FILED
MAY 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF PAMELA KAY COCHRAN
AND RONALD LEE COCHRAN

Upon the Petition of)
PAMELA KAY COCHRAN,)
Petitioner-Appellee,)
And Concerning)
RONALD LEE COCHRAN,)
Respondent-Appellant.)

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9-199
88-1859

Appeal from the Iowa District Court for Marshall County (D 4320), Milton D. Seiser, Judge.

The husband appeals from the district court's refusal to modify a dissolution decree. **AFFIRMED AS MODIFIED.**

Sharon Soorholtz Greer and John B. Grier, of Cartwright, Druker & Ryden, Marshalltown, for the respondent-appellant.

Barry S. Kaplan, of Fairall, Fairall, Kaplan, Hoglan, & Condon, Marshalltown, for the petitioner-appellee.

Heard by Donielson, P.J., and Hayden and Sackett, JJ.

SACKETT, J. 93

Iowa does not allow the trial court to cancel arrearages of child support accrued after the filing of an application for modification of a dissolution decree. See In re Marriage of Shepherd, 429 N.W.2d 145, 146 (Iowa 1988); In re the Matter of Evans, 267 N.W.2d 48, 52 (Iowa 1978); Gilliam v. Gilliam, 258 N.W.2d 155, 156 (Iowa 1977).

Iowa does allow child support to be ordered paid or increased as of the date of the filing of an application for modification. See Willcox v. Bradrick, 319 N.W.2d 216, 219 (Iowa 1982); Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973); Cappel v. Cappel, 243 Iowa 1363, 1367-68, 55 N.W.2d 481, 482-83 (1952).

The question we must address is whether these two rules can be utilized together to correct an inequitable result created by the application of the first rule. We determine the equities dictate the rules can be utilized together. We modify the dissolution decree.

The marriage of petitioner-appellee Pamela Kay Cochran and respondent-appellant Ronald Lee Cochran was dissolved in July 1987. In the decree of dissolution the physical care of the parties' child Bradley was given to Pamela. Ronald was ordered to pay Pamela child support of $250 per month. Shortly after the filing of the dissolution decree Bradley commenced living with his father. He did so because his mother was moving to Des Moines and Bradley

wanted to stay in the Marshalltown schools. Pamela agreed to the placement. However, she did not agree to pay Ronald child support or agree to modify Ronald's obligation to pay her child support.

On October 30, 1987, Ronald filed a petition to modify the dissolution decree seeking physical care of Bradley and termination of his child support obligation to Pamela, and asking Pamela to pay him child support. Because of the busy docket in Marshall County, the modification petition did not come on for hearing until nearly a year later. By that time Bradley had lived with and been supported by Ronald for over a year and a judgment had accrued for child support against Ronald and in Pamela's favor for $3,500.

After hearing the evidence the trial court determined Ronald had physical care of Bradley from the date of the decree through September 1988. The trial court found Ronald should be relieved of the $250 per month child support for that period and Pamela should in turn pay him $100 per month child support.

On a ruling on an application to amend and enlarge, the trial court determined it was prohibited by Shepherd, 429 N.W.2d at 145 from reducing or eliminating accrued support. In doing so the court noted the matter had been pending for a year before hearing and the delays were not attributable to either party. The court found the equities were in Ronald's favor and he had stepped forward when his

son had a pressing need. The trial court determined to award Ronald support while he was paying support would only be an attempt to do indirectly what could not be done directly. The modification was denied.

Pamela therefore was left with a child support judgment against Ronald for the time Ronald supported Bradley. Ronald agrees the trial court cannot relieve him from the judgment for child support to Pamela. Ronald contends the trial court can and should order Pamela to pay him support retroactively, and in doing so should assess the child support Pamela was ordered to receive in assessing her ability to pay. We agree.

On our de novo review we determine as did the trial court the placement with Ronald was agreed to and affirmed by Pamela and there is no showing Ronald in taking Bradley sought to underplay Pamela's custody. The placement was to allow the child to remain in the school he had attended. This distinguishes this case from Chambers v. Chambers, 231 N.W.2d 23, 25 (Iowa 1975), (where the court in refusing modification found the father had not proven the child had moved into his home).

While the child lived with Ronald he paid substantially all the child's support. Pamela was employed, had other income and was able to contribute to Bradley's support during that period. The trial court found she had the ability to pay $100 per month support without the $250

child support payment from Ronald. We agree with the trial court in nearly all respects except for its decision not to order Pamela to pay child support.

This state has long subscribed to the premise both parents have an obligation to support their child not necessarily equally but in accordance with their ability. See In re Marriage of Brands, 392 N.W.2d 855, 857 (Iowa App. 1986); In re Marriage of Byall, 353 N.W.2d 103, 108 (Iowa App. 1984). Pamela has a support obligation to her son for the period he was in his father's physical care. See In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984).

The strong policy that both parents, according to their ability, have a support obligation to their children must be considered in applying the proper rules here. Additionally, the dictates providing support payments can be increased retroactively to the date of filing of a petition to modify indicate an attempt to discourage unreasonable withholding of support where the ability to pay exists. See Willcox, 319 N.W.2d at 219; Spaulding, 204 N.W.2d at 636; Cappel, 243 Iowa at 1367-68, 55 N.W.2d at 482-83.

Because we find an agreement to transfer physical care, we find the equities and strong policy requiring both parents to support their children as they are able, dictate Ronald should receive child support retroactively to the

date of the filing of his petition to modify. The trial court determined Pamela had the ability to pay $100 per month without the $250 child support from Ronald. She is entitled to $250 per month child support from Ronald for this period but has not had an offsetting support obligation to Bradley. We find Pamela shall pay Ronald child support of $350 per month from November 1, 1987 through September 1, 1988.

Ronald has requested attorney fees. In a proceeding for modification the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court. See Iowa Code § 598.36. Also see In re Marriage of Stanley, 411 N.W.2d 698, 702-03 (Iowa App. 1987); In re Marriage of Mueller, 400 N.W.2d 86, 89 (Iowa App. 1986); In re Marriage of Phipps, 379 N.W.2d 26, 29 (Iowa App. 1985). We have considered Pamela's ability to pay. We consider also Ronald's brief addressed a custody issue now moot because of Bradley's age. We determine the parties shall pay their own attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.