longer a full time student in a college, University or area school, no longer living with the petitioner, or attains twenty two (22) years of age, whichever first occurs.

The original decree adopted the parties stipulation, there was no appeal.

The majority concludes because Cayle, Carolyn's younger brother, became emancipated before age of 18, this event was not contemplated in the decree, thus no provision was made to pay child support to Carolyn when Cayle was not in the petitioner's home.

I do not believe we should deny Carolyn support for her college education her parents agreed to provide.

Paragraph 4 states the respondent shall pay child support for Carolyn until she is 22 when enrolled in college. She is enrolled in college and is not 22. There is no provision that states the payments cease if Cayle is emancipated. I would not write a new provision into the stipulation.

The problem facing the court is that if we enforce the original stipulation the respondent is receiving child

support when the child Cayle is not in the home. I believe the action of the majority in voiding the paragraph because enforcing now results in a windfall to the respondent is misdirected. Carolyn's right to support should not be halted because her mother receives a windfall.

In my judgment an application of mathematics provides a simple solution. Paragraph 4 provides that when Carolyn becomes 22 the petitioner shall receive \$400.00 per month. I would subtract the \$400.00 for Cayle alone from the \$450.00 for both children, thus leaving \$50.00 per month for Carolyn.