

**IN THE COURT OF APPEALS OF IOWA**

No. 1-716 / 11-0325  
Filed October 5, 2011

**IN RE THE MARRIAGE OF ARLEEN MARIE WHITE-VAUGHAN  
AND PHILIP JAMES VAUGHAN**

**Upon the Petition of  
ARLEEN MARIE WHITE-VAUGHAN,  
n/k/a ARLEEN MARIE WENTWORTH,**  
Petitioner-Appellee,

**And Concerning  
PHILIP JAMES VAUGHAN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

A father appeals from the amount of a postsecondary education subsidy for his child established by the district court. **AFFIRMED.**

Jeffrey E. Clements, West Union, for appellant.

Jennifer A. Clemens-Conlon of Clemens, Walters, Conlon & Meyer, L.L.P., Dubuque, for appellee.

Considered by Vogel, P.J., Potterfield, J., and Schechtman, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**VOGEL, P.J.**

Philip Vaughan appeals the district court order establishing a postsecondary education subsidy for his daughter, Allison. The court ordered Philip and his former wife, Arleen White-Vaughan, now known as Arleen Wentworth, to each pay one-third of Allison's educational expenses. Agreeing with the district court's finding of good cause for Philip to contribute to Allison's college expenses and the proportional amount set, we affirm. Further, we affirm the district court's decision not to grant Arleen trial attorney fees. We also deny each party's request for appellate attorney fees.

***I. Background Facts & Proceedings.***

Arleen and Philip were married in June 1990, and divorced two years later. Allison was born in 1992 and is presently a full-time student at Iowa State University (ISU).<sup>1</sup> Philip spent little time with Allison during her childhood, and has not seen nor spoken to her since she was nine years old.

Arlene earns \$28,000 annually. She is married to a retiree who has significant assets. Philip resides in Guttenberg and manages some farms near Garnavillo, owned by his employer. He has three children from his second marriage, ages fourteen, twelve, and ten, at the time of trial. They reside with their mother and Philip pays \$750 monthly as decretal child support. He earns around \$58,000 per year, as well as being provided health insurance for his weekly contribution of fifty dollars. He owns his home, residing with his girlfriend and her child, with the majority of the expenses assumed by him. His credit card debt exceeds \$15,000. He does own two vehicles, a 1997 Harley-Davidson

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<sup>1</sup> Allison was given her mother's maiden name at birth, which was subsequently changed, with Philip's consent, to her mother's surname after her remarriage.

motorcycle (valued at \$9000) and a 2005 Chevrolet pickup. Philip's few assets are heavily encumbered, including his home and the vehicles. His house loan monthly payment is \$702 per month, including taxes and insurance, with a home equity loan payment of \$664 per month. Philip's payroll deductions for federal and state withholding, social security and Medicare, is \$484 every two weeks or about \$11,400 annually (Allison is not his income tax dependent).

The genesis of this action was a petition for modification filed by Philip,<sup>2</sup> after Allison graduated from high school, relying upon the terms of Iowa Code section 598.21F(6) (2009).<sup>3</sup> Philip was paying \$480 (after some modifications) as monthly child support, plus providing health insurance for Allison. The 1992 dissolution decree provided, as the law then allowed,<sup>4</sup> for child support to continue to age twenty-two if the child continued her education by attending college. Arleen responded to the petition for modification by filing a counterclaim for a postsecondary education subsidy for Allison. Philip's application for modification was granted, without contest, and his child support terminated.

As for the postsecondary education subsidy, the district court found that "good cause" existed for the imposition of a subsidy for Allison in the sum of \$633.94 each month for Philip and for Arleen, payable directly to Allison,

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<sup>2</sup> Philip originally asserted a defense of repudiation by Allison, but the district court found no repudiation, which issue has not been appealed to this court.

<sup>3</sup> This code section enables a parent paying support, under a pre-July 1997 decree, for college expenses to modify it "in accordance[ ] with this section."

<sup>4</sup> Iowa Code § 598.1(2) (1991) then read, in part, that support payments "may include support for a child who is between the ages of eighteen and twenty-two years who is . . . in good faith, a full-time student in a college, university, or community college . . . ."

beginning on March 1, 2011.<sup>5</sup> This represented one-third of the annual collegiate “cost” for each parent, as limited by section 598.21F(2)(c). Only Philip appeals, contending there was a lack of good cause for him to pay the amount of the subsidy assessed to him, that the subsidy was excessive, and the court erred in failing to consider the financial situation of Arleen with her present husband.

## **II. Standard of Review.**

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Neff*, 675 N.W.2d 573, 577 (Iowa 2004). In equity cases, we give weight to the fact findings of the district court, especially when considering the credibility of witnesses, but are not bound by those findings. Iowa R. App. P. 6.904(3)(g).

## **III. “Good Cause” to Order Postsecondary Education Subsidy.**

Iowa Code section 598.21F details the postsecondary education subsidiary. It begins by stating, “The court may order a postsecondary education subsidy if good cause is shown.” Iowa Code § 598.21F(1). The criteria for “good cause” that the court shall consider are “the age of the child, the ability of the child relative to postsecondary education, the child’s financial resources, whether the child is self-sustaining, and the financial condition of each parent.” *Id.* § 598.21F(2). Therefore, the statute does not require college support in all cases. “It allows the trial court, in its discretion, to award support of the children through college under the proper circumstances.” *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980).

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<sup>5</sup> Pursuant to Iowa Code § 598.21F(3), “A postsecondary education subsidy shall be payable to the child, to the educational institution, or to both, but shall not be payable to the custodial parent.”

The district court found “good cause” existed as Allison had completed her first semester at ISU

and appears to have a promising future. While the Court admires her industriousness, the part-time work she is able to perform is far from enough to make her self-sustaining. Both Philip and Arleen work and are able to contribute toward Allison’s postsecondary education.

In Allison’s first semester at ISU, she earned a 3.42 GPA. When she is home on school breaks and in the summer, Allison works part-time at a retail store in Dubuque and is able to contribute to the costs of her education. However, she has not received any scholarships, grants, or student loans and both parents have income to contribute to Allison’s education. The district court’s decision mirrors the proper statutory factors, and we affirm the finding of “good cause.” See Iowa Code § 598.21F(2).

#### **IV. Calculation of Amount of Subsidy.**

After determining “good cause”, the statute requires any subsidy to be calculated as follows:

a. The court shall determine the cost of postsecondary education based upon the cost of attending an in-state public institution for a course of instruction leading to an undergraduate degree and shall include the reasonable costs for only necessary postsecondary education expenses.

b. The court shall then determine the amount, if any, which the child may reasonably be expected to contribute, considering the child’s financial resources, including but not limited to the availability of financial aid whether in the form of scholarships, grants, or student loans, and the ability of the child to earn income while attending school.

c. The child’s expected contribution shall be deducted from the cost of postsecondary education and the court shall apportion responsibility for the remaining cost of postsecondary education to each parent. The amount paid by each parent shall not exceed thirty-three and one-third percent of the total cost of postsecondary education.

Iowa Code § 598.21F(2); see also *In re Marriage of Sullins*, 715 N.W.2d 242, 253–255 (Iowa 2006).

The district court considered the undisputed cost of attending ISU, of \$22,822 per year, which was based on information provided by the university. See Iowa Code § 598.21F(2)(a). The court then calculated the amount Allison could reasonably be expected to contribute toward her education (\$5000 per year), and subtracted that amount from the annual cost, which left \$17,822 to be apportioned between Philip and Arleen, with neither assessed more than one-third the total cost. See *id.* § 598.21F(2)(c).

Philip first asserts the court ordered him to pay an excessive amount of college support as “there is not the requirement to make the same amount of parental sacrifice for assisting in the college education of a child that is required to provide subsistence support for minor children,” citing *In re Marriage of Longman*, 619 N.W.2d 369, 371 (Iowa 2000). While we agree generally with his proposition, the foundation of our analysis remains with the statutory criteria, “the court shall apportion responsibility for the remaining cost of postsecondary education to each parent. The amount paid by each parent shall not exceed thirty-three and one-third percent of the total cost of postsecondary education.” Iowa Code § 598.21F(2)(c). The code does not mandate that each parent pay thirty-three and one-third percent, but simply that the subsidy of each parent not exceed that percentage. See *In re Marriage of Neff*, 675 N.W.2d 573, 577 (Iowa 2004) (noting “the percentage, if any, the parent pays depends on his or her financial situation”)

The district court found Philip's income in 2009 to be \$56,648, considered his expenses, and concluded Philip's spending priorities should be with supporting his daughter's education ahead of some of his own expenses. In reviewing the income and expenses of Philip, the amount of the subsidy assigned to Philip is not excessive. He has a good income and should bear his proportional expenses of assisting Allison with her college education.

Philip next contends that the court should have considered Arleen's husband's income in comparing each party's ability to contribute to Allison's education. However, the income of Arleen's spouse is only considered as it relates to Arleen's overall financial condition. "In considering a parent's income for child support purposes we can consider a spouse's income, as it relates to the overall financial condition of the paying parent." *In re Marriage of Moore*, 702 N.W.2d 517, 521 (Iowa Ct. App. 2005). Regardless of Arleen's financial situation, the point is moot as Arleen was directed to pay the maximum subsidy of one-third. She cannot be ordered to pay more, irrespective of her husband's alleged wealth or income sources.

On our de novo review, we conclude that good cause has been proved for the need for postsecondary subsidy for Allison. We further find the district court, working with the estimated costs per year to attend ISU, properly considered the financial position of the parties, and set a reasonable amount to be contributed by Philip for Allison's postsecondary educational expenses.

#### ***V. Attorney Fee Request.***

The district court denied any award of attorney fees. Arleen has requested that Philip pay her attorney fees accrued at the district court level. The

award of attorney fees depends upon the respective parties' ability to pay them. *Sullins*, 715 N.W.2d at 255. As the district court remarked, "Arleen's financial condition is much better than Philip's when assets, liabilities, and monthly expenses are taken into account." We agree. The request for attorney fees by Arleen is denied and the district court affirmed on that issue.

Both parties have requested 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, 767 (Iowa 1997). On a request for appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party was required to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). Based on the parties' respective financial positions, we determine each party should pay their own appellate attorney fees.

Costs of this appeal are assessed one-half to each party.

**AFFIRMED.**

Potterfield, J., concurs; Schechtman, S.J., dissents.



**SCHECHTMAN, S.J.** (dissenting)

I disagree and dissent on the postsecondary education subsidy issue.

Though *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980), concluded that a statute (then Iowa Code section 598.1(2) (1977)) requiring divorced parents to provide support, through college, to their adult children, (with no similar requirement for married parents or parents who never married), was not a violation of equal protection under the federal and state constitutions, bore a rational relationship to a state interest, and was not arbitrary or unreasonable, we need to be particularly sensitive to the statute's components when asked to construe and implement its text. We need to assure that we do not, in any way, equate its need to statutory child support. It merits repeating from *In re Marriage of Longman*, 619 N.W.2d 369, 371 (Iowa 2000), that there is not the requirement "to make the same amount of parental sacrifice for assisting in the college education of a child that is required to provide subsistence for minor children."<sup>6</sup>

Iowa Code section 598.21F(1) (2009) provides: "The court *may* order a postsecondary education subsidy if good cause is shown." (Emphasis added.) The word "may" normally connotes permissive rather than mandatory action. *Schultz v. Bd. of Adjustment*, 258 Iowa 804, 810, 139 N.W.2d 448, 451–452 (1966); see also Iowa Code § 4.1(30)(a), (c) (in construing statutes the word "shall" imposes a duty and the word "may" confers a power). It is clearly apparent that even though good cause is shown to empower the imposition of an

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<sup>6</sup> Though not dispositive of this issue, Philip was previously paying Arleen \$450 monthly for child support for Allison, and, \$750 per month to his second wife for their three children. This compares with \$633.94 for the education subsidy. Though this is not comparing "apples to apples," it does reflect the need to appraise its assessment cautiously, due principally, to the spiraling cost of postsecondary education.

education subsidy, the court reserves the right to refuse or pare its application to any one parent. The case of *Longman*, 619 N.W.2d at 370–71, found “good cause,” but refused to impose an obligation on the mother for her sons’ college expenses, though the father was assessed the maximum one-third. Ergo, though the trial court and the majority have found good cause, and have imposed the maximum of one-third of the cost of the postsecondary education on Arleen (which she does not contest), it remains permissible to deny any contribution, or, to impose something less than the maximum of one-third upon Philip.<sup>7</sup>

Iowa Code section 598.21F(2) absolutely requires “consideration of the financial condition of each parent in the determination of good cause.” *Longman*, 619 N.W.2d at 370. The legislature opted to use “financial condition,” rather than “disposable income,” “net earnings,” “net worth,” “net after taxes,” or similar terms. It did not choose to provide for guidelines, as it had mandated for child support.<sup>8</sup>

A most profound statement is found in *Longman*, 619 N.W.2d at 371, wherein it cites, with unanimous approval, *Stanford v. Stanford*, 628 So. 2d 701, 703 (Ala. Ct. Civ. App. 1993), for the tenet, “prior to awarding postsecondary educational subsidy court must determine whether parent in question has sufficient earning capacity or income to provide assistance without incurring undue hardship.”

There should be no hesitation by any court to put a pencil to the financial information given it; to produce an income stream and analyze the legitimate

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<sup>7</sup> The importance of considering the “financial condition” of each party is exemplified by *In re Marriage of Vannausdle*, 668 N.W.2d 885, 890 (Iowa 2003), where there was a seventy-thirty apportionment to the parents.

<sup>8</sup> Iowa Code § 598.21B(1).

expenditures, resources, and debts. In this context, there is little need to be exact to the dollar, but couched in round and rough figures to get a feel for the overall financial climate of the parent in question. Philip earns \$58,200 per year. After deductions for income withholding and social security/Medicare of \$11,400, the balance reduces to \$3900 per month. From this sum, \$750 constitutes his monthly child support (deducted from his paycheck), monthly house payments of \$1366, \$215 for his share of his employer's health insurance plan per month (Allison is an insured), and \$380 per month on his credit card debt.<sup>9</sup> These figures are undisputed in the record. There remains \$1189 for his other monthly expenditures which, per his financial affidavit to approximates \$1085.<sup>10</sup> He has nothing estimated for uninsured medical, optical and dental expense, contributions, newspapers, home maintenance, entertainment, and the multitude of variable unplanned expenses that arise daily. Either a healthy bundle of his monthly expenses, any postsecondary education subsidy, or both, will need to be sourced by credit cards, which triggers high interest and default rates.

No one asserts that Philip is not working as much as he should or that he is underemployed. Nor is there any insinuation that he is a spendthrift or has an expensive vice or habit. His residence is worth about \$130,000, with a \$98,000 conventional loan against it, together with a \$23,000 home equity loan that

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<sup>9</sup> Credit card balances total \$17,000. \$7000 of this amount constitutes a home remodeling project, with the remainder for routine living expenditures.

<sup>10</sup> He estimated \$500 for utilities and telephone, \$300 for food, \$25 for clothing, and \$225 for gas and vehicle expense. These estimates appear relatively modest and well within the norm. He also owes \$2500 for attorney fees for this litigation.

financed his vehicles, a 2005 pickup at \$14,000 and a 1997 Harley motorcycle at \$9000.<sup>11</sup> His net worth borders on being a negative number.

Similar to *Longman*, when you match up Philip's disposable income, with his monthly obligations, there is very little, if anything, left to contribute to Allison's college expenditures. Its payment, in any amount, would constitute an undue hardship. He appears to have a negative cash flow, which does not warrant the imposition of an education subsidy for his adult child. Allison deserves his assistance, but the strained financial situation of her father does not allow it.

I would not require Philip to pay a postsecondary education subsidy, in any amount.

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<sup>11</sup> The trial court placed an undue emphasis on Philip's acquisition of this fourteen-year-old cycle, requiring financing, when it remarked: "The court considers Philip's legal obligation under Iowa Code section 598.21F superior to his desire to have a motorcycle in addition to his regular transportation, which is a Chevrolet pickup truck." The pickup is six years old. The two vehicles have a combined value of \$23,000, which is not an extravagant sum in today's market.