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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARY JO HUNCHIS AND JOHN F. HUNCHIS 118

Upon the Petition of)

MARY JO HUNCHIS,)

Petitioner-Appellant,) Filed May 31, 1988

And Concerning)

JOHN F. HUNCHIS,) 8-150
87-964

Respondent-Appellee.)

Appeal from the Iowa District Court for Worth County (No. 8871), Stephen P. Carroll, Judge.

Petitioner former wife appeals from the trial court's ruling on her application for modification of the decree dissolving the parties' marriage. **AFFIRMED.**

David E. Funkhouser of Brown, Kinsey & Funkhouser, Mason City, for appellant.

Craig G. Ensign of Ensign Law Office, Northwood, for appellee.

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

PER CURIAM

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The marriage of petitioner, Mary Jo Hunchis, and respondent, John F. Hunchis, was dissolved in 1976. The dissolution decree awarded Mary custody of the parties' three remaining minor children and directed John to pay child support of $200 per child per month and alimony of $200 per month. In 1984, Mary filed an application for modification of the dissolution decree; she asked that her alimony and child support awards be increased and that she be awarded attorney fees.

Trial was held in 1986. At the time of the trial, the parties' youngest child, Johnny, born May 26, 1967, was nineteen years old and a full-time college student. After trial, the court entered its ruling. It denied Mary's request for an increase in alimony but granted her request for an increase in child support; it directed John to pay $250 per month child support directly to Johnny (through the Collection Services Center) beginning the month after the ruling and continuing so long as Johnny was a full-time college student, but only until his twenty-second birthday. The trial court did not mention an attorney fee award. Mary has appealed.

I.

As to petitioner's request for an increase in alimony, we note that the appellate court has de novo review of appeals relating to modification of alimony payments. In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987). "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 Vetternack, 334 N.W.2d 761, 762 (Iowa 1983).

The supreme court has established the following principles in determining if alimony payments should be modified:

> (1) There must be a substantial and material change in 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 circumstances must not have been within the contemplation of the trial court when the original decree was entered.

Id. at 762.

In Iowa Code section 598.21(8) (1987), there are several categories of circumstances that should be considered in determining if there is a substantial and material change of circumstances of either party. Some of these circumstances included in this section are the following: income; earning capacity; inheritance; employment; numbers and needs of dependents; medical expenses; remarriage; outside support; and changes in physical or emotional health. Id. Once again, these circumstances must not have been within the contemplation of the trial court when the original decree was entered. Vetternack, 334 N.W.2d at 762.

The primary thrust of petitioner's application for an increase in alimony is that the respondent, through inheritance, has become a majority stockholder of Hunchis Cattle Company and has increased his ownership of Fred Hunchis Farms. In this respect, we note that the respondent still earns $18,000 per year although his housing, utilities, transportation, and meat are provided for him. However, these conditions did exist at the time of the dissolution decree.

The petitioner urges the court to take into consideration that respondent's earning capacity has increased. But the record does not support that conclusion; nor does it support a finding that there has been a material or substantial increase in his earning capacity. On the contrary, the evidence shows that, despite his increased stock ownership, respondent's net worth has decreased since the entry

of the dissolution decree, mainly because of the substantial decrease in the value of Iowa farmland and the heavy debt of Hunchis Cattle Company.

The petitioner also argues that respondent's new wife has a salary of $26,000 per year and that therefore the respondent has an increased earning capacity. Remarriage of a party is not ipso facto a ground for modification of support. Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974). The court may take into consideration the income of respondent's present wife insofar as it bears on the issue of his financial condition and ability to pay. In re Marriage of Stafford, 386 N.W.2d 118, 122 (Iowa App. 1986). It must be remembered, however, that respondent's present wife has no obligation of support as to the petitioner and his son, Johnny. Page, 219 N.W.2d at 558.

The record shows that while some of respondent's present wife's salary is used for family expenses, including the respondent, most of it is spent on herself and their son. Therefore, we cannot say that this is evidence of a material or substantial change in the respondent's earning capacity.

We conclude that on this record the petitioner has failed to prove that there has been a substantial and material change of circumstances which mandates a modification of alimony payments.

II.

The petitioner contends that the trial court erred in not making the child support award retroactive to the date of the filing of the modification petition and further erred in ordering that the support be paid directly to Johnny and not to the petitioner.

Although increases in child support awards may be made retroactive, it is not mandated that a court do so. See In re Marriage of Hayne, 334 N.W.2d 347, 352 (Iowa App. 1983). The trial court has discretionary rights when determining whether an increase in child support should be made retroactive. Id. The

trial court did not abuse its discretion in modifying the child support prospectively.

During Johnny's first year of college, he did have access to a joint savings account with the respondent, in which Johnny could withdraw up to $1,390 without his father's signature to pay for educational expenses. In addition, there is a savings account in Johnny's name with a balance of $1,307.17. It is apparent that the respondent, during the period of time that Johnny was a freshman, made funds available from which Johnny could draw for his educational needs. Those funds were available at trial time, which placed Johnny in a position of being able to draw against them if he desired reimbursement for money borrowed to meet his educational needs. Under the circumstances here, we do not find that the trial court erred in not making the support payment retroactive to the date of the filing of the modification petition.

III.

It is within the trial court's discretion to order support paid directly to an adult child enrolled as a full-time college student. See In re Marriage of Jones, 309 N.W.2d 457, 462 (Iowa 1981). We concur with the trial court that Johnny should directly receive the support payments.

IV.

On the issue of attorney fees, the district court is vested with considerable discretion. In re Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). A factor in determining if attorney fees should be awarded is whether the party seeking fees was successful at the trial level. In re Marriage of Stanley, 411 N.W.2d 698, 702 (Iowa App. 1987). The petitioner was only partially successful in modifying the respondent's support payments. We find that the trial court acted within its discretion by not allowing attorney fees to the petitioner. Attorney fees for this appeal are also denied.

On our de novo review, we find that the trial court's determination should not be altered. We affirm in all respects.

AFFIRMED.