

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF
RUTH E. WAY AND DENNIS D. WAY

FILED

AUG 24 1988

CLERK SUPREME COURT

Upon the Petition of)

RUTH E. WAY,)

410

Petitioner-Appellee/
Cross-Appellant,)

And Concerning)

8-201
87-739

DENNIS D. WAY,)

Respondent-Appellant/
Cross-Appellee.)

Appeal from the Iowa District Court for Polk County (CD
41-24593), George Bergeson, Judge.

Respondent husband appeals the district court's order
for modification of the parties' dissolution decree.
AFFIRMED AS MODIFIED.

Eric Borseth of Wright, Wright & Borseth, Des Moines,
for respondent-appellant/cross-appellee.

Patrick H. Payton of Patrick H. Payton, P.C., Des
Moines, for petitioner-appellee/cross-appellant.

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

SCHLEGEL, J.

Respondent husband appeals the district court's order for modification of the parties' dissolution decree. He claims that the trial court erred in taxing court costs and petitioner's attorneys fees to him when he was the prevailing party. Petitioner wife cross-appeals, claiming that the court erred in altering the parties' proposed decree. Petitioner also seeks attorney fees on appeal. Our review of the district court's modification of the dissolution decree is de novo. In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983); Iowa R. App. P. 4. We affirm as modified.

The respondent, Dennis D. Way, and the petitioner, Ruth E. Way, were married in 1974. They have one child, Carrie Beth Way, born August 11, 1975. Dennis owns a grocery store in Redfield, Iowa. Ruth resides in West Des Moines and is unable to work due to illness. Her only means of support is provided through welfare services.

A decree of dissolution of the parties' marriage was entered on January 5, 1984. The decree was subsequently modified in 1985, and gave Dennis increased visitation rights. On June 18, 1986, Dennis filed a petition for further modification, seeking joint legal custody of Carrie and increased visitation. The district court granted joint legal custody, increased Dennis's summer visitation with Carrie, and provided specific times for holiday visita-

tion. The court also ordered Dennis to pay \$300 for Ruth's attorney fees and court costs for the action.

Dennis contends that the trial court erred in taxing court costs and attorney fees to him, when he was the prevailing party. In a proceeding to modify a dissolution decree, the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court. Iowa Code § 598.36 (1987). Such fees are not recoverable as a matter of right, but rest within the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to pay. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983).

Our de novo review of the record indicates that Ruth, who is unemployed due to illness and does not anticipate working in the future, receives approximately \$322 per month in ADC support payments and has few assets. Dennis owns and operates a grocery store in Redfield, Iowa, earns approximately \$225 per week, has very few assets himself, and has numerous debts totaling over \$13,000. The record also indicates that he is in arrears of \$3,280 in child support payments. In view of the fact that neither party has substantial earning capacity, and that Dennis was the prevailing party in his petition for modification of the decree, we determine that the trial court abused its discretion in awarding Ruth attorney fees and court costs.

We further find Ruth's claim that the court erred in altering the proposed decree prior to filing to be without merit. An unfiled decree is not conclusive and is subject to the control of the court until entered on the proper record. Smith v. Willcockson, 143 Iowa 449, 451, 121 N.W. 1054, 1054 (1909). Ruth's request for attorney fees and costs associated with this appeal is denied.

AFFIRMED AS MODIFIED.