FILED
DEC 26 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CALVIN O. HULTMAN AND CHARLENE C. HULTMAN

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UPON THE PETITION OF
CALVIN O. HULTMAN,

Petitioner-Appellant/Cross-Appellee,

AND CONCERNING
CHARLENE C. HULTMAN,

Respondent-Appellee/Cross-Appellee.

Filed December 26, 1984

4-415
83-1517

Appeal from the Iowa District Court for Polk County-Arthur E. Gamble, Judge.

Petitioner, Calvin O. Hultman, appeals from trial court's order refusing to modify an alimony award made to Respondent. Respondent cross-appeals contending that the trial court should have required Petitioner to pay transportation expenses connected with visitation. AFFIRMED AS MODIFIED.

David L. Brown, of Hansen, McClintock & Riley, Des Moines, and James W. Carney, of Carney, Williams, Hudson & Green, Des Moines, for petitioner-appellant/cross-appellee.

James F. Fowler, of Wilson, Goodhue & Fowler, Indianola, for respondent-appellee/cross-appellant.

Heard by Snell, P.J., and Schlegel and Sackett, JJ.

Background Facts

The parties' 15-year marriage was dissolved in September of 1981. Custody of the parties' two sons Calvin and Daniel, born in 1972 and 1975, was awarded to Calvin. Calvin was ordered to pay Charlene $25,000[1] as a property settlement, payable $5,000 within thirty days and the balance in four equal annual installments, with 10% interest on the unpaid balance. In addition thereto, he was to pay her alimony for an indefinite term.

The original decree provided Charlene was awarded alimony of $500 per month. A supplement order amending the decree was filed, which provided:

> "The Court finds that the alimony award of $500.00 per month is justified . . . that it is in the interest of equity and justice that upon application of petitioner the matter of alimony may be reviewed after January 1, 1984, at which time the court will review the situation of the parties and see if it is equitable that alimony be changed. The Court maintains jurisdiction of this matter for that limited purpose."

The decree of dissolution was entered September 29, 1981. On October 1, 1981, both parties filed financial statements. The statement filed by Calvin showed the net worth of the parties to be $36,944.92. The statement filed by Charlene showed their net worth to be $43,729.51[2] The difference in the net worth was primarily due to two obligations to the Houghton State Bank which Charlene did not list.

Calvin was making $28,800 annually at the time of the decree. His income has increased about $100 a month. He is now 42 years of age. Prior to the marriage Charlene was successfully employed in a secretarial capacity. She was a homemaker during the marriage except for minor outside jobs. Her testimony at

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[1] Together, a 1977 automobile and some personal items was the entire property award made to Charlene.

[2] Twenty-seven thousand dollars ($27,000) of the net value shown by each party was their equity in the family home where Calvin continues to reside with the children.

the first trial indicated she anticipated no difficulty in obtaining employment. She is now 39 years of age She is now employed in a part-time secretarial position, but the expense of reaching her place of employment is nearly equal to her wage. Following the dissolution Charlene lived in Red Oak and exercised substantial visition with the children. She has subsequently moved to the Washington, D.C., area and is living with her mother.

Calvin has remarried. He and his present wife are expecting a child. His present wife is employed. She assumes a substantial portion of the care of the two boys and has an excellent relationship with the children.

In May of 1983, Calvin filed an application for modification, alleging a change in circumstances and seeking a reduction or termination in the alimony award. Charlene subsequently sought a modification of the visitation and sought to have Calvin pay transportation and telephone expenses. The trial court refused to modify the alimony award, finding there had been no change in circumstances. The trial court did not order Calvin to assume any financial responsibility for transportation or telephone expense. Both parties have appealed.

I. Should the alimony award have been modified?

Calvin contends that the trial court's statement concerning retention of jurisdiction in the original decree put both parties on notice that the alimony award would be carefully reviewed in the future. He also contends that he proved a change of circumstances sufficient to warrant modification of the alimony provision of the decree. The issues are interrelated and will be discussed together.

Our review is de novo. Iowa R. App. P. 4. The trial court has 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. In Re Marriage of Vellernack, 3334 N.W.2d 761, 762 (Iowa 1983).

We determine this is a modification as opposed to a continuation of the original proceeding. "[T] trial courts should make final disposition of cases on the circumstances then existing. There may be exceptional cases justifying a departure from this rule, although we 'do not foresee circumstances in which a dissolution court is justified in issuing its decree peacemeal.' Of course, the trial court always retains jurisdiction by statute to modify a divorce decree upon change of circumstances. The question is, may it do so absent such a change.

Only when the decree unequivocally provides for later date court review without the necessity of showing a change of circumstances will we say this was the trial court's intent. Otherwise, we consider statements concerning retention of jurisdiction as mere expresses of already existing authority." In Re Marriage of Schlenker, 300 N.W.2d 164, 166 (Iowa 1981). We must therefore determine whether or not Calvin has met the burden of showing a substantial change of circumstances to justify the modification. The facts here are unusual because the custodial parent is paying alimony and is receiving no child support from the noncustodial parent. The alimony issue has a direct effect on the minor children and the increased cost of their care is one of the grounds which Calvin contends supports his request for modification.

Calvin has custody of and responsibility for the well-being of the parties' two children. Both Charlene and Calvin have an obligation to those two children, and an obligation to contribute to the children's support not necessarily equally but according to their ability to pay, In Re Marriage of Fleener, 247 N.W.2d 219, 221 (Iowa 1979). Charlene was not ordered to pay child support. She has made contributions to the children by way of purchase of certain items and providing living expenses during visitation. The record reflects that Charlene has made no reasonable effort to obtain remunerative employment, nor has she preserved her property settlement to generate income. Calvin claims that the trial court has really held that Charlene is unemployable per se until she obtains a full-time job,

and that the court fails to give any feasibility to Charlene being self-supporting. Charlene suffered a mental disorder during the marriage and still takes lethium and sees a psychiatrist. There is no evidence that this condition makes her unemployable. She is in fact employed by an elderly doctor, but she realizes little income because of job related expenses. She has made few job applications.

Calvin has the custodial and financial responsibilities for the two young sons of this marriage. Their best interests continues to be our concern. Calvin is a man of modest means who has elected to devote a substantial portion of his life to public service. The remuneration for such employment is not great. Charlene left a good job in Washington, D.C., to come to Red Oak, Iowa. Some of her most productive years were devoted to Calvin purposes and care of the two children. She lost FICA contributions, pension and longevity rights. She is rightfully entitled to compensation in the form of alimony and support to assist her in becoming a self-sustaining individual.

The problem is Calvin is a person of limited means, and the marital years did not propell him into economic security. Had this marriage survived, the parties would not be financially affluent. The dissolution has put a severe financial strain on a single income. The plain fact is that Calvin's income is not sufficient to provide more than a minimal living for two households. Charlene's financial situation is not good nor is Calvin's, and consequently the two boys'. In today's economy, few two-parent families are supported by one breadwinner. The necessity for both parents to be gainfully employed becomes more real when the dissolution requires them to support two households.

We must determine that the trial court anticipated Charlene's obtaining employment when the original decree was entered. This finding is supported by Charlene's own testimony at the time of the original trial. Looking at the property division made, the trial judge could not have determined that Calvin

could make the $500 alimony payments indefinitely but they would be reduced when Charlene obtained employment.

Charlene received a cash settlement of over 1/2 the parties' net worth by her figures, 5/7ths by Calvin's figures. The difficult fact is that Charlene has not obtained remunerative employment. There has never been a finding made that she is unemployable nor can we determine from this record that she is. She has made little effort to become self-sustaining.

The Iowa Supreme Court has said:

> "In addition, the wife, like other handicapped persons, has a duty to endeavor to help herself by seeking employment within her capabilities or by obtaining training and then seeking employment.

In Re Marriage of Downing, 210 N.W.2d 436, 438 (Iowa 1973).

We have two young children whose lives will be greatly affected by her failure to help herself financially. While lots of money is not necessary to raise children, and many of our most outstanding citizens were raised in less than affluent homes, the record here relates serious financial pressures which will affect the children.

This is an extremely difficult case. There is little precedent to guide us. It is only in recent years that many fathers have received custody of their children. And, it is unusual for the custodial parent to be paying alimony and not receiving child support.

Although directed to a modification for child support, it is appropriate to consider the language of the Iowa Supreme Court in Dworak v. Dworak, 195 N.W.2d 740, 743 (Iowa 1972). "We have held time and time again child custody and support provisions of a divorce decree are final as to circumstances then existing. Such provisions will be modified only where it is proven by a preponderance of the evidence that subsequent conditions have so changed that the welfare of the children requires, or at least makes expedient, such modification. In matters of

this kind the child's welfare is the controlling consideration." The best interest of the children and the additional expenses of raising the children should be considered. The additional cost to a wife of educating daughter was considered in increasing the wife's alimony award where husband's income had not increased. Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974). Charlene's failure to actively seek employment should not enure to her benefit.

The trial court gave consideration to the income of Calvin's current wife. In Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974), the Iowa Supreme Court found the trial court considered defendant's present wife was gainfully employed and contributed substantially to the family coffers and said:

> "While she, (referring to new wife) has no obligation to support defendant's daughter or his former wife, it is proper to consider defendant's overall financial condition in fixing the amount he should pay."

The equities here do not justify Charlene benefiting from the income of Calvin's current spouse who has assumed a substantial portion of the custodial responsibility for the children of this marriage. She is herself pregnant and, with Calvin's financial picture, she will be required to assume a substantial amount of support for their child. To suggest that her financial situation should benefit Charlene is totally unfair and without merit.

We determine the best interest of the children and their need for additional support is a substantial change of circumstances sufficient to modify the decree. We therefore modify Charlene's alimony and decrease it by $100 per month commencing in October, 1984, and a decrease of $100 in October, 1985, 1986 and 1987, until the amount payable shall be $100 per month, which amount shall continue until Calvin reaches the age of 65, at which time the alimony shall terminate. The original alimony award provided it was to terminate on Charlene's remarriage. The modifying court struck the remarriage provision, even though Charlene made no request to have it stricken. The remarriage provision should be reinstated.

There is no support for Charlene's position that Calvin pay travel and telephone expenses. The record fails to indicate that he has the financial resources to do so. The finding of the trial court on this issue is affirmed.

The request for appellate attorney fees is denied.

AFFIRMED AS MODIFIED.