FILED
OCT 28 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-264 / 92-1404

000467

IN RE THE MARRIAGE OF KAREL SUE SMITH AND GARY MARK SMITH

Upon the Petition of
KAREL SUE SMITH, n/k/a KAREL SUE CORNELL,
Petitioner-Appellant,

And Concerning
GARY MARK SMITH,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, James W. Brown, Judge.

Petitioner wife appeals from a judgment of the district court denying her request for modification of child support. **REVERSED AND REMANDED.**

James M. Gocke of Dreher, Simpson, Jensen, Sellers, Harvey, Butters, Kaiser & Abels, P.C., Des Moines, for appellant.

Jo Ellen Whitney of Davis, Hockenburg, Wine, Brown, Koehn & Shors, P.C., Des Moines, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab, JJ. Donielson, J., takes no part.

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SACKETT, J.

The question in this appeal from the trial court refusal to modify the child support provisions of a dissolution decree is whether petitioner-appellant Karel Sue Smith has shown the required change of circumstances for modification. We agree with Karel that she has and her child support should be increased. We reverse and remand to the trial court to apply the guidelines and make the necessary calculation.

The marriage of Karel and respondent-appellee Gary Mark Smith was dissolved in 1979. Custody of the three children of the marriage born in 1973, 1976, and 1978 was awarded to Karel. Gary was ordered to pay child support of $100 per month per child. Said amounts were to be paid until the child reached the age of eighteen or graduated from high school, whichever occurred later.

Karel filed a petition for modification seeking an increase in support on October 23, 1991. The matter was submitted and a decree entered on August 5, 1992 denying relief. This appeal follows.

In the 1979 dissolution decree Gary was ordered to pay Karel a property settlement, alimony, and child support. The property settlement was satisfied in five years, and Karel's alimony terminated on remarriage. Karel is now remarried.

At trial, it was shown the oldest child was a student at Iowa State University and Gary had contributed to his

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support the prior year. The trial court found there was not a change of circumstance and noted the case had been tried and submitted prior to the effective date of a recent amendment to Iowa Code section 598.21(9). This section provides a deviation of ten percent or more in support calculated by current guidelines from that previously ordered will be considered a substantial change of circumstances. The trial court advised the effect of this amendment had not been considered in this case.

The trial court ordered Gary to provide financial assistance for the oldest child, now at Iowa State University, in the amount of $2500 per academic year but not to exceed forty percent of the cost of the child's board, room, tuition, and books.

The court also modified the dissolution decree to grant joint custody with physical care to Karel.

Gary operates a mortuary in Laurens, Iowa. The trial court found Gary's adjusted gross income in 1979 was $21,000 and his average adjusted gross income for the four years proceeding the modification was about $28,000. Gary's adjusted gross income in 1991 was $36,648. Karel's net income is $7200 a year.

The burden to show a substantial change of circumstances rests on Karel. See In re Marriage of Feustel, 467 N.W.2d 261, 265 (Iowa 1991). Karel contends she has met that burden. She said there has been inflation since 1979; her children are now older and their needs more

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expensive; $100 a month child support is inadequate; and Gary has accumulated assets including a home on Lake Okoboji and has a standard of living higher than hers. She also contends the interests of the children have been jeopardized by their father's very minimal contribution to their support. Karel also contends Gary has a larger compensation package from his funeral home business than is reflected on his tax returns.

Gary contends these factors do not support an increase in child support. He relies on our case of In re Marriage of Chmelicek, 480 N.W.2d 571 (Iowa App. 1991), to support his position. Chmelicek is not dispositive because of its factual differences. In Chmelicek, the custodial parent sought to show that inflation, the increased cost of raising a child, and the noncustodial parent's increase in income supported a modification. In Chmelicek, we denied modification even though the noncustodial parent's annual income had increased about $13,200 in a six-year period. However; in Chmelicek, unlike the case at bar, there was a COLA or cost of living adjustment clause which we said showed the inflation factor was within the contemplation of the parties when the decree was entered. Chmelicek, 480 N.W.2d at 574. We then looked at the noncustodial parent's increase in income and said the record did not show what portion of the increase was due to inflation. The rationale in Chmelicek that Gary seems to miss is the children in Chmelicek were receiving annual increases in

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support as the noncustodial parent's income increased due to inflation. Consequently, in Chmelicek, the inflation factor had to be subtracted from the noncustodial parent's income before determining whether the noncustodial parent's income had increased. The provision in the Chmelicek decree for a cost of living adjustment distinguishes it from the case before us.

We agree with Karel that the effect of inflation on the parties' purchasing power is a factor which may be considered in determining whether a substantial change in circumstances has occurred. Chmelicek, 480 N.W.2d at 574; In re Marriage of Brands, 392 N.W.2d 855, 856-57 (Iowa App. 1986). We also find Gary's increase in income was substantial and he has had no increase in his child support obligation since 1979. To continue with the minimal support for teenage children in today's economy would not be just. See In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983). Having decided Karel has shown a substantial change of circumstances necessary for modification, we need not determine whether we should assess the grounds for modification under the amendment to section 598.21(9).

We remand to the trial court to determine the parties' net monthly incomes and apply the child support guidelines.

Karel requested attorney fees at the trial court level and requests them on appeal. The trial court awarded her no attorney fees, and she claims she should have had

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attorney fees at the trial court level. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). We find no abuse of discretion in the trial court refusal to award attorney fees.

We have considered Karel's request for attorney fees on appeal and award her the sum of $1500. Costs on appeal are taxed to Gary.

REVERSED AND REMANDED.