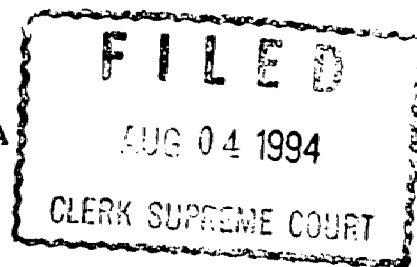


IN THE COURT OF APPEALS OF IOWA

No. 3-588 / 92-1791



IN RE THE MARRIAGE OF KAROL L. COX AND DONALD J. COX

Upon the Petition of
KAROL L. COX,

Appellee/Cross-Appellant,

And Concerning
DONALD J. COX,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Harrison
County, James M. Richardson, Judge.

Donald Cox appeals, and Karol Cox cross-appeals, the
district court's modification of the parties' dissolution
decree. **AFFIRMED.**

Robert Kohorst of Kohorst Law Firm, Harlan, for
appellant.

J.C. Salvo and Richard C. Schenck of Salvo, Deren,
Schenck & Lauterbach, P.C., Harlan, for appellee.

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

DONIELSON, C.J.

Donald and Karol Cox were divorced in 1988. Donald had just sold his farming business and has since worked at Westendorf Manufacturing. Karol was working part-time and receiving Title XIX benefits.

The original decree ordered Donald to pay \$100 per month support for each of the parties' two children: Patricia, born December 3, 1972, and Justin, born February 20, 1976. Donald also was ordered to provide health insurance for the children or pay their medical bills if Karol ceased to be eligible for Title XIX benefits.

Karol filed her petition for modification on August 28, 1991. She sought an increase in child support for the remaining minor child, Justin. Karol signed a proposed stipulation but did not sign accepting a paragraph added later. In August 1992 a hearing on the modification was set for September 18, 1992. Donald's counsel requested a continuance because he would be on duty with the marines. The court did not grant the continuance, but Donald did not acquire new counsel until the September 17th. His new counsel called the judge at home the night before the hearing and asked for a continuance. The court denied the request.

The district court found: (1) Donald's net monthly income had risen from \$788 to \$1515, (2) Donald was in willful contempt of court for failing to provide health care for the children or pay their uninsured medical

expenses, and (3) a substantial change in circumstances existed because there was more than a ten percent deviation between Donald's current child support obligation and what it would be under the child support guidelines. The court also found Karol's current net monthly income was \$850. The district court ordered an increase in child support to \$351.50 per month effective October 1, 1992. Donald was given forty-five days in which to purge himself of contempt.

Donald appeals and Karol cross-appeals. We affirm the district court's decree.

We review modifications of dissolution decrees 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 Vetterlack, 334 N.W.2d 761, 762 (Iowa 1983)).

Donald first argues the district court erred in modifying his child support obligation because no substantial change in circumstances was demonstrated. We disagree. He argues through all the subparagraphs of Iowa Code 598.21(8), which describes the considerations for the

court in determining whether a substantial change in circumstances exists. He fails to recognize section 598.21(9) applies "notwithstanding subsection 8." Iowa Code § 598.21(9) (1993). Iowa Code section 598.21(9) was amended effective July 1, 1992 to specify "a substantial change of circumstances exists when the court order for child support deviates by ten percent or more from the amount which would be due pursuant to the most current child support guidelines." Id. The ten percent rule applies even though this action was filed before the statute became effective. Schuler v. Rodberg, 1994 WL 236931 at *2 (Iowa May 25, 1994). The child support ordered in the original decree in 1988 was \$100 monthly for each child. The amount due pursuant to the current guidelines for the remaining minor child is \$351.50. The district court properly found a substantial change in circumstances and modified Donald's child support obligation pursuant to the current child support guidelines.

Donald next asserts the court set his support obligation too high because it miscalculated his net monthly income. The guidelines set forth the means of calculating net monthly income from gross monthly income. The evidence introduced at the hearing supports the court's determination Donald's net monthly income is \$1515. Donald argues the court should deduct an additional \$170 from that figure because family health insurance coverage, as

specified in the original dissolution decree, costs that amount through his employer. Donald, however, has not obtained such health insurance. The district court did not miscalculate Donald's income. We do not consider the worksheet attached to Donald's brief on appeal because it is not part of the record. Jones v. Madison County, 492 N.W.2d 690, 693-94 (Iowa 1992); Klieg v. Iowa Employment Sec. Comm'n, 206 N.W.2d 123, 126 (Iowa 1973).

Donald next asserts the district court should have given effect to the joint stipulation for modification of decree signed in August 1992. The record reveals Karol signed a stipulation containing five numbered paragraphs. Donald then signed the stipulation after a sixth numbered paragraph was added. Karol refused to sign after the sixth paragraph was added. Even if we assume the parties agree and stipulate to the first five paragraphs, Iowa Code section 598.21(8) gives the court discretion to approve or reject the parties' agreement. Id.; Marriage of Van Zee, 488 N.W.2d 721, 724 (Iowa App. 1992). "The court is not bound by the parties' stipulation and may disregard the stipulation entirely." In re Marriage of Davis, 447 N.W.2d 571, 573 (Iowa App. 1989) (citing Brin v. Brin, 240 Iowa 659, 664, 37 N.W.2d 261, 264 (1949)). The court chose not to adopt the stipulation after asking several questions to clarify the understanding of the parties. We find no abuse of discretion in refusing to approve a joint stipulation,

especially when serious questions remain concerning the extent of the parties' agreement.

Donald argues the district court should have granted him a continuance. Since district courts have broad discretion to grant or deny continuances, we reverse only when that discretion is abused. Hawkeye Bank & Trust Co. v. Mathew, 373 N.W.2d 127, 129 (Iowa 1985). If the movant is without fault or negligence in the cause alleged, "the court must determine whether substantial justice will be more nearly obtained by granting the request." State v. Birkestrand, 239 N.W.2d 353, 360 (Iowa 1976). The hearing date was set by the court administrator on August 18, 1992. Donald's counsel at the time, Stephen Engelhardt, requested a continuance on August 31, but took no further action on his request. The record does not reflect whether any ruling was made on the request. The day before the hearing, Engelhardt contacted Robert Kohorst about taking the case. Kohorst called Karol's attorney who declined to agree to a continuance. Kohorst called the judge late that evening requesting a continuance. The judge denied the request as untimely. Several renewed requests at the hearing were denied based on being untimely, the case having been pending for over a year, and the uncomplicated nature of the case. Engelhardt knew immediately he would be unavailable and could have arranged for a replacement or sought a ruling on his request earlier. The requests the night before and during the hearing were untimely. We do

not find the court abused its discretion in denying the requests for a continuance.

Karol argues on cross-appeal the court should have made the modification in support retroactive to the date notice of the petition was served on Donald. Iowa Code section 598.21(8) gives the court discretion in determining the effective date of a modification of child support. We find no abuse of discretion in setting the effective date of the modification as the day after the court issued its decree.

Finally, Karol asks for appellate attorney 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). Donald is better able to pay attorney fees than Karol. Although Karol cross-appealed on one issue, she was required to defend the court's decree on appeal. We determine Donald is required to pay \$1000 of Karol's appellate attorney fees. Costs of this appeal are taxed to Donald.

AFFIRMED.