

IN THE COURT OF APPEALS OF IOWA

No. 6-130 / 95-0072

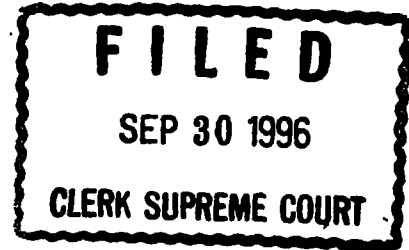
**IN RE THE MARRIAGE OF RHONDA LYNN
MATHEWS AND RAYMOND D. MATHEWS**

**Upon the Petition of
RHONDA LYNN MATHEWS,**

Petitioner-Appellee/Cross-Appellant,

**And Concerning
RAYMOND D. MATHEWS,**

Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Jefferson County, Robert Bates,
Judge.

Appeal and cross-appeal from action for declaratory relief and modification
of dissolution decree. **AFFIRMED.**

Myron L. Gookin of Foss, Kuiken & Gookin, P.C., Fairfield, for appellant.

John Wunder, Muscatine, for appellee.

Considered by Sackett, C.J., and Habhab and Huitink, JJ.

HABHAB, J.

This is an appeal and cross-appeal from an action for declaratory relief and a counterclaim requesting modification of the parties' dissolution decree. We affirm.

Rhonda and Raymond Mathews were married in 1978. They have one child from the marriage, Raymond Jr., born December 4, 1979. In addition, Rhonda has a daughter, Nicole Duggan, born December 15, 1975.

In April 1989, Rhonda filed a petition for dissolution of marriage. At this time Raymond, a member of the United States army, was stationed in Germany. Raymond filed an acceptance of service and notice.

Following a November 1989 hearing at which neither Raymond nor any counsel for Raymond appeared, the court filed a default dissolution of marriage decree. The decree gave Rhonda primary physical care of the children and ordered Raymond to pay child support in the amount of \$50 per month per child. It further provided Raymond maintain health, dental, and eye care insurance coverage for the children as long as they could be covered through the army insurance plan. The decree required Raymond to pay spousal support to Rhonda in the amount of \$660 per month for six months and that Rhonda receive one-half of the proceeds from Raymond's pension upon his retirement from the army. No appeal was taken from the dissolution decree.

In June 1994, Raymond filed a petition for a declaratory judgment. He requested, among other things, the court terminate his support obligation for Nicole

after May 1994, the approximate date of her high school graduation, and clarify the decree to provide that Rhonda only receive one-half of the portion of his pension amassed during their marriage.

Rhonda answered and filed a counterclaim for modification of the decree. Rhonda requested Raymond's child support obligation be increased, her alimony award be reinstated, and Raymond's obligation to provide the children with insurance be modified. The court found Raymond had no further obligation to support Nicole. It also denied Raymond's request for clarification of the pension award. The court denied Rhonda's requests for modification of Raymond's insurance obligation, for the reinstatement of alimony, and for an award of attorney fees.

Raymond appeals. He argues the court erred in failing to provide declaratory relief concerning the decree's award of his pension plan. Raymond maintains the decree's language regarding the pension is unclear and the court should have provided Rhonda be awarded one-half of his pension benefits accumulated during the parties' marriage.

Rhonda cross-appeals. She argues the court correctly denied Raymond's request for clarification of the award of the pension plan because it was an attempt to modify the property division. Rhonda further argues the court erred in terminating Raymond's support obligation for Nicole and in denying her requests to reinstate alimony, to alter Raymond's insurance obligation, and for an award of attorney fees. In addition, Rhonda requests appellate attorney fees.

I. Declaratory Relief. Raymond sought declaratory relief to ascertain the meaning and effect of the language in the dissolution decree which divided his pension benefits. The decree provided:

Petitioner shall receive an amount equal to one-half of the proceeds from Respondent's pension, with Petitioner's share being calculated and paid over to Petitioner upon Respondent's retirement from the U.S. Army.

Raymond proposes the language be construed to give Rhonda only a limited one-half interest in his pension benefits and not a full one-half of the benefits. Specifically, he argues Rhonda's half of the benefits should be calculated "by only allowing one-half of the benefits accumulated during the period of the marriage as compared to Raymond's total years of credited service." Raymond calculates during his eleven years of marriage to Rhonda he accumulated only seven and one-half years of service credited toward his pension.

The district court denied Raymond's request for declaratory relief noting it had no authority to modify a division of property. We agree. The supreme court has held an action for a declaratory judgment may be maintained to construe a dissolution decree. *See Whitworth v. Heinzle*, 246 Iowa 1155, 1159, 70 N.W.2d 536, 539 (1955). However, dicta in the *Whitworth* decision indicates such relief is not available where the provisions of the decree are so clear as to render further declaratory relief a frivolous request. *See id.* at 1157, 70 N.W.2d at 538.

The language in the dissolution decree is clear and unambiguous. Rhonda is entitled to one-half of Raymond's pension without any limitation or application of a formula calculating the years of marriage and Raymond's years of service. To apply Raymond's interpretation would amount to a modification of the property division which, with limited exceptions, is prohibited. *See In re Marriage of Bruns*, 535 N.W.2d 157, (Iowa App. 1995) (it is well-established a division of property is not subject to modification absent fraud, duress, coercion, mistake, or other similar grounds which would support the modification of ordinary judgments). The trial court was correct in denying Raymond's request for declaratory relief.

II. Child Support for Step-Child. In his petition for declaratory judgment, Raymond requested his support obligation for Nicole be terminated. In her answer and counterclaim, Rhonda requested an increase in Raymond's child support obligation. The district court increased Raymond's support obligation for Raymond Jr. from \$50 per week to \$455 per month. No appeal has been taken on this issue. The court also determined Raymond had no further obligation for the support of Nicole.

Rhonda's petition for dissolution had informed the court Nicole was not a child of the marriage but was a child whose welfare would be affected by the dissolution. Raymond testified he paid support for Nicole because he felt he had been a father to her since she was two years of age. The decree provided:

The Respondent shall pay the sum of \$50.00 per week per child commencing the 20th day of Nov, 1989, until the minors reach 18 years of age or until they become self-supporting, marry or die, whichever is sooner, or unless any child is enrolled in an institution of higher learning and a student in good standing, in which event, the support shall continue until the child graduates from the institution of higher learning, leaves school, or turns 22 years of age, whichever is sooner. As each child becomes self-supporting, said payments shall abate proportionately.

At the time of the declaratory relief/modification hearing, Nicole was eighteen years of age, had graduated from high school, and was enrolled in college. The district court modified the decree to provide Raymond had no further obligation to support Nicole. On appeal, Rhonda claims theories of res judicata, equitable estoppel, and contract prevent Raymond's support obligation for Nicole from being eliminated. We find these arguments to be without merit.

Rhonda first asserts the trial court erred in not continuing Nicole's support on the basis of res judicata. Application of the doctrine of res judicata is not dispositive on this issue because, as noted later in this opinion, child support, including support for a child's college expenses, is subject to modification. We also find there was insufficient evidence to support a finding of detrimental reliance as required for the application of equitable estoppel. Finally, Rhonda failed to prove a contractual obligation for Raymond to pay support for Nicole.

Our rejection of Rhonda's theories is not dispositive on the issue of support for Nicole. We must determine whether Raymond carried his burden to establish a material and substantial change in circumstances which would warrant a modification

of his obligation to support Nicole. Before we do so, we first note the unusual context of this case. From the outset it was acknowledged Raymond was not Nicole's father.¹ Ordinarily, an Iowa court cannot order support for a step-child. *In re Marriage of Bethards*, 526 N.W.2d 871, 874 (Iowa App. 1994). Raymond had no legal obligation to provide support for Nicole after the dissolution of the marriage. He testified he did not object to the inclusion of a support obligation for Nicole because he had acted as her father for twelve years.

The dissolution court ordered Raymond to pay support for Nicole. A child support obligation generally terminates when a child turns eighteen years of age unless it falls within the statutory provisions of section 598.1(6)² and is provided for

¹ Neither party has argued the applicability of the doctrine of "equitable parenthood." See *In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995); *In re Petition of Ash*, 507 N.W.2d 400 (Iowa 1993). We need not address whether that doctrine may be used for the imposition of a child support obligation.

² "Support" or "support payments" means an amount which the court may require either of the parties to pay under a temporary order or a final judgment or decree, and may include alimony, child support, maintenance, and any other term used to describe these obligations. For orders entered on or after July 1, 1990, unless the court specifically orders otherwise, medical support is not included in the monetary amount of child support. The obligations may include support for a child who is between the ages 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, or regularly attending a course of vocational-technical training either as a part of a regular school program or under special arrangements adapted to the individual person's needs; or is, in good faith, a full-time student in a college, university, or community college; or has been accepted for admission to a college, university, or community college and the next regular term has not yet begun; or a child of any age who is dependent on the parties to the dissolution proceedings because of physical or mental disability. Iowa Code § 598.21(6) (1995).

in the dissolution decree. *See In re Marriage of Linberg*, 462 N.W.2d 698, 700-701 (Iowa App. 1990); *In re Marriage of Rohlfesen*, 398 N.W.2d 197, 199 (Iowa App. 1986). To the extent a dissolution court imposes a support obligation for college-age children, the child support guidelines are not applicable in determining the amount of support. *See Linberg*, 462 N.W.2d at 701.

Support orders are subject to modification. Iowa Code § 598.21(8)(1995). A child support obligation may be modified if it is proven by a preponderance of the evidence its enforcement will be attended by positive wrong or injustice as a result of material and substantial changes in the circumstances since the date of the original decree. *Bethards*, 526 N.W.2d at 874.

Raymond sought to have the decree modified to eliminate the provision he provide support for Nicole after she graduated high school and entered college. We find the decision to eliminate this support was equitable and supported by a material and substantial change in circumstances. Raymond had remarried and assumed new familial obligations. His new wife had considerable health problems with related medical expenses. Iowa Code § 598.21 (8)(d). (g) (remarriage of party and changes in number or needs of dependents). His support obligation for Raymond Jr., had increased over 100 percent, and Raymond testified he would be retiring from the military in 1997. Iowa Code § 598.21(8)(a) (1995) (changes in earning capacity or resources of party). These circumstances constitute a material and substantial change in circumstances warranting a modification of support. We affirm the elimination of

Raymond's obligation to provide support for Nicole after she turned eighteen and graduated high school.

III. Reinstatement of Alimony. Rhonda requested Raymond's obligation to pay her alimony be reinstated. She requested the alimony not be reinstated until such time as Raymond is no longer required to pay child support. The dissolution decree had required Raymond to pay Rhonda spousal support in the sum of \$660 per month for the first six months following the entry of the decree. Raymond made those payments and his alimony obligation ceased.

A court has the power to modify a finite award of alimony payments even after the period for alimony payments has expired. *In re Marriage of Marshall*, 394 N.W.2d 392, 396 (Iowa 1986). Our review is de novo in determining if Rhonda proved a material and substantial change in circumstances warranting a reinstatement of an alimony award.

Rhonda was ill during the marriage and at the time of the divorce. She continued to be ill after the divorce, with the only difference being she received an accurate diagnosis of her illness after the dissolution. While Rhonda asserted she was disabled, she did engage in physical activity like bowling. Raymond has remarried and supports a wife who has numerous health problems. He also pays substantially more in child support for Raymond Jr. We have considered the factors set forth in Iowa Code section 598.21(3) (1995) and conclude equity does not warrant reinstatement of alimony in this case.

IV. Medical Expenses. In her request for modification, Rhonda argued her children's medical service providers would not honor Raymond's insurance coverage and she requested Raymond's obligation to assist her in providing medical coverage for the children be modified. The district court denied this request. The decree ordered Raymond to provide ample insurance coverage and he has done so. Rhonda asserted she has had some difficulties in getting claims processed, but Raymond's present wife testified it was not difficult to utilize the army's insurance coverage. We do not find modification was warranted on this issue.

V. Trial Attorney Fees. Rhonda requested \$1500 in attorney fees. The district court denied her request. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay and the fees must be fair and reasonable. *Id.* To overturn the decision of the trial court, Rhonda must establish the trial court abused its discretion. *Id.*

Rhonda was the prevailing party in resisting Raymond's request for declaratory relief, but she lost with respect to all of the issues raised in her request for modification. There is a disparity in the present level of the parties' incomes, but Raymond now has a new spouse and a substantially increased child support obligation for Raymond Jr. Under these circumstances, we find the decision not to award trial attorney fees was equitable and not an abuse of discretion.

VI. Appellate Attorney Fees. Rhonda requests an award of \$1500 in appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppelle*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we 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 decision of the trial court on appeal. *Id.* Given the circumstances of the parties in this action, we do not find equity warrants an award of appellate attorney fees to Rhonda.

AFFIRMED.