

IN THE COURT OF APPEALS OF IOWA

No. 1-400 / 10-1977
Filed June 15, 2011

**IN RE THE MARRIAGE OF SHARON KAE DIAZ
AND WILLIAM JOHN DIAZ**

Upon the Petition of

**SHARON KAE DIAZ, n/k/a
SHARON KAE GRATIAS,**
Petitioner-Appellant,

And Concerning

WILLIAM JOHN DIAZ,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

Appellant appeals the district court's denial of her request of attorney fees.

AFFIRMED.

David A. Morse of Rosenberg & Morse, Des Moines, for appellant.

Jessica A. Millage of Sporer & Flanagan, P.L.L.C., Des Moines, for
appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

The sole question in this appeal is whether the district court abused its discretion in denying Sharon Gratias's claim for attorney fees from William Diaz after he dismissed a petition he filed to modify the college support provisions of the parties' 2000 dissolution. The district court denied Sharon's request. We find no abuse of discretion and affirm.

BACKGROUND AND PROCEEDINGS. The parties' marriage was dissolved in July of 2000. There were two minor children for whom support was ordered. Subsequent orders modified the decree to address post high school education expenses. In September of 2009, William filed a petition to modify the post high school education provision of the modified decree. Sharon filed a denial and a hearing date was set for March 23, 2010. On March 11, 2010, William dismissed his petition.

On March 17, 2010, Sharon filed what was captioned a motion in the case William had dismissed, contending she had incurred \$8820 in attorney fees and \$704.93 in expenses and requesting William be ordered to pay this amount as well as the court costs for the action. Filed with the application was a statement from Sharon's attorney indicating 39.20 hours had been spent on the file and the attorney billed his services at \$225 an hour. The bill also included charges of \$704.93 for expenses such as copy and printing, postage, Westlaw charges, faxes, and court reporter fees.

A hearing was held on Sharon's motion and the district court denied it. The court found William's annual earnings for the prior five years were \$15,000

to \$18,000 and he had made payment for his daughter's college expenses by drawing money from his 401(k), which at the hearing had a current balance of \$90,000. The court found Sharon's annual earning to be \$43,500. The court determined William did not have the ability to pay the fees sought to be assessed against him and dismissed Sharon's motion or application without addressing the reasonableness of the attorney fee claim. The court also in a footnote indicated that looking at the incomes of Sharon's husband and William's girlfriend both households have additional income, but the court did not include this additional income in determining ability to pay. Neither party challenges this finding.

REQUEST FOR ATTORNEY FEES. Sharon contends the district court's decision that William does not have the ability to pay is wrong contending he is the owner of a skateboard shop that had \$18,000 in gross income in 2008 and \$16,000 in 2009, has a part-time job selling spices at twelve dollars an hour plus gas expense, and has a balance of \$90,000 in a 401(k) that he can utilize to pay her attorney fees.

In modification proceedings "the court *may* award attorney fees to the prevailing party in an amount deemed reasonable by the court." Iowa Code § 598.36; *In re Marriage of Rosenfeld*, 668 N.W.2d 840, 849 (Iowa 2003) (emphasis supplied). The decision to award attorney fees rests within the sound discretion of the court, and we will not disturb its decision absent a finding of abuse of discretion. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994).

William has minimal income. He has two other children who are minors and live in his household. The only asset the record shows he has is his 401(k) and he is using it to pay his share of college expense. He is fifty years old and contends to deplete his 401(k) further will jeopardize his retirement. He also pays a ten percent penalty to draw from it. From the sparse record it appears that he has not been included in addressing college issues and costs. While he may have been late in making a payment or payments, the record shows he has made them.

The district court heard the testimony of the parties and their attorneys. Sharon must establish the trial court abused its discretion, and she has failed to do so. See *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). We affirm.

AFFIRMED.