

FILED

OCT 28 1987

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JENNIFER A. POLZIN AND CLAYTON D. POLZIN

Upon the Petition of

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JENNIFER A. POLZIN, n/k/a
JENNIFER A. MIDDLETON,

)

Petitioner-Appellant,

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Filed October 28, 1987

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And Concerning

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CLAYTON D. POLZIN,

)

7-310
87-74

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County (No. CD-043-25735),
Gene L. Needles, Judge.

Petitioner former wife appeals and respondent former husband cross-appeals
from the trial court's denial of each party's application for modification of
a dissolution of marriage decree. **AFFIRMED AS MODIFIED.**

Leslie Babich of Babich, Bennett & Nickerson, Des Moines, for appellant.

Steven H. Shindler of Wimer, Hudson, Flynn & Neugent, Des Moines, for
appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ. Snell, J.,
takes no part.

PER CURIAM

On October 3, 1984, Jennifer and Clayton Polzin were granted a dissolution of their marriage by the District Court for Polk County. Jennifer has subsequently remarried, and we refer to her hereinafter by her present married name, Middleton. On the date the dissolution decree was entered, the parties had one child, Jacob, born January 3, 1983. The decree incorporated a stipulation and property settlement agreement which had been entered into by the parties. In those parts of that agreement pertinent to the present appeal, a joint legal custody relationship was established, Polzin was awarded physical care of Jacob, a comprehensive visitation schedule was set forth, and the parties agreed "that neither party shall pay to the other child support." On March 3, 1986, Middleton filed an application for modification of the decree, seeking physical care of Jacob subject to Polzin's reasonable visitation rights, child support, and attorney's fees. On March 19, 1986, Polzin responded by answer and separate modification application, requesting child support, and an altered visitation schedule. The applications were consolidated for trial which commenced on October 14, 1986. The district court, in its January 12, 1987, order, denied both applications. The present appeal and cross-appeal followed. Our review is de novo. Iowa R. App. P. 4. Although we give weight to the district court's fact findings, we are not bound by them. Iowa R. App. P. 14(f)(7).

I.

Middleton contends the trial court erred in refusing to modify the custodial provision of the dissolution decree. To succeed in modifying the custodial provisions of a dissolution decree, the moving party must carry a heavy burden. Our supreme court, in In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983), stated:

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons. In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980).

We agree with the district court that Middleton has failed to meet this heavy burden. Middleton places heavy emphasis on the fact that since the dissolution decree was entered she has successfully completed a drug and alcohol rehabilitation program. In addition, she believes her remarriage and the subsequent birth of another child have afforded her the type of stability she earlier lacked. The record provides substantial support for this claim. While we are encouraged by Middleton's success at restructuring her life, we are not persuaded that such progress mandates an alteration of the original custodial provisions. The record shows that Jacob is a healthy and well-adjusted child, and we are not convinced that Polzin has demonstrated his inability or unwillingness to provide for Jacob's best interests.

In connection with this issue, Middleton claims the district court should have considered a written psychological report prepared by her expert witness, Dr. Steven Dawdy. The report dealt with psychological evaluations of Jacob, Jennifer, and Jennifer's husband, Bill Middleton. The district court determined the report was hearsay. Middleton contends sufficient foundation was laid to bring the report within the "business records" exception to the rule against hearsay. See Iowa R. Evid. 803(6).

We have examined the report and find the same evidence was admitted through the expert. We therefore need not address the issue. See Kengorco, Inc. v. Jorgenson, 176 N.W.2d 186, 189 (Iowa 1970).

II.

(A)

The district court concluded that no change had occurred in the relevant circumstances sufficient to allow for the imposition of support obligations upon Middleton. Polzin assigns this conclusion as error. 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).

At the time of the dissolution decree, Middleton reported income of \$800.00 per month. Her testimony at trial establishes an average net income currently of \$1,083.00 per month. In addition, her present husband also contributes approximately \$1,520.00 per month to the household coffers. As Middleton concedes in brief, "her financial condition has dramatically improved." A modification court is entitled to take into consideration a noncustodial parent's financial condition, including that parent's spouse's income, as it bears upon the noncustodial parent's financial condition and ability to pay child support. In re Marriage of Stafford, 386 N.W.2d 118, 122 (Iowa App. 1986). At trial, Middleton estimated their household income at \$52,000.00 per annum. We think this reflects an

ability to pay reasonable child support. With ability comes an equitable responsibility. See In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984).

Accordingly, we modify the decree so as to provide that Middleton pay to Polzin \$200.00 per month child support beginning on the first day of the first month following the filing of this opinion. Such payments shall continue each month thereafter until Jacob has graduated from high school and reaches the age of 18, or he dies, or he becomes emancipated. Payments shall be made through the Clerk of Court of Polk County.

(B)

Polzin maintains the district court erred in failing to modify the decree's visitation provisions in recognition of the fact that Jacob will soon be attending school. While the burden upon an applicant seeking a modification of visitation provisions is much less than that in cases seeking modification of custody, In re Marriage of Jerome, 378 N.W.2d 302, 305 (Iowa App. 1985), we cannot say this burden was met here. That Jacob would eventually begin school is, we think, a fact which would not have eluded the contemplation of the decretal court. See, e.g., Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974) (in order to support modification, change in circumstance must not have been within the contemplation of decretal court).

III.

Polzin maintains the district court should have awarded him attorney's fees. Iowa Code section 598.36 (1985) provides that such an award may be made to the prevailing party in a modification action. See In re Marriage of Phipps, 379 N.W.2d 26, 29 (Iowa App. 1985). We cannot say such an award is required by the equities of this case. See In re Marriage of Harvey, 393 N.W.2d 312, 314 (Iowa 1986).

Costs are assessed one-half to each party.

AFFIRMED AS MODIFIED.