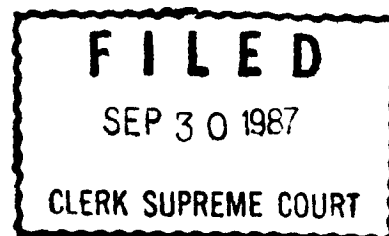


IN THE COURT OF APPEALS OF IOWA



IN RE THE MARRIAGE OF NANCY C. SQUIRES AND ROBERT A. SQUIRES

Upon the Petition of	)	218
NANCY C. SQUIRES,	)	
Petitioner-Appellee,	)	Filed September 30, 1987
And Concerning	)	
ROBERT A. SQUIRES,	)	<u>7-176</u>
Respondent-Appellant.	)	86-1313

Appeal from the Iowa District Court for Linn County (No. DM 7480),
Thomas M. Horan, Judge.

Respondent husband appeals from a modification of the parties' dissolution decree, claiming that the district court erred in increasing the child support to be paid by him, not granting him more visitation time with the children, awarding attorney's fees to the wife's attorney, and requiring him to pay a portion of the children's medical expenses not covered by insurance. Petitioner wife seeks attorney's fees on appeal. **AFFIRMED AS MODIFIED.**

Wallace L. Taylor of Bennett, Kucera & Taylor, Cedar Rapids, for respondent-appellant.

Lisa M. Kenyon of Lynch, Dallas, Smith & Harman, Cedar Rapids, for petitioner-appellee.

Considered by Donielson, P.J., and Snell and Hayden, JJ.

PER CURIAM**219**

On September 29, 1980, Nancy and Robert Squires were granted a dissolution of their marriage by the District Court for Linn County. The district court, in the dissolution decree, awarded custody of the parties' children, Cari, Mandy, and Dustan, to Nancy. On the date the decree was entered the children were two, four, and six years old, respectively. Robert was awarded visitation and ordered to pay \$70 in child support per week. On October 1, 1985, Robert filed a petition for modification of the decree, seeking joint custody and physical care of the children. On October 2, 1985, Nancy filed her petition for modification of the decree, seeking a change in the decree's visitation provisions, an increase in Robert's child support obligations, an automatic cost-of-living escalator with respect to the child support provisions, a provision for the children's health insurance and expenses, along with attorney's fees and costs. Robert subsequently abandoned his request for joint and physical custody and, at trial, sought only a modification of the decree's visitation provisions. The petitions were consolidated for trial which commenced on July 1, 1986. The district court, in its ruling filed on July 3, 1986, found changes in circumstances sufficient to allow it to restructure both the economic and visitation provisions of the original decree. Following unsuccessful posttrial motions, Robert brought this appeal. Our review is de novo. Iowa R. App. P. 4. Although we give weight to the district court's findings of fact, we are not bound by them. Iowa R. App. P. 14(f)(7).

I.**(A)**

The authority of our courts to modify dissolution decrees is grounded in both statute and the cases. Iowa Code section 598.21(8) (1985), as amended by Act of May 23, 1985, ch. 178, § 7, states that "[t]he court may subsequently

modify orders made under this section [dealing with, inter alia, child support payments] when there is a substantial change in circumstances." See Iowa Code § 598.21(8) (1987). We are guided in our application of this authority by a number of principles which have emerged from our cases. The change must be material and substantial and must occur after the entry of the decree. In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977). It must appear that continued enforcement of the original decree would, as a result of the changed circumstances, result in positive wrong or injustice. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). The change in circumstances must be permanent or continuous rather than temporary. In re Marriage of Mayer, 347 N.W.2d 681, 683 (Iowa App. 1984). The change in circumstances must not have been within the contemplation of the trial court when the original decree was entered. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974). The district court is granted reasonable discretion in determining whether modification is warranted, and that discretion will not be disturbed on appeal unless there is a failure to do equity. E.g., In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983) (application to modify child support provisions); Norenberg v. Norenberg, 168 N.W.2d 794, 797 (Iowa 1976) (application to modify visitation).

(B)

Robert maintains the record fails to support the district court's finding of a material and substantial change of circumstances with respect to the economic condition of the parties. Consequently, he contends the district court's modification of his economic obligations is unjustified. The district court found that "the unanticipated effects of inflation, coupled with the fact that [Robert] is now earning substantially more in income than he did at the time the original dissolution decree was entered" amounted to a material and substantial change of circumstances sufficient to support a modification of the decree's child support

provisions. The court then increased Robert's obligations to \$100 per week and ordered him to pay one-half of all health care expenses not covered by insurance.

In analyzing claims for modification of a decree's child support provisions, we are bound to consider, inter alia, "[c]hanges in the employment, earning capacity, income or resources of a party." Iowa Code § 598.21(8), as amended by Act of May 23, 1985, ch. 178, § 7(1). In connection with these factors, we acknowledge the effects of inflation on the support dollar, In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981); In re Marriage of Brands, 392 N.W.2d 855, 857 (Iowa App. 1986), and weigh the factors of increased school and medical expenses as well as the needs of growing children. Stutsman, 311 N.W.2d at 76; Brands, 392 N.W.2d at 857; see Iowa Code § 598.21(8), as amended by Act of May 23, 1985, ch. 178, § 7(1). Our consideration of the latter set of factors, however, does not obviate the requirement that a previously-uncontemplated substantial and material change of circumstances be demonstrated. See Mears v. Mears, 213 N.W.2d 511, 516-17 (Iowa 1973).

Robert is employed by Cargill, Incorporated, as he was at the time of the dissolution decree. In addition he claims that, commencing in 1983, he began farming land rented from his father. We discuss Nancy's disputes with certain aspects of this claim below. At the time of the original decree, Robert had an average weekly gross income from Cargill, exclusive of overtime pay, of \$286. At the time of the modification trial, this income had risen to \$350 per week. His financial affidavit at the time of the modification trial shows a net monthly income of approximately \$1,062 and monthly expenditures, including the original support obligation at issue here as well as support obligations to a different child resulting from his presently pending divorce, of \$1,263. Nancy, at the time of the original decree, was a student supporting herself

and the three children on Robert's support payments, assistance from her parents, and Aid to Families with Dependent Children payments. At the time of the modification trial, she had graduated and become employed as a teacher. Her financial affidavit lists net monthly income of \$888.08, exclusive of Robert's child support payments, against monthly expenditures of approximately \$1,211.

Nancy contends that Robert's entry into the farming business provides him with substantial tax advantages. She claim that Robert has been both overstating his farm expenditures and understating his farm income so as to create an artificial farm loss for tax purposes. This artificial loss, coupled with his actual farm income, claims Nancy, places Robert in a substantially better financial condition than that prevailing at the time of the dissolution. The district court apparently agreed with this assertion. We, on de novo review, do not.

We note initially that we are somewhat hindered by the fact that the district court made no fact findings in support of its ultimate finding of a substantial change of circumstances. Consequently, we do not know precisely what evidence persuaded the district court; nor do we know, other than by inference, what part of whose testimony the district court credited. Our review of the record, however, convinces us that Robert's current economic situation, relative to his situation at the time of the original decree, falls short of the necessary substantial change in circumstances.

Nancy argues that the effects of inflation have made substantial inroads into the support Robert is obligated to pay under the original decree. In support of this contention, she directs our attention to the 30% increase in the cost of living, as reflected by the Consumer Price Index, which occurred between the entry of the original decree and the modification trial. We take issue with neither her claim nor her supporting statistical evidence. We think, however, that Robert's modest wage increase at Cargill must be considered in light of

these factors also. Mears v. Mears, 213 N.W.2d 511, 519 (Iowa 1973) ("Of course, this diminished purchasing power of the dollar works both ways. Although defendant's income has increased so has his cost of living.") In that vein, far from amounting to a substantial increase in income, Robert's 22% increase in average earnings during that period has not allowed him to keep step with inflation.

Neither are we persuaded by Nancy's claim that Robert's 1983 assumption of his father's crop-farming operation has resulted in windfall income for Robert. For example, Nancy's allegations that Robert failed to report his 1984 income from soybean sales is countered, reasonably we think, by Robert's explanation that his tax preparer listed soybean income together with corn income on his farm schedule tax form.

Although the record does support a claim that Robert's economic condition was improved following his remarriage due to the availability of his second wife's income, that marriage was in the process of dissolution proceedings during the modification trial. Robert was, at the time of trial, paying child support payments for the child of his second marriage. In addition, while we think Robert's financial affidavit understates his current net worth as a result of a duplicative listing of liabilities, the vast majority of his assets are both heavily encumbered and bound up into his farm operations.

In short, we do not believe such a substantial change in Robert's economic status has occurred as would allow for the modification made by the district court. Accordingly, we modify the district court's ruling and reinstate Robert's child support obligations as contained in the original decree. We also strike that part of the district court's ruling which made Robert responsible for additional health-care expenses.

II.

Robert maintains the district court inequitably granted him too little

visitation with his children. The original decree granted him visitation on alternating weekends, for two weeks during the summer, and on Christmas Eve or Christmas Day in alternating years. At the time of the original decree the parties were living approximately ten miles from each other. In the summer of 1985, however, Nancy obtained her current employment and relocated, with the children, to Grundy Center, Iowa, some two hundred miles from Robert. The district court found this move to constitute a change in circumstances sufficient to allow for a modification of the decree's visitation provisions. The court accordingly modified the visitation provisions so as to grant Robert one weekend of visitation per month, three weeks during the summer, and Thanksgiving break or Christmas break in alternating years.

The court was clearly acting within its discretion in finding that Nancy's move constituted a substantial and material change of circumstances. See In re Marriage of Jerome, 378 N.W.2d 302, 305-06 (Iowa App. 1985). Moreover, we think the visitation arrangement established by the district court is well within the bounds of equity. The court compensated for the increased distance by omitting the biweekly visitation and adding more time during the summer and school vacations. We think this consistent with both the children's needs and desires; therefore, we affirm.

III.

Finally, Robert contends the district court should not have awarded Nancy attorney's fees for the modification trial. Iowa Code section 598.36 (1985) provides that the district court may award reasonable attorney's fees to the prevailing party in a modification action. See In re Marriage of Phipps, 379 N.W.2d 26, 29 (Iowa App. 1985). In light both of our determination that the economic modifications entered by the district court were not justified and of the fact that Nancy and Robert both petitioned for the visitation modifica-

tion, we do not think Nancy qualifies as the "prevailing party" within section 598.36. Accordingly, she was not entitled to attorney's fees under that section and we strike the district court's award. We think the parties should be responsible for their own attorney's fees on appeal, and likewise assess costs one-half to each party.

AFFIRMED AS MODIFIED.