IN THE COURT OF APPEALS OF IOWA

No. 5-513 / 94-718

IN RE THE MARRIAGE OF CHERYL V. BUDLONG AND IRVING W. BUDLONG

Upon the Petition of

CHERYL V. BUDLONG,

Petitioner-Appellee,

And Concerning

IRVING W. BUDLONG,

Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan, Judge.

Respondent appeals a district court ruling denying his petition for modification of his child support obligation. **MODIFIED.**

Habbo G. Fokkena of Shepard, Fokkena & Gibson, Clarksville, for appellant.

Allison M. Heffern of White & Johnson, P.C., Cedar Rapids, for appellee.

Considered by Sackett, P.J., and Habhab and Cady, JJ.

SACKETT, P.J.

Respondent-appellant Irving W. Budlong appeals from the trial court's refusal to modify the child support provision of his 1990 dissolution decree. Irving contends, while the trial court found he has realized a substantial decrease in income, the trial court incorrectly considered his current financial circumstances temporary and looked to past earnings in determining what the court felt his income could be. Irving contends he has met the necessary burden and his child support obligation should have been modified. We agree and modify.

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. *Mears v. Mears*, 213 N.W.2d 511, 514 (Iowa 1973). 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 Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987).

The principles enumerated in *In re Marriage of Vetternack*, 334 N.W.2d 761 (Iowa 1983), and applied in *Kern* are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have

> been in the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

When the dissolution decree was entered, the parties had entered into a joint stipulation addressing issues of child custody and child support and property settlement. Petitioner-appellee Cheryl V. Budlong received primary physical care of the children born June 5, 1975, March 21, 1977, June 4, 1980, and May 21, 1981. Irving was ordered to pay child support of $2500 per month to be increased to $3500 per month if he failed to make payments on the second mortgage he was ordered to assume under the decree. The total support was to continue until the youngest child finished high school. The stipulation was termed confidential. A review of the stipulation and the financial statements made when the stipulation was signed reveals at the time the parties had a negative net worth, but anticipated Irving would have a substantial future income.

In March 1993, Irving filed an application to modify his child support obligation contending his income at the time the decree was entered was $100,000, but he currently had no job or source of income. Irving was not employed at the time he filed the application to modify, but was employed by the time the matter came on for hearing.

Cheryl has a doctoral degree in curriculum and instruction and has been a full-time professor of education at Wartburg College since 1987. At the time of the dissolution, Cheryl's net monthly income was $2668.55. Her affidavit at the time of the modification showed her net monthly income to be $2377.10.

Irving is a graduate of the University of Northern Iowa and was certified as a public accountant. He invested in farmland in the 1970's, and in one year when he sold farmland, he had income of over $700,000. Irving suffered substantial financial ruin when land prices plummeted in the early 1980's. From 1984 to 1988, Irving owned a business that manufactured grain carts and he took from the business an annual income of $24,000 to $30,000. He changed businesses and, at the time of the dissolution, listed his annual income at $30,000 but agreed to pay $2500 monthly in child support. He also agreed to assume nearly one and one-half million dollars of debt. Attached to the stipulation was a statement of Irving's anticipated pre-tax salary necessary to pay the basic expenses under the stipulation. The anticipated salary was fixed at $126,120 per year, or $10,510 per month. Irving has been unable to generate the anticipated salary. Irving filed personal bankruptcy in early 1992. He discharged most of the debt he had assumed in the dissolution decree, including a $20,000 property settlement he had promised to pay Cheryl. A federal income tax obligation owed by both parties in the amount of $40,000 Irving had agreed to assume was not discharged.

Irving paid the child support provided for in the original decree utilizing a retirement account until January 1993.

Irving currently owns and operates a company that makes cement blocks for decks. He drew $30,000 from the business in 1994. He testified he expects to draw between $30,000 and $40,000 from the business.

The stipulation fixing child support entered into by these parties was based on hopes and anticipation. Although Cheryl and the trial judge fault Irving for lack of ambition, it seems more that at the time of signing the dissolution stipulation, the couple built on unrealistic hopes.

Cheryl argues Irving needs to look for other jobs and make more money. At Irving's age, with his unfortunate financial history including the bankruptcy, it is not reasonable to believe high paying jobs are available to him. While Irving can be faulted for not paying Cheryl the property settlement and not discharging the income tax liability, these were joint obligations which he assumed at the time of the dissolution on the anticipation of a substantial income that never materialized.

Cheryl faults Irving for taking a trip to Boston and taking the children on a skiing vacation when he was not paying child support. We do not condone this and understand her frustration. She has had primary responsibility for the children. The family had grown used to a high standard of living and she had anticipated substantial child support.

The anticipated income on which the stipulation was based was not met. There is no showing Irving is capable of generating income in excess of what he is now earning. The current circumstances are not what Cheryl and Irving envisioned when they agreed on Irving's child support obligation. Irving has shown his current financial circumstances were not contemplated when the decree was entered. We agree with Irving his child support obligation should be modified. We, therefore, need not address the issue of whether Irving's child support obligation has been $2500 or $3500. Irving requests this clarification only if the child support is not modified.

In doing so, we fix Irving's monthly income before taxes at $3600 [1] and $2538.52 per month after taxes and deductions.

There is a question raised as to the date any modification should be made. We determine as of March 3, 1994, the day the order appealed from was entered, Irving's child support obligation is modified to provide he pay child support in the amount of $878.33 per month as long as three children are entitled to support, the sum of $736.17 per month as long as two children are entitled to support, and the sum of $502.63 per month as long as one child is entitled to support. According to the original decree, child support shall continue to high school graduation or age nineteen, whichever occurs first.

The decree made provision for college expenses which provision is not subject to challenge on appeal.

MODIFIED.

Habhab, J., concurs; Cady, J., dissents.

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[1] The tax deductions for the children have been allocated to Cheryl.

CADY, J. (dissenting)

I respectfully dissent. I would affirm the trial court.

Our standard of review requires us to give weight to the findings of the trial court. Iowa R. App. P. 14 (f)(7). The trial court acknowledged Irving's financial woes, but found they were the result of his own irresponsibility and lack of ambition. The majority, however, fails to give weight to this finding. Instead, it concludes higher paying jobs are not available to Irving given his age and history of bankruptcy. Not only is this conclusion contrary to the findings of the trial court, it is not supported by the evidence. Irving's financial problems are self inflicted, and we should not permit him to visit them on Cheryl.