IN THE COURT OF APPEALS OF IOWA

No. 6-984 / 05-1925
Filed February 28, 2007

IN RE THE MARRIAGE OF TAMMY LEE GRITTMAN AND MARK ALAN GRITTMAN

Upon the Petition of
TAMMY LEE GRITTMAN,
Petitioner-Appellee,

And Concerning
MARK ALAN GRITTMAN,
Respondent-Appellant.

MARK ALAN GRITTMAN,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,
Defendant.

Appeal from the Iowa District Court for Polk County, Karen Romano, Judge.

Mark Alan Grittman appeals the district court's ruling establishing a postsecondary education subsidy. **AFFIRMED AS MODIFIED.**

Alexander Rhoads of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellant.

Roman Vald of Lamarca & Landry, P.C., Des Moines, for appellee.

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

MAHAN, P.J.

Mark Alan Grittman appeals the district court's ruling establishing a postsecondary education subsidy for his child. He argues (1) Iowa Code section 598.21(5A) (2003) violates equal protection under both the federal and state constitutions; (2) the court erred in ordering the subsidy because the child's expected contributions exceed the cost of attending a public in-state university; and (3) the court erred in awarding attorney fees. We affirm as modified.

I. Facts

Mark and Tammy Grittman's marriage was dissolved on May 20, 2002. On April 18, 2004, Tammy filed an application to establish a postsecondary education expense subsidy for the parties' eldest child, Amanda. Amanda applied to Iowa State University (ISU) and several private colleges. Ultimately, she decided to attend Central College. Amanda asked Mark for help paying for school, but he refused. He wanted her to attend an in-state public university.

Tuition and expenses at Central cost approximately $30,744 per year. The approximate cost of attending an in-state public university is $15,852.[1] Amanda is receiving $10,000 in scholarships from Central and has a Stafford Loan for $3500. She also has a Central Partnership Loan for $13,274. She worked in the summer, earning approximately $1600. Finally, she participates in work-study, earning approximately $1200 per school year. Her testimony indicated that had she attended ISU, she would have received $1000 in scholarships.

[1] The district court determined this cost by averaging the costs of attending ISU and the University of Iowa.

The district court determined Mark should pay a postsecondary subsidy of $5000 per year. He appeals, challenging the constitutionality of Iowa Code section 598.21(5A) and the amount of the subsidy. He also argues the district court should not have awarded Tammy attorney fees.

II. Standard of Review

We review Mark's constitutional challenge de novo. *In re Marriage of Seyler*, 559 N.W.2d 7, 8 (Iowa 1997). We also review de novo Mark's challenge to the district court's award of the subsidy. Iowa R. App. P. 6.4; *In re Marriage of Sojka*, 611 N.W.2d 503, 504 (Iowa 2000).

III. Merits

A. Constitutionality of Section 598.21(5A)

Mark argues section 598.21(5A) is unconstitutional because it creates impermissible distinctions between three classes of children based on the marital status of their parents. He argues the distinctions violate equal protection under both the federal constitution and the state constitution. *See* U.S. Const. amend. XIV, § 1; Iowa Const. art. I, § 6. According to Mark, the three classes are: adult children of married, non-divorced parents; adult children of married, divorced parents; and adult children of never-married parents.

Mark's challenge to the statute is not unique. Several other states have similar statutes providing postsecondary child support subsidies and their courts have entertained constitutional challenges similar to the one Mark presents.[2]

[2] Most of these courts have held, generally, that postsecondary support does not violate the constitution. *See Nuedecker v. Nuedecker*, 577 N.E.2d 960, 962 (Ind. 1991); *In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999); *In re Marriage of McGinley*, 19 P.3d 954, 965 (Or. Ct. App. 2001); *Childers v. Childers*, 575 P.2d 201, 209 (Wash.

Furthermore, the issue has been extensively examined in law reviews and journals.[3] Finally, our supreme court has definitively ruled on the issue, concluding the statute does not violate equal protection. *See Johnson v. Louis*, 654 N.W.2d 886, 891 (Iowa 2002) (concluding statute did not impermissibly discriminate against illegitimate children whose parents were never married); *In re Marriage of Vrban*, 293 N.W.2d 198, 202 (Iowa 1980) (concluding statute did not violate equal protection where parents were divorced).

Because our supreme court has already definitively ruled on the issue, we decline to overrule their decision. As the court has written,

> Yet it is the prerogative of this court to determine the law, and we think that generally the [lower] courts are under a duty to follow it as expressed by the courts of last resort, as they understand it, even though they may disagree. If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.

State v. Eichler, 248 Iowa 1267, 1270, 83 N.W.2d 576, 578 (1957).

1978); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382, 1389-90 (Ill. 1978); *see also Bayliss v. Bayliss*, 550 So.2d 986, 987-92 (Ala. 1989) (concluding court had authority to award postmajority support for education). Other courts, however, have found postsecondary education support violates equal protection. *See Grapin v. Grapin*, 450 So.2d 853, 854 (Fla. 1984); *Curtis v. Kline*, 542 A.2d 265, 268-70 (Pa. 1995); *see also, Ex parte Barnard*, 581 So.2 489, 491 (Ala. 1991) (Justice Almon concurring in the result).

[3] *See, e.g.,* Hon. Vincent A. Cirillo, Curtis v. Kline*: The Pennsylvania Supreme Court Declares Act 62 Unconstitutional—A Triumph for Equal Protection Law*, 34 Duq. L. Rev. 471 (1996); Carol R. Goforth, *The Case for Expanding Child Support Obligations to Cover Post-Secondary Educational Expenses*, 56 Ark. L. Rev. 93 (2003); Ryan C. Leonard, *New Hampshire Got It Right: Statutes, Case Law and Related Issues Involving Post-Secondary Education Payments and Divorced Parents*, 4 Pierce L. Rev. 505 (2006); Judith G. McMullen, *Father (Or Mother) Knows Best: An Argument Against Including Post-Majority Educational Expenses in Court-Ordered Child Support*, 34 Ind. L. Rev. 343 (2001); Maureen A. Shannon, *Postsecondary Educational Support Statutes: Promoting Equal Education Opportunity by Creating an Equal Protection Problem*, 35 Duq. L. Rev. 683 (1997).

B. Amount of the Subsidy

Mark also argues the district court erred in determining the amount of his support. He claims the court should not have considered the cost of attending Central in its analysis. He also claims he should not be required to contribute to the cost of Amanda's education since the sum of the scholarships and loans she receives is more than the cost of an in-state public education.

We agree with Mark in that the court should not have considered the cost of attending Central. However, we recognize that Amanda would not have the scholarships and loans she has were she not at a private institution. *See In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The transcript indicates that she had only $1000 in scholarships offered at ISU, versus the $10,000 she receives at Central. Furthermore, there is no indication in the record she would have been able to receive the Central Partnership Loan had she not attended Central. Therefore, we conclude Amanda's available contribution includes $1000 in scholarships, $3500 from the Stafford Loan, $1200 from work-study, and $1600 from summer work. Thus, Amanda's available contribution is $7300. By subtracting from the in-state tuition of $15,852 and dividing by two, we come to Mark's contribution: $4276. We affirm the district court's decision finding Mark responsible for a postsecondary education subsidy. However, we modify the amount of the subsidy from $5000 to $4276.

C. Attorney Fees

Mark argues the district court erred in awarding Tammy attorney fees. Tammy concedes this is an original action, not a modification of their dissolution decree. Since the action relates back to the decree, and both the provision for

attorney fees and the provision for postsecondary education are in chapter 598, we conclude the district court did not abuse its discretion in awarding attorney fees. *See In re Marriage of Mullen-Funderburk*, 696 N.W.2d 607 (Iowa 2005) (taxing district court costs to father); *Sullins*, 715 N.W.2d at 255 (reviewing award of attorney fees for abuse of discretion).

Tammy also requests appellate attorney fees. An award of appellate attorney fees is also not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Sullins*, 715 N.W.2d at 255. Tammy's request for appellate attorney fees is denied. Costs of appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.