IN THE COURT OF APPEALS OF IOWA

No. 9-118 / 08-1238
Filed March 26, 2009

IN RE THE MARRIAGE OF MARY MOORE JONES AND DOUGLAS HOWARD JONES

Upon the Petition of
MARY MOORE JONES,
Petitioner-Appellee,

And Concerning
DOUGLAS HOWARD JONES,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Fae Hoover-Grinde, Judge.

Respondent appeals the district court decision modifying the parties' obligations regarding postsecondary education expenses. **AFFIRMED AS MODIFIED.**

Stephen B. Jackson and Stephen B. Jackson, Jr. of Jackson & Jackson, P.L.C., Cedar Rapids, for appellant.

Constance Peschang Stannard of Johnston, Stannard, Klesner, Burbridge & Fitzgerald, P.L.C., Iowa City, for appellee.

Considered by Vogel, P.J., and Vaitheswaran, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.

I. Background Facts & Proceedings

Douglas and Mary Jones were divorced on October 23, 1997. The decree granted the parties joint legal custody of their three children, Katherine, born in 1988, and Karen and Austin, born in 1992, with Mary having physical care of the children. Douglas and Mary were both employed as medical doctors at the University of Iowa Hospitals and Clinics. At that time Douglas's annual income was $91,358 and Mary's was $89,391.

The parties entered into a stipulation which was incorporated into the decree. On the issue of post-high school education, the stipulation provided:

> The Petitioner and the Respondent shall each pay one half of the costs of tuition, room, board, books, fees and a reasonable allowance for personal expenses such as transportation, recreation, entertainment, clothing and personal needs for the children while they are attending a college, university or other institution of post-high school education, including costs at a private school. Neither party shall be obligated to contribute to the children's post-high school educational expenses unless the child meets the criteria set forth at § 598.1(6), 1997 Code of Iowa, and remains unmarried.

After the dissolution Mary moved to Michigan, where she became an associate professor at Michigan State University. Douglas decided to specialize in psychiatry, and he has a private practice. Both parties experienced an increase in income. Additionally, Douglas received an inheritance from his parents.

The dissolution decree was modified on February 4, 2004, to place Katherine in the physical care of Douglas, and his child support obligation was modified accordingly. The modification decree additionally provided:

> Pursuant to the Stipulation of Settlement relating to post-high school education subsidy expenses, the Court reserves jurisdiction to make subsequent orders regarding continued child support pursuant to §§ 598.1(5A) and 598.21(5A) of the Code of Iowa (2003), as amended.

On November 17, 2006, Douglas filed an application for rule to show cause, claiming Mary was in contempt for failure to contribute to Katherine's college expenses under the terms of the 1997 dissolution decree. Katherine was enrolled as a full-time student at Grinnell College. On January 30, 2007, Mary filed a petition to modify the dissolution decree to increase Douglas's child support obligation for Karen and Austin, and to apply section 598.21F (2007) in determining her obligation for Katherine's college expenses.

The district court issued a ruling on the contempt matter of January 31, 2007. The court found Katherine's costs for the 2006-07 academic year at Grinnell College were $38,705. The court determined Mary was in contempt for failure to contribute one-half of these costs. The court stated:

> The Court finds that the post-high school education subsidy provision of the 1997 Stipulation and Decree is unambiguous and requires each party to pay one-half of their children's college education costs, "including costs at a private school." Both parties were represented in the dissolution case, and both consented to this provision. The 2004 Modification Decree did not change this obligation, and paragraph 6 of the Modification Decree cannot reasonably be read or interpreted to modify the original Decree as to post-secondary education subsidies, notwithstanding the amendments to the Iowa Code since 1997. The Petitioner's duty to pay one-half was clear.

The district court issued a ruling on the modification matter on January 18, 2008. At the time of the modification Douglas's annual income was $295,000, and Mary's was $142,300. Douglas's child support obligation for the two younger

children was increased. On the issue of postsecondary education expenses, the court found, "Mary has not established by a preponderance of the evidence a substantial change in circumstances requiring modification of the postsecondary education subsidy language contained in the original decree."

Mary filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The district court reversed its earlier ruling. The court found that Douglas's increased income plus his inheritance led to a disparity in the relative net worth of the parties, and this disparity constituted a substantial change in circumstances. The court found that in the 2004 modification decree the parties had specifically adopted section 598.21(5A), now section 598.21F, to apply to any future modification regarding college expenses. The court noted that Mary had asked the court to cap each parent's obligation at $12,000 per year. The court determined, however, that section 598.21F should apply, and that each parent's obligation should not exceed one-third of the cost of attending an in-state public institution. Douglas has appealed.

II. Standard of Review

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.4. In modification actions, the district court has reasonable discretion in determining whether to modify a dissolution decree, and that discretion will not be disturbed on appeal unless there is a failure to do equity. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983); *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987).

III. Merits

A. Douglas first contends that under section 598.21F(6) the parties' 1997 stipulation regarding college expenses should not be modified. Section 598.21F(6) provides, "A support order, decree, or judgment entered or pending before July 1, 1997, that provides for support of a child for college, university, or community college expenses may be modified in accordance with this section." Douglas points out that the parties' dissolution decree was filed on October 23, 1997, after section 598.21F took effect.

We agree that section 598.21F(6) does not apply in this case because the dissolution decree was filed after July 1, 1997. *See In re Marriage of Pals*, 714 N.W.2d 644, 649 (noting that in section 598.21F(6) "[t]he legislature intended the standard under section [598.21F] . . . to apply retroactively to pre-July 1, 1997 decrees"). This does not mean, however, that the decree cannot be modified if there has been a substantial change in circumstances. *See In re Marriage of Haker*, 684 N.W.2d 262, 264 (Iowa Ct. App. 2004) (declining to apply section 598.21F retroactively, but considering whether there had been a substantial change in circumstances to justify modification).

B. Douglas contends the district court improperly determined there had been a substantial change in circumstances which would permit it to modify the post-high school education provision of the parties' 1997 dissolution decree. He asserts the parties' increased incomes and his inheritance were matters that were within the contemplation of the court at the time of the dissolution decree.

We note that although a support obligation is based on a stipulation, it may still be subject to modification. *In re Marriage of Wilson*, 572 N.W.2d 155, 157 (Iowa 1997). A dissolution decree may be modified if there has been a substantial change in circumstances since the entry of the decree or any subsequent modification. *Vetternack*, 334 N.W.2d at 762. We consider these additional principles in modification actions: (1) not every change in circumstances is sufficient; (2) it must appear that the continued enforcement of the decree would, as a result of changed circumstances, result in positive wrong or injustice; (3) the change in circumstances must be permanent, rather than temporary; and (4) the change must not have been within the contemplation of the court at the time of the decree. *In re Marriage of Maher*, 596 N.W.2d 561, 565 (Iowa 1999).

At the time of the dissolution decree, when the parties agreed they would each pay one-half of the children's college expenses, their incomes were nearly equal. Douglas was earning $91,358 and Mary was earning $89,391. At the time of the modification hearing in 2007, however, Douglas was earning $295,000 and Mary was earning $142,300. Although the incomes of both parties had increased, Douglas was earning slightly over twice as much as Mary. Put another way, Douglas's income increased more than $200,000 over this time, while Mary's increased about $53,000. In addition to his increased income, Douglas had received in inheritance which he stated was "more than a little."[1]

[1] Douglas's affidavit of financial status, dated June 13, 2007, shows his net worth as about $1.5 million. Mary's affidavit of financial status shows her net worth as $474,000.

The district court found that the disparity between the parties' incomes and net worth since the dissolution decree constituted a substantial change in circumstances. The change is not temporary, and we find the extent of this change was not within the contemplation of the parties at the time of the dissolution decree. We agree with the court's conclusion that the disparity which has arisen over time between the parties' incomes and their relative net worth is a substantial change in circumstances which justified a modification of the postsecondary education provision of the parties' dissolution decree. *See Vetternack*, 334 N.W.2d at 762 (noting we will not disturb a district court's discretionary finding that a modification is warranted, unless there is a failure to do equity).

C. Douglas also contends the district court erred by applying section 598.21F(2), which limits a parent's obligation to one-third of the cost of attending an in-state public institution. He states that Mary offered to pay $12,000 per year for the children's post-high school education, and her obligation should be set at this amount.

Mary's pretrial statement submitted before the modification hearing states, "The parties' obligation to pay college expenses should be capped at a maximum of $12,000 per year, per parent, per child, or up to 1/2 of the total expenses . . . at the institution per year, whichever is less." The court noted this, stating "Mary does not ask the court to establish a post-secondary education subsidy described in Section 598.21(5A) [now section 598.21F], rather she asks the court to cap each parent's contribution to each child's college expenses at $12,000 per

year, for four years or graduation." Furthermore, in her rule 1.904(2) motion, Mary asked the court to set her obligation for college expenses at $12,000 per year.

Generally, "parties to a dissolution are free to make agreements regarding the future college expenses of their children, which the courts may then enforce." *In re Marriage of Rosenfeld*, 668 N.W.2d 840, 848 (Iowa 2003); *see also In re Marriage of Dolter*, 644 N.W.2d 370, 373 (Iowa Ct. App. 2002) (noting the parties are not precluded from entering into a stipulation regarding additional college expenses). Thus, the parties may agree to pay more than that required by section 598.21F for the postsecondary education expenses of their children.[2]

In the present case, Mary asked the court to set her postsecondary education obligation at $12,000 per year, per child. We determine she should be taken at her word, and her obligation should be set at this amount. We modify the decision of the district court to set Mary's obligation for the children's college expenses at $12,000 per year, per child.

IV. Attorney Fees

Mary seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We determine each party should pay his or her own attorney fees for this appeal.

[2] The district court found that under the 2004 modification, section 598.21F would apply to any future modifications. The language of the 2004 modification, however, did not prohibit the parties from agreeing to pay more than that required by section 598.21F.

We affirm the decision of the district court, but we modify to set Mary's obligation for the children's college expenses at $12,000 per year, per child. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.