

IN THE COURT OF APPEALS OF IOWA

No. 8-779 / 08-0123
Filed October 29, 2008

**IN RE THE MARRIAGE OF TIMOTHY McKENZIE
AND DOLORES GUEST**

**Upon the Petition of
TIMOTHY McKENZIE,**
Petitioner-Appellant,

**And Concerning
DOLORES GUEST,**
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Petitioner appeals from the district court's decree of modification which requires him to pay a postsecondary education subsidy. **AFFIRMED.**

Gregory N. Lohr of Baron, Sar, Goodwin, Gill & Lohr, Sioux City, for appellant.

Elizabeth A. Row, Sioux City, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Timothy McKenzie appeals from the district court's decree of modification, which requires him to pay a postsecondary education subsidy for his daughter, Kilie. We affirm.

I. Background Facts and Proceedings.

Timothy McKenzie and Delores Guest were married 1979. Three children were born to the marriage: Timothy Jr., Montana, and Kilie. The marriage was dissolved by a stipulated decree in 1998. At that time, the parties agreed to each pay one-third of Timothy Jr.'s postsecondary education expenses. The parties did not agree as to their share of postsecondary education expenses for their younger two children.

After Montana graduated from high school in 2002, Timothy refused to contribute to Montana's postsecondary education expenses asserting Montana had repudiated him. Delores then filed a petition for modification, and Timothy was ordered to pay a postsecondary education subsidy for Montana equal to one-third of Montana's educational expenses. Later Delores filed an application for rule to show cause because Timothy had not paid towards Montana's education expenses. Timothy, having moved to Charleston, South Carolina, resisted, claiming that he had no proof that Montana was enrolled in school, was denied access to his grades, and had no information concerning his rent or expenses. Timothy then filed a petition to modify the decree, asserting, among other things, that Montana had repudiated him.

After considering the evidence presented by the parties regarding the issue, the district court rejected Timothy's argument finding:

The lack of closeness between [Timothy] and Montana had its genesis in the actions of [Timothy] toward Montana. [Timothy] did not foster a close relationship with Montana. He cannot now claim that Montana repudiated him in order to avoid paying his one-third share of the post-educational subsidy.

However, the postsecondary education subsidy was eliminated because Montana failed to maintain the requisite grade point average.

Kilie was born in June 1989. She is an excellent student, graduating from high school in 2007 with honors and a 3.5 grade point average. Kilie was on the honor roll every semester and received several scholastic awards for her academic achievements. In addition, Kilie played soccer and basketball all four years of high school. She began attending the University of Iowa in August 2007. She is majoring in business management and hopes to attend law school. Timothy refused to contribute to Kilie's college expenses. Delores filed a petition for modification in July 2007, requesting that the court order Timothy to pay a postsecondary education subsidy to Kilie.

Trial was held on November 6, 2007, and the court ordered, among other things, that Timothy pay one-third of the total necessary postsecondary education expenses, less Kilie's scholarship, for each year Kilie attends the University of Iowa as a full-time student, not to exceed five years. On appeal, Timothy argues that good cause was not shown to establish a postsecondary education subsidy and that the postsecondary education subsidy should not have been awarded because Kilie repudiated him.

II. Scope and Standards of Review.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). Although not bound by

the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g): *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

III. Postsecondary Education Subsidy.

A court may order a postsecondary education subsidy if good cause is shown. Iowa Code § 598.21F(1) (2007). In determining whether good cause exists, the court shall consider: (1) the age of the child; (2) the ability of the child relative to postsecondary education; (3) the child's financial resources; (4) whether the child is self-sustaining; and (5) the financial condition of each parent. *See id.* Timothy argues no evidence was offered regarding Kilie's postsecondary education ability, financial resources, and whether she was self-sustaining.

There appears to be no dispute between the parties concerning the amount of Kilie's college expenses or that Dolores had paid all of Kilie's college expenses up to the time of the hearing. Kilie received an academic scholarship from the University of Iowa in the amount of \$1000 per semester. She was taking sixteen credits a semester and receiving A's and B's in her classes. Kilie was not working while taking classes because she was taking so many credits and needed to maintain a certain grade point average in order to keep the scholarship award. In fixing the postsecondary education subsidy, the trial court took into consideration Kilie's scholarship. The court found that Kilie has limited

financial resources of her own and was not self-sustaining.¹ We agree. Good cause was shown to order a postsecondary education subsidy.²

IV. Repudiation.

Timothy claims Kilie repudiated him so he should not be required to pay a postsecondary education subsidy. Under Iowa Code section 598.21F(4), the court cannot award a postsecondary education subsidy “if the child has repudiated the parent by publicly disowning the parent, refusing to acknowledge the parent, or by acting in a similar manner.” On appeal, Timothy raises two incidents to support his repudiation argument.

In the first, Timothy points to a letter from Kilie dated May 9, 2007. Kilie invited her father to attend her high school graduation and graduation party. Timothy claims he did not receive this letter until May 19, only four days before the graduation (presumably implying that he could not have travelled from South Carolina to Sioux City in time to make the graduation). He argues the motivation, timing, or other aspects for sending the letter are suspect. The second incident involved publication of West High School scholarship recipients in a supplement to the Sioux City Journal. Under her photograph, Kilie was identified as the daughter of “David [Dolores’ current husband] and Dolores Guest.” The night before it was due, Kilie gave her mother the form for the newspaper and asked her to fill it out. Dolores listed herself and David as Kilie’s parents “out of habit.”

¹ It is noted that no evidence was offered as to the availability of student loans to Kilie or what she could earn working during breaks and the summer months.

² Although the district court recognized that a finding of good cause is required before ordering a postsecondary education subsidy, it did not specifically make such a finding in its decree of modification. Nevertheless, we find such a conclusion implicit in the decree. In any event, the issue was not raised on appeal. See *Hylar v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996) (“[O]ur review is confined to those propositions relied upon by the appellant for reversal on appeal.”).

Kilie had nothing to do with the filling out of the form and did not see it before it went to the newspaper.

Since the parties' dissolution in 1998, Timothy has had little contact with his children. He has had no visitation with Kilie since 2000. He attended none of her soccer or basketball games. He moved to South Carolina in 2003 without telling Kilie. He did not visit Kilie either time he was in Sioux City for court. He sent her no birthday or Christmas cards until 2004. Between 2000 and 2004 he did not send Kilie any letters or make any phone calls to her. He began sending Kilie numbered letters in late 2004 after the court rejected his repudiation argument concerning Montana. Kilie sent a number of letters to her father making several invitations that he come visit her in Sioux City. Kilie did not publicly disown her father. She testified that if it were her choice she would like to have a closer relationship with her dad.

Timothy maintains the facts of this case, when viewed in the light of *In re Marriage of Pendergast*, 565 N.W.2d 354 (Iowa Ct. App. 1997), and *In re Marriage of Baker*, 485 N.W.2d 860 (Iowa Ct. App. 1992), support his claim of repudiation. In *Pendergast*, the court held a daughter repudiated her father when she completely cut off her relationship with him, asked for the return of any personal property still in her father's possession, wrote him a letter telling him she "no longer considered him to be her father," failed to acknowledge him at funerals for his parents, and did not list him as a parent in the program for her high school graduation. 565 N.W.2d at 355. In *Baker*, a brother and sister publicly disowned their father and both testified they consciously and intentionally did so. 485 N.W.2d at 862. The record in this case is much different than the

facts presented in *Pendergast* and *Baker*. Kilie did nothing to disenfranchise herself as a prospective beneficiary under section 598.21F.

Upon our de novo review of the record, we agree with the district court findings. The record simply does not support the conclusion that Kilie repudiated her father.

V. Amount of Subsidy.

The court found Kilie's total postsecondary expenses for the 2007-08 school year to be \$18,540. See Iowa Code § 598.21F(2)(a). The court reduced this amount by Kilie's \$2000 scholarship. *Id.* § 598.21F(2)(b). The court then computed Timothy's one-third share for the 2007-08 school year to be \$5513.34. See *id.* § 598.21F(2)(c). Timothy argues that if this court finds there was no repudiation, that he should only bear a small portion, if any, of Kilie's college expenses, not one-third.

Timothy's child support obligation for Kilie had been \$495 a month. See *In re Marriage of McKenzie*, 709 N.W.2d 528, 529 (Iowa 2006). He testified he had been paying roughly \$6000 a year in child support. We recognize that a parent is not required to make the same amount of parental sacrifice toward assisting in the college education of a child that is required to provide subsistence support for minor children. *In re Marriage of Longman*, 619 N.W.2d 369, 371 (Iowa 2000). Here, neither parent is of meager means. Dolores earns \$100,000 annually working in a family business. At trial Timothy claimed his year-to-date income through July 1, 2007, was \$14,348.08, thus making his annual income \$28,696.16. In making an assessment of whether Timothy is required to provide a subsidy for Kilie, we may consider Timothy's wife's income as it relates to

Timothy's overall financial condition. See *In re Marriage of Moore*, 702 N.W.2d 517, 521 (Iowa Ct. App. 2005). Timothy's wife's gross salary was about \$55,000. When asked: "Are you contending that you can't afford to pay for this post-secondary education or are you contending that you shouldn't have to pay it because Kilie repudiated you?" Timothy responded: "Repudiation." He was then asked: "So it isn't a financial issue?" and he responded: "It is as far as – it also is as far as what I make and what I made before." Timothy has sufficient earning capacity to provide assistance without incurring undue hardship. We believe the amount apportioned by the district court to Timothy is appropriate.

VI. Attorney Fees.

Timothy finally claims the district court erred in awarding Dolores trial attorney fees. Iowa Code section 598.36 provides that in a modification proceeding, the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court. An award of attorney fees in such instances 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. *Id.* In addition, the fees must be fair and reasonable. *Id.* In light of these factors, we do not believe the district court abused its discretion in awarding Dolores trial attorney fees.

For the same reasons, we grant Dolores's request for appellate attorney fees and award her \$1000 in appellate attorney fees. See *Sullins*, 715 N.W.2d at 255 (stating the factors to be considered in determining whether to award appellate attorney fees include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal).

VII. Conclusion.

We affirm the district court's order requiring Timothy to contribute to Kilie's college education expenses. We affirm the trial court's award of attorney fees. We further order Timothy to pay \$1000 towards Dolores's appellate attorney fees.

AFFIRMED.