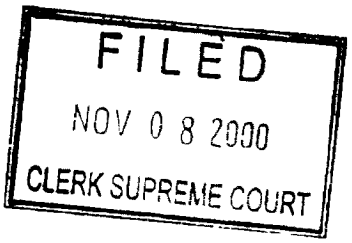
IN THE COURT OF APPEALS OF IOWA

No. 0-333 / 99-1190
Filed November 8, 2000

IN RE MARRIAGE OF ALEXIS CAROLE BERGER AND RICHARD ALLEN BERGER



Upon the Petition of
ALEXIS CAROLE BERGER,
n/k/a ALEXIA CAROLE STIGGE,
Petitioner-Appellant,

And Concerning
RICHARD ALLEN BERGER,
Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Sharon A. Mellon of Mellon & Spies, Iowa City, for appellant.

Robert N. Downer and Margaret T. Lainson of Meardon, Sueppel & Downer, P.L.C., Iowa City, for appellee.

Petitioner-appellant appeals from the district court's rulings interpreting the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

ZIMMER, J.

Overview. The petitioner-appellant, Alexis Stigge, f/k/a Berger, appeals from a district court's ruling interpreting the parties' decree of dissolution. She contends the court erred in (1) ordering Richard Berger to pay only one-third of their daughter's college expenses, (2) ordering that Richard's child support obligation end in May instead of August, and (3) failing to award her attorney fees. On appeal, she also seeks appellate attorney fees. We affirm as modified.

Background facts and proceedings. Alexis and Richard Berger married in 1977. They had one child, Andrea, born in April 1981. During the marriage, Richard attended medical school and had not yet completed his residency when they divorced in November 1987. Alexis attended college and worked toward a teaching degree, which she received in 1988. The court gave Alexis physical care of Andrea and ordered Richard to pay monthly child support of $300. The decree also provided for Richard to pay "for post-high school support" until Andrea reached twenty-two years old so long as she was either accepted for admission or a full-time student in college.

Richard appealed several provisions of the decree, including the post high school support. This court affirmed the district court's "provision of the continuation of such child support past age 18, in the event Andrea meets the qualifications of Iowa Code section 598.1(2) (1987)."[1] *In re Marriage of Berger*, 431 N.W.2d 387, 390 (Iowa App. 1988).

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[1] Section 598.1(2) defined "support" or "support payments" and provided, in pertinent part:

> The obligations may include support for a child who is between the ages of eighteen and twenty-two years who is, . . . in good faith, a full-time

In 1994 Alexis sought an increase in Richard's monthly child support. Richard then had a net monthly income in excess of $13,000, and Alexis was earning nearly $30,000 per year as a teacher. In January 1995 the district court increased Richard's monthly child support obligation to $1750 "under such conditions as previously ordered in the original decree of dissolution." The court authorized immediate income withholding.

Andrea turned eighteen in April 1999 and graduated from high school that May. By the time of her graduation, she was accepted for admission to the University of Iowa. In April Richard applied for an order terminating his child support after the May 1999 payment and releasing the wage withholding order. Alexis resisted, citing the post high school support provisions of the original decree, the decision on appeal, and the 1995 modification order. After a hearing in June 1999, the court ordered Richard's child support terminated and made him responsible for one-third of Andrea's room, board, books and tuition at the University of Iowa. The court made no award of attorney fees.

Appellate claims. Alexis claims that in light of the supreme court's decision in *In re Marriage of Williams*, 595 N.W.2d 126 (Iowa 1999) (holding that a statute providing a parent's share of college expenses should not exceed one-third of costs does not apply retroactively), Richard should pay for all of Andrea's post-high school educational expenses and continue to provide her with insurance coverage. She also claims regular child support should not have terminated until August 1999. She seeks both trial and appellate attorney fees.

> student in a college, university . . . or who has been accepted for admission . . . and the next regular term has not yet begun. . . .

Iowa Code § 598.1(2) (1987).

Discussion. Iowa Code section 598.21(5A), effective July 1, 1997, limited divorced parents' contribution to their child's post high school education expenses to one-third of the cost at an in-state public institution. In applying that statute to a case in which a father's support obligation spanned the effective date of the legislation, this court held the limitation only applied prospectively and applied the limitation to those expenses incurred after July 1, 1997. *In re Marriage of Griffin*, 570 N.W.2d 258, 260 (Iowa App. 1997) (reasoning that the financial obligations incurred prior to the effective date of the new law and those incurred after could be segregated).

In 1999 the supreme court revisited the issue of prospective application of the statute and overruled that portion of *Griffin* which applied the statute to expenses incurred after the statute's effective date. *In re Marriage of Williams*, 595 N.W.2d 126, 130 (Iowa 1999). The court held:

> While asserting that the statute was only to be applied prospectively, the court of appeals gave it retroactive effect by applying it to the provisions of a district court order which had been entered before July 1, 1997. We cannot reconcile this outcome with our determination that the statute was only to be applied prospectively. . . .

Id.

This year the supreme court addressed the prospective application of the statute again in *In re Marriage of Sojka*, 611 N.W.2d 503 (Iowa 2000). The court stated:

> To the extent *Williams* left open any question about the matter, we now hold that section 598.21(5A) applies only to dissolution decrees postdating the statute's enactment.

Id. at 505.

The original decree provided for Richard to "pay for post-high school support" for Andrea up to age twenty-two while she remained a full-time student in good faith. The court took into consideration it was likely "Richard will make a substantial income" when it ordered support. In the 1994 modification proceeding, Richard argued he should not be required to pay additional child support because under the decree he was "required to provide the total cost of Andrea's post high school education" and needed to accumulate funds for that purpose. The evidence reveals Richard did set aside funds for Andrea's college education, albeit in his wife's name. Because he was accumulating funds for Andrea's college costs, Alexis did not set aside any funds for that purpose.

The ruling at issue is not from a modification proceeding. Richard applied to have the district court issue an order concerning the conclusion of his child support obligation because his employer would not stop withholding child support until the court terminated the wage assignment. Alexis resisted, but did not seek modification of the decree. Neither party tried this case as if it were a modification proceeding. The parties did, however, request the court to resolve their disagreement regarding the extent of Richard's obligation for post high school support for Andrea under the terms of their dissolution decree as modified.

Under the decree, child support was to end when Andrea graduated from high school or attained age eighteen. In its ruling, the district court enforced the decree and terminated the wage withholding order. We find that under the terms of the decree and as it was modified in 1995, Richard was not responsible for

child support for the summer months between her high school graduation in May 1999 and her matriculation in the University of Iowa later that same year.

The district court, apparently relying on *Griffin*, limited Richard's obligation for college support to one-third of Andrea's tuition, room and board, and books. Alexis argues the support obligation should include other college expenses such as transportation and personal expenses. She also contends that, in light of the *Williams* case, Richard should be required to pay all of those expenses. Both before and after the time of the original decree in this case, we have held college expenses to be those "incident to" the education or "direct" costs, which we defined as tuition, room, board, and books. *See, e.g., In re Marriage of Springer*, 538 N.W.2d 897, 901 (Iowa App.1995); *In re Marriage of Richards*, 439 N.W.2d 876, 880 (Iowa App. 1989); *In re Marriage of Frink*, 409 N.W.2d 477, 482, n.5 (Iowa App. 1987).

We determine Richard is obligated to pay all of Andrea's post high school education costs of tuition, room, board, and books. This conclusion is consistent with a fair reading of the original decree, Richard's own prior interpretation of that decree, and the supreme court's recent pronouncements in *Williams* and *Sojka*. Richard's obligation does not extend to other estimated costs such as travel or personal expenses. We modify the district court's ruling, therefore, to conform to this opinion. Andrea's college expenses shall not be paid to Alexis, but rather to Andrea or the school directly.

Alexis also claims the district court erred in not awarding her attorney fees. Ordinarily an award of attorney's fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of

discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). We find no abuse of discretion by the district court.

Alexis also seeks an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). 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 trial court's decision on appeal. *In re Marriage of Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). Considering the needs of Alexis and Richard's ability to pay, we determine Richard shall pay $1,000 of Alexis's appellate attorney fees.

AFFIRMED AS MODIFIED.