

**IN THE COURT OF APPEALS OF IOWA**

No. 0-202 / 09-0312  
Filed April 8, 2010

**IN RE THE MARRIAGE OF CHRISTINA RUTH POTTS  
AND RYAN RAY POTTS**

**Upon the Petition of  
CHRISTINA RUTH POTTS,**  
Petitioner-Appellee,

**And Concerning  
RYAN RAY POTTS,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Taylor County, John D. Lloyd,  
Judge.

Ryan Potts appeals a district court's award of attorney fees in a contempt  
action based on a dissolution decree. **AFFIRMED.**

Alexander Rhoads, Des Moines, for appellant.

Christina Potts, Ankeny, pro se.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

**MANSFIELD, J.**

This is an appeal from a post-hearing award of attorney fees in a contempt action. Ryan Potts argues the district court abused its discretion in awarding \$10,000 in attorney fees to Christina Potts after determining that Ryan was in contempt of court for willfully violating the decree dissolving the parties' marriage. Ryan contends Christina's request for fees was untimely, since no fee application was presented until after the contempt order was entered. He also claims the fees awarded were excessive. We disagree with both contentions and affirm.

Ryan and Christina were divorced in 2006. See *In re Marriage of Potts*, No. 06-1014 (Iowa Ct. App. Feb. 28, 2007) (affirming the dissolution decree). The decree was subsequently modified on several occasions. One ongoing issue between the parties had to do with medications prescribed for the two children born of the marriage. In January and April 2008 orders, the district court specifically directed Ryan to give the children their medications during visits and to keep a log demonstrating his compliance with this requirement. The district court openly expressed its concern that Ryan "has no intention of assuring/ensuring that the best interest of the minor children are addressed by regularly and consistently providing them with their prescribed medications."

In August 2008, Christina initiated a contempt proceeding wherein she claimed, among other things, that Ryan had refused to keep a medication log and had refused to administer prescribed medications to the children. She requested an award of attorney fees in her application. Ryan resisted Christina's application and filed his own contempt application. Both applications were heard

on November 7, 2008. Christina did not request the court at the hearing to keep the record open for submission of her attorney fee affidavit.

On December 12, 2008, the district court ruled in Christina's favor. It explained:

[Ryan's] failure to administer the medications was clearly unauthorized and accompanied by unconcern on [Ryan's] part. His action in failing to give the medications was in violation of a very clear court order and his expressed attitude makes it clear that his actions were deliberate and willful. [Christina's] application should be granted.

On December 19, 2008, Christina filed a motion for award of her attorney fees. This was accompanied by time records showing a total of 108.2 hours incurred at \$150 per hour, or \$16,230. On December 22, 2008, the district court stated that it would consider the motion together with any resistance that might be filed on or before January 9, 2009. The court added that no hearing would be held unless specifically requested by one of the parties. Ryan filed a resistance on December 23, 2008, which essentially argued that the fee application was untimely. Ryan also asserted, however, that the \$16,230 was an "incredulous" (sic) amount for a half-day hearing. Ryan did not request a hearing.

On January 27, 2009, the district court awarded Christina \$10,000 in attorney fees. It first overruled Ryan's timeliness objection, and then added:

Some award of attorney fees is appropriate in light of the finding of [Ryan] to be in contempt. Some of the matters itemized by [Christina] in her fee application appear to the court to be related to this case but not to the specific contempt issue that was submitted. The court notes that a separate issue was initially filed and then removed from this case. Without indicating any determination as to the value of the services rendered, the court finds that an award of \$10,000 in attorney fees should be made against [Ryan] and judgment entered against [Ryan] and in favor of [Christina] for that amount.

Ryan appeals.<sup>1</sup>

Under Iowa Code section 598.24 (2007), the district court may award reasonable attorney fees upon a finding that a party is in contempt of a dissolution decree. We review a trial court's application of section 598.24 for an abuse of discretion. *In re Marriage of Hankenson*, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993).

In this case Ryan does not challenge the underlying contempt finding, but only the attorney fee award. Ryan's first argument is that the district court lacked authority to award attorney fees after entering the contempt judgment because Christina did not raise the issue at the contempt hearing itself.<sup>2</sup> We disagree.

Christina's motion for attorney fees came only seven days after the district court's contempt ruling, and thus was within the deadline for filing motions for new trial or to enlarge or amend findings and conclusions. See Iowa R. Civ. P. 1.904(2), 1.1007. While it might be more helpful if the Iowa Rules of Civil Procedure, like the Federal Rules, see Fed. R. Civ. P. 54(d)(2)(B)(i), provided a specific deadline for filing attorney fee applications, we believe that a motion for fees filed within the rule 1.1007 deadline is clearly timely, when the other prerequisites for a fee award have been met.

Attorney fees are frequently litigated in post-trial motions. See, e.g., *Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 109-10 (Iowa 2004); *Schaffer*

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<sup>1</sup> We note that Christina has not filed an appellee's brief in this case. Thus, we will not search the record for any alternative theories supporting affirmance. *Bosch v. Garcia*, 286 N.W.2d 26, 27 (Iowa 1979).

<sup>2</sup> Ryan concedes that Christina's application for contempt included a request for her attorney fees, but points out that no evidence of fees was presented before judgment was entered, nor did Christina request that the record remain open to receive the evidence, nor was the issue even discussed at the contempt hearing.

*v. Frank Moyer Const., Inc.*, 628 N.W.2d 11, 15 (Iowa 2001); *Vicorp Restaurants, Inc. v. Bader*, 590 N.W.2d 518, 520 (Iowa 1999); *Audus v. Sabre Communs. Corp.*, 554 N.W.2d 868, 871 (Iowa 1996); *Dutcher v. Randall Foods*, 546 N.W.2d 889, 894-95 (Iowa 1996); *Berryhill v. Hatt*, 428 N.W.2d 647, 658 (Iowa 1988). From an efficiency standpoint, this makes sense. Until the merits are decided, the parties do not know who has been the prevailing party, the issues on which that party has prevailed, or the fees that have been incurred.

Furthermore, our courts have repeatedly held that attorney fees are separate and distinct from the underlying controversy. *Iowa State Bank & Trust Co.*, 683 N.W.2d at 110; *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990); *Ayala v. Center Line, Inc.*, 415 N.W.2d 603, 605 (Iowa 1987); *Maday v. Elview-Stewart Sys. Co.*, 324 N.W.2d 467, 470 (Iowa 1982). Therefore, the district court retains jurisdiction to consider attorney fees as a collateral issue, even if an appeal is filed. *Iowa State Bank & Trust Co.*, 683 N.W.2d at 110; *Landals*, 454 N.W.2d at 897. If attorney fees are a “collateral” matter that may be determined by the trial court even when an appeal is already pending, it is logical to conclude that evidence of attorney fees may be filed post-hearing where the request has been made timely and the parties have notice that attorney fees will be sought in some amount, assuming the other preconditions for an award of fees have been satisfied. For the foregoing reasons, we reject Ryan’s timeliness objection.

In the alternative, Ryan also argues that the district court’s award of attorney fees was excessive. Ryan has failed to show an abuse of discretion here. Christina provided itemized bills with her motion. Although Ryan argues

that the district court's decision to award \$10,000 out of the requested \$16,230 was inappropriate, he does not challenge any specific entries within Christina's fee request as unwarranted or unreasonable. The district court did award less than the total amount of fees sought based on a concern that "[s]ome of the matters itemized by [Christina] in her fee application appear to be related to this case but not to the specific contempt issue that was submitted." This was an appropriate course for the court to follow. Additionally, the district court afforded each party the opportunity to have a hearing on the merits of the fee request, but Ryan declined that opportunity. Having declined the district court's offer of a hearing, and having failed to point out any time entries should have been excluded from any fee award, Ryan is not in a good position now to argue that the fee award should be down-sized based on overall "excessiveness."

Ryan further argues the district court abused its discretion in awarding trial attorney fees because "there is no evidence in the record concerning Ryan's ability to pay attorneys fees." We disagree. Ryan did not raise this argument below. But in any event, the record included the parties' tax returns showing that Ryan's income is significantly higher than Christina's. Furthermore, in this case fees were awarded pursuant to Iowa Code section 598.24, which relates specifically to contempt proceedings. While there is considerable precedent that trial court awards of attorney fees in dissolution cases should be based on ability to pay, see, e.g., *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006), we are not aware of a reported precedent that directly addresses the weight to be accorded that factor in a section 598.24 contempt proceeding, as opposed to a typical dissolution or modification proceeding. One might argue that

considerations of ability to pay should be afforded less weight when a party has willfully disobeyed a court order. However, because the record contains evidence of Ryan's ability to pay, and Ryan failed to raise his alleged inability to pay below, we need not reach that argument.

For the foregoing reasons, we affirm the judgment of the district court awarding Christina \$10,000 in attorney fees. The costs on appeal are taxed against Ryan.

**AFFIRMED.**