

IN THE COURT OF APPEALS OF IOWA

No. 1-573 / 91-791

IN RE THE MARRIAGE OF DIANA LYNN VIBBARD
AND DENNIS LEROY VIBBARD

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Upon the Petition of

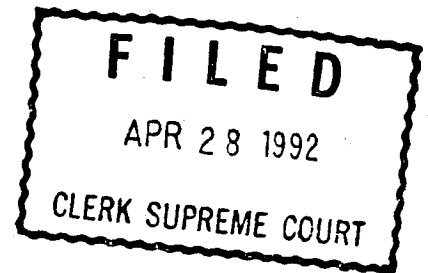
DIANA LYNN VIBBARD,

Appellant,

And Concerning

DENNIS LEROY VIBBARD,

Appellee.



Appeal from the Iowa District Court for Marshall
County, Carl E. Peterson, Judge.

Petitioner former wife appeals from the district
court's denial of her application for modification of the
decree dissolving the parties' marriage. REVERSED AND
REMANDED.

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan,
Condon & Klaessy, Marshalltown, for appellant.

Dennis Leroy Vibbard, pro se, for appellee.

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

OXBERGER, C.J.

The marriage of Diana and Dennis Vibbard was dissolved in April 1975. The dissolution decree awarded Diana custody of the parties' children; Lisa, born on May 29, 1971, and Denny Lee, born on November 25, 1972. The court directed the father, Dennis, to pay child support for each child until the child either reached age eighteen or graduated from high school, whichever came first.

On November 25, 1990, Denny Lee reached age eighteen, and the father stopped making child support payments. In April 1991 Diana applied for a modification of the dissolution decree to continue child support for Denny Lee until he graduated from high school. Although Denny Lee has reached age eighteen, he is not scheduled to graduate from high school until May 1992. Denny Lee was held back in his first grade which delayed his graduation.

After a hearing, the district court denied Diana's application for modification. Diana has now appealed from the district court's ruling.

SCOPE OF REVIEW: In this equity action we review de novo. Iowa R. App. P. 4. 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 Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

MODIFICATION OF THE DECREE: We consider whether the trial court erred in refusing to modify the decree to provide for continued child support until Denny Lee completes high school in May 1992.

At the time of the plaintiff's application, Denny Lee was eighteen years old. As such, the district court had the authority to modify the original award of support. See Willcox v. Bradrick, 319 N.W.2d 216, 218 (Iowa 1982). If the court had the power to order continued support payments, the fact that the original support obligation had terminated does not preclude modification to extend it. Id.

Iowa Code section 598.1(2) defines "support" in part as:

The obligations may include support for a child who is between the ages of eighteen and twenty-two years who is regularly attending an accredited school in pursuance of a course of study leading to a high school diploma or its equivalent. . .

In the present case, the original decree provided support was to be paid by the father "until the youngest child reaches the age of 18 years or finishes high school, whichever event shall first occur, at which time said support shall cease, . . ." We find the original decree is

clear on its face. Denny had reached the age of 18 and the payments, according to the original decree, ended at that time.

Denny Lee's eighteenth birthday was on November 25, 1990. He now desires to regularly attend a high school in pursuit of a high school diploma. Denny Lee's earning opportunity will be diminished while he attends school. While he is obtaining his diploma, there will be a need for support which he cannot otherwise provide for himself.

The Iowa Supreme Court has held that a child's decision to attend college was a sufficient material, unanticipated change of circumstances to warrant a modification of an original decree to provide support. In re Marriage of Peiper, 369 N.W.2d 439, 440 (Iowa 1985). Denny Lee is not required to complete his high school education. He could, if he chose, end his education and attempt throughout his life to compete against others for work who have obtained their diploma. We find his decision to obtain his diploma is in principle akin to the child's decision in Peiper to further his education. Denny Lee's choice to remain out of the work force and obtain his diploma is a sufficient material, unanticipated change of circumstances which warrants a modification of child support. The change in circumstance occurred the day Denny Lee enrolled in his senior year of high school. We therefore remand to the trial court to determine child support amounts under the

current child support guidelines, and direct such payments to be due from the date of Denny Lee's enrollment in the twelfth grade until May 30, 1992. This order does not preclude the possibility of another modification in the future regarding Denny Lee's child support in the event he should choose to further his education beyond high school.

ATTORNEY'S FEES: 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 Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

We are unable to consider, upon the record before us, the financial positions of the parties. We therefore decline to address this issue and remand to the trial court for its determination. Costs are taxed to Dennis Leroy Vibbard.

REVERSED AND REMANDED.