

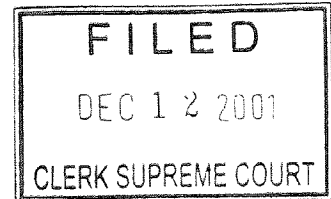
IN THE COURT OF APPEALS OF IOWA

No. 1-684 / 01-0058
Filed December 12, 2001

IN RE THE MARRIAGE OF MARILYN VRBAN
AND GREGORY VRBAN

Upon the Petition of
MARILYN VRBAN,
Petitioner-Appellant,

And Concerning
GREGORY VRBAN,
Respondent-Appellee.



Appeal from the Iowa District Court for Marion County, Richard D. Morr,
Judge.

The petitioner appeals a district court ruling denying her petition to modify
the child support provisions of the parties' dissolution decree. **AFFIRMED.**

Steven Hamilton of the Hamilton Law Firm, P.C., Storm Lake, for
appellant.

John R. Sandre of Coppola, Sandre, McConville & Carroll, P.C., West Des
Moines, for appellee.

Considered by Huitink, P.J., and Zimmer, and Vaitheswaran, JJ.

ZIMMER, J.

Marilyn Vrbán appeals a district court ruling denying her petition to modify the child support provisions of the parties' dissolution decree. She contends the district court erred in failing to increase respondent's child support obligation under a method that assumed he had applied for and was receiving Social Security retirement benefits. We affirm.

I. Background Facts and Proceedings

Marilyn and Gregory Vrbán were divorced in September of 1993. Marilyn was awarded primary physical care of their son, Sean, born in 1986. Gregory, then sixty years of age, was ordered to pay \$326 per month in child support.

In January 2000, Marilyn filed a modification action asserting there had been a substantial change in circumstances justifying an increase in Gregory's child support obligation. She alleged Gregory had become eligible for Social Security retirement benefits, the receipt of which would substantially increase his monthly income. Gregory resisted modification because he did not intend to apply for benefits until age seventy.

An abbreviated trial was held in December 2000. Neither party testified. Instead, the application to modify was submitted on a stipulated record which summarized the parties' current financial circumstances. Marilyn's attorney asked the district court to either order Gregory to immediately apply for Social Security retirement benefits, or in the alternative, to reassess his child support obligation based on the assumption that he was currently receiving retirement benefits. The trial court declined to order Gregory to apply for benefits and

denied Marilyn's application to modify after concluding she had failed to establish a substantial change in circumstances. Marilyn appeals.

II. Scope of Review

Because this modification of a dissolution decree is an equity action, our review is de novo. See Iowa R. App. P. 4; *In re Marriage of Walters*, 575 N.W.2d 739, 740 (Iowa 1998). However, the trial court has reasonable discretion in determining whether a modification is warranted and we will not disturb its discretion on appeal unless there is a failure to do equity. *State ex rel. Pfister v. Larson*, 569 N.W.2d 512, 514 (Iowa Ct. App. 1997).

III. Request for Modification

A court may modify child support provisions of a dissolution decree when there has been a substantial change in circumstances. Iowa Code § 598.21(8). As the party seeking to modify the existing child support order, Marilyn must prove the change in circumstances by a preponderance of the evidence. *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998). Not every change in circumstances is sufficient. *Pfister*, 569 N.W.2d at 514. "[A] substantial change of circumstances exists when the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines..." Iowa Code § 598.21(9). The change must be permanent or continuous, rather than temporary. *Pfister*, 569 N.W.2d at 514. Additionally, Marilyn must show that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice. *Id.* Finally, she must show that the change in circumstances was not

within the contemplation of the trial court when the original decree was entered.
Id.

Marilyn contends the trial court should have granted her application to modify because Gregory is currently eligible to receive Social Security retirement benefits of \$1348 per month. She points out that modification would be warranted if Gregory had elected to receive Social Security retirement benefits, because the amount of child support required by the child support guidelines as a result of his increased income would deviate by ten percent or more from the amount set in the decree. See Iowa Code § 598.21(9). Marilyn contends we should impute income to Gregory in the amount of the retirement benefit he is currently entitled to receive.

Based upon our de novo review of the record, we conclude the record supports the trial court's finding that no substantial change in circumstances has occurred in this case. Gregory was sixty-seven years old at the time of trial and current in his child support obligation. He has elected not to apply for Social Security because he can receive a significantly higher monthly benefit if he waits until age seventy to apply.

We recognize that it is appropriate to award child support based on earning capacity and not simply earnings alone. See *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). However, we are unconvinced that mere eligibility for Social Security retirement benefits implicates this rationale, especially when it may be financially beneficial to defer those payments. We are also unconvinced by Marilyn's argument that Gregory's decision to defer is tantamount to a voluntary reduction in earnings calculated to avoid an increased

child support obligation. See *In re Marriage of Flattery*, 537 N.W.2d 801, 803-04 (Iowa Ct. App. 1995) (district court properly relied on earning capacity where child support obligor did not actively seek employment). The limited record before us simply does not support the conclusion that Gregory has deferred applying for retirement benefits to avoid an increase in his child support obligation. We find the trial court was correct in concluding Marilyn has failed to establish the existence of a material and substantial change in circumstances sufficient to warrant an adjustment of Gregory's child support obligation.

IV. Request for Attorney Fees

On appeal, both Marilyn and Gregory request an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We are to 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. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We award no attorney fees on appeal.

AFFIRMED.