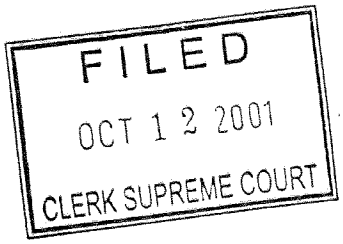
IN THE COURT OF APPEALS OF IOWA

No. 1-479 / 00-1788
Filed October 12, 2001



IN RE THE MARRIAGE OF ANNE COLLEEN ROHLFSEN AND GREGORY THARAN ROHLFSEN

Upon the Petition of
ANNE COLLEEN WIARDA, f/k/a ANNE COLLEEN ROHLFSEN,
Petitioner-Appellant,

And Concerning
GREGORY THARAN ROHLFSEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Hardin County, Newt Draheim, Judge.

The petitioner appeals a district court order granting the respondent's petition to modify the child support provisions of the parties' dissolution decree. **AFFIRMED.**

Sharon Soorholtz Greer of Cartwright, Druker & Ryden, Marshalltown, for appellant.

Michael A. Smith of Craig & Smith, L.L.P., Eldora, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

PER CURIAM

The petitioner appeals a district court order granting the respondent's petition to modify the child support provisions of the parties' dissolution decree. Petitioner contends the district court erred in concluding respondent had demonstrated a substantial change in circumstances justifying a reduction in his child support obligation. Both parties request an award of appellate attorney fees. We affirm.

I. Background Facts and Proceedings. The marriage of Gregory and Anne Rohlfsen was dissolved by decree in 1992. Anne was awarded physical care of the children, Nicholas, born in 1987, and Macey, born in 1989. The decree incorporated the parties' stipulation that Gregory pay child support of $370 per month.

In February of 1999, Gregory left his employment at Iowa Prestressed Concrete, claiming that a degenerative back injury prohibited him from performing his job as a laborer. That fall, Gregory began attending school at Ellsworth Community College to study biology. He received Vocational Rehabilitation Services from the State for tuition and fees for the fall semester of 1999 and the spring semester of 2000.

While attending school, Gregory worked part-time at McDonald's until his back went out in January of 2000. Since the fall of 2000, Gregory has worked at the Ellsworth Community College Wellness Center for eight hours a week, earning $5.75 per hour. Gregory also mows lawns for his father in lieu of paying him $275 per month in rent.

In November of 1999, Gregory filed a petition to modify the child support provisions of the dissolution decree, alleging a substantial change in circumstances justified a reduction in his payments. Anne resisted the modification action, claiming Gregory is capable of working full-time with certain lifting restrictions. She argues Gregory's reduction in income was voluntary.

Following a trial, the district court concluded Gregory had demonstrated a substantial change in circumstances, and reduced his child support obligation to $75 per month. The court further ordered that Gregory continue to provide medical insurance for the children. Anne then brought a rule 179(b) motion alleging Gregory's child support obligation should be increased to $335.57 and, if not, she should be awarded the income tax exemptions for both children. The district court denied the motion with respect to both provisions, but granted Anne's request to order Gregory to notify her if he receives Social Security benefits.

On appeal, Anne argues that Gregory is capable of earning more and that his earning capacity, not his actual earnings, should be considered in determining his child support obligation. Both parties request an award of appellate attorney fees.

II. Scope of Review. Our review of proceedings to modify a marriage dissolution decree is de novo. *In re Marriage of Barker,* 600 N.W.2d 321, 323 (Iowa 1999). This standard requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Vieth,*

591 N.W.2d 639, 640 (Iowa Ct. App. 1999). We give weight to the findings of the trial court, although they are not binding. *Id.*

III. Modification of Child Support. A court may modify an order of child support when there has been a substantial change in circumstance. Iowa Code § 598.21(8) (1999). In determining whether a change in circumstances has taken place, the court considers changes in employment, income or earning capacity of a party, as well as changes in the physical health of a party. Iowa Code § 598.21(8)(a) & (e). The party seeking modification must prove the change in circumstances by a preponderance of the evidence. *In re Walters*, 575 N.W.2d 739, 741 (Iowa 1998).

Not every change in circumstances is sufficient to warrant modification. *Id.* Instead, it must appear that continued enforcement of the original decree, as a result of the change in circumstances, would result in a positive wrong or injustice. *Id.* The change in circumstances must be permanent and substantial. *Id.* Additionally, the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered. *Id.*

The district court found a substantial change in circumstances exists because Gregory's financial condition has deteriorated as a result of his inability to be gainfully employed on a full-time regular basis. Anne argues the court should have considered Gregory's earning capacity, and not his actual earnings. She contends that Gregory is capable of working 40 hours per week in a light duty job, earning between $6 and $9 per hour, while he attends school full-time.

A parent is not entitled to support if they reduce their income through an improper intent to deprive their children of support or in reckless disregard for their children's well-being. *In re Marriage of Swan*, 526 N.W.2d 320, 324 (Iowa 1995). In such a situation, it is appropriate to consider the earning capacity of the parent when setting an award of child support. *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995).

This case is analogous to *In re Marriage of Swan*, where the court refused to impute a father's former earnings for the purposes of setting his child support obligation. *In re Swan*, 526 N.W.2d at 324. In that case, the father was forced to leave his employment as a driver at UPS because of a lower back problem. *Id.* He had no education beyond high school and his only employment prospects were in minimum wage positions. *Id.* The court found his return to school would allow him to increase his future earning capacity and was not done with the intent to deprive his children or with reckless disregard for their well-being. *Id.* Gregory is paying $75 per month and he is also ordered to provide medical insurance for the children.

Gregory testified at trial that his back condition would not allow him to work 40 hours per week at McDonald's. There was also testimony that employers were reluctant to hire someone with Gregory's medical problems. There was no evidence to indicate that there were jobs available for Gregory that he was able to perform on a full-time basis. While other jobs may be available in towns in the surrounding area, Gregory does not own a car and did not have a driver's license.

The district court found that Gregory demonstrated he could not find full-time employment. The courses Gregory is taking should open new employment opportunities to enable Gregory to better provide for his family in the future. We affirm the district court's order granting Gregory's petition to modify the child support provisions of the parties' dissolution decree.

IV. Appellate Attorney Fees. Both parties request an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson,* 545 N.W.2d 252, 258 (Iowa 1996). 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 district court's decision on appeal. *In re Marriage of Wood,* 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We award no attorney fees on appeal.

We affirm the decision of the district court. Costs of this appeal are taxed one-half to each party.

AFFIRMED.

Vogel, J. concurs in part and dissents in part.

VOGEL, J. (concurring in part and dissenting in part)

While I agree that Gregory has established a substantial change in circumstances, I respectfully dissent with the majority decision to affirm the district court's support amount. Gregory does have well-founded medical reasons for his inability to maintain or obtain employment at his former level of income and for seeking further education or training. However, these reasons are not so substantial as to limit Gregory's employment potential to an eight-hour per week, low-paying job, particularly in light of his obligation to his children. Gregory's current lack of transportation rest squarely on his shoulders, as it arose out his past convictions for operating while intoxicated and driving under suspension. While Gregory will clearly face some difficulty in finding adequate employment, the needs of his children are ongoing and must be met. I would therefore modify Gregory's former support obligation in light of his medical and education concerns, but at a level that would more appropriately reflect his actual earning capacity and the needs of his children.