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FILED
OCT 18 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SARA JANE FRASEUR AND JOHN RANDALL FRASEUR

Upon the Petition of)
SARA JANE FRASEUR,) Filed October 18, 1979
Petitioner-Appellee,)
And Concerning)
JOHN RANDALL FRASEUR,) 198
3-62725
Respondent-Appellant.)

Appeal from Cedar District Court - Allan L. Keck, Judge.

Respondent appeals denial of application to modify child custody, support, and alimony provisions of dissolution decree. AFFIRMED.

Willaim B. Norton and Dennis L. Bates of Norton, Freese, Zearley & Bates, Lowden, for respondent-appellant.

John W. Hayek of Hayek, Hayek & Hayek, Iowa City, for petitioner-appellee.

Heard by Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

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DONIELSON, J.

Respondent, John Randall Fraseur, appeals trial court's denial of his application to modify the decree of dissolution, in which he requested custody of parties' minor daughter and relief from child support and alimony obligations. For reversal, John asserts the trial court erred in finding that he failed to show a substantial change in circumstances to justify modification in either custody and support or alimony requirements. We affirm.

Our review of this equity proceeding is de novo. Iowa R. App. P. 4. We are bound to review the facts and law and determine anew from credible evidence all properly presented and preserved contentions of the parties. We give weight to the trial court's fact-findings, especially when the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7). See Paxton v. Paxton, 231 N.W.2d 581, 584 (Iowa 1975).

I

In an action involving custody of children, the first and governing concern is the best interests of the children. Iowa R. App. P. 14(f)(15). The party seeking a modification has the burden of establishing by a preponderance of the evidence that conditions have so materially and substantially changed since the date of the original decree that the furtherance of the child's best interests makes it expedient to change the custody. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). Further, the party seeking to take actual custody from the other must show some superior claim based on an ability to minister not equally but more effectively to the child's well-being. Id; In re Marriage of Gutermuth, 246 N.W.2d 272, 274 (Iowa 1976). It is a settled principle that once custody is fixed it should seldom be disturbed and only then for the most cogent reasons. Melton, 256 N.W.2d at 205; Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975); Stouwie v. Stouwie, 222 N.W.2d 435, 438 (Iowa 1974). Additionally, unless necessary to protect the best interests of the child, the change of circumstances relied on to justify modification must not have been within the knowledge or contemplation of the court when the earlier decree was entered. Leo v. Leo, 213 N.W.2d 495, 496 (Iowa 1971). Cf. Warren v. Warren, 191 N.W.2d 659, 660-62 (Iowa 1971) (best interests of child may override even a contemplated change). The changed circumstances relied on must be material and substantial, not trivial, permanent or

continuous, not temporary. In re Evans, 267 N.W.2d 48, 50 (Iowa 1978) (quoting Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973)).

There is evidence in the record the decretal court did not know of allegations and facts on which John relies for modification. We, therefore, must determine whether those facts along with any changes since then are sufficient grounds for modification. Leo, 213 N.W.2d at 496. After reviewing the record and arguments of the parties, we conclude the trial court correctly refused to modify Sara's custody of Christine.

The primary reason for our decision is John's failure to establish a superior claim to custody based on his ability to minister more effectively to Christine's well-being than Sara. Gutermuth, 246 N.W.2d at 274. Sara is providing an enriching, healthy environment in which Christine is growing and developing normally. Moreover, Sara's drug abuse problem appears to have been eliminated. While we cannot condone her illegal marijuana smoking, there is evidence John has also engaged in similar activity, although not recently. The possible traumatic effects of a change of custody and environment requires us to be certain the child will receive a compensating benefit. We do not find the circumstances of this case warrant or justify modification of custody.

II

John also appeals the trial court's refusal to order a modification of support and alimony requirements. He contends the decrease in his income and increase in Sara's effective income since the date of the dissolution is a substantial change requiring modification. Further, John argues the written agreement between Sara and himself, executed August 20, 1971, was a binding agreement supported by consideration, releasing him from certain support payments. Lastly, John asserts that Sara's marriage-like relationship with Steve Gaul is grounds for termination of support payments under the terms of the decree that provided support payments would cease if Sara remarried. We disagree on all counts.

Modification of support and alimony requirements is permissible only when there has been a material and substantial change in circumstances of the parties since the time of the original dissolution decree; changes that were not within the contemplation of the decretal court. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977); Hagen v. Hagen, 226 N.W.2d 13, 15

(Iowa 1975); In re Marriage of Powers, 226 N.W.2d 810, 811-12 (Iowa 1975). The change relied on must be permanent or continuous, not temporary. Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973).

We view the changes in the incomes of John and Sara to be not only within the contemplation of the decretal court, but at least to his income of a temporal nature. The income of a grain farmer, like John, is susceptible to wide fluctuations due to the obvious vagaries of the business and means of accounting. This fact would certainly have been within the contemplation of the court.

The increase in Sara's income, resulting primarily from her work, would also have been within the reasonable contemplation of the decretal court. John, however, would have us believe the court did not consider the likely possibility of Sara's future employment. The amount of Sara's earnings are certainly not so large to be beyond the court's reasonable expectation. Additionally, the sharing of expenses between Sara and Steve Gaul was not of such a substantial amount to require modification. Neither the temporary decline in John's income nor the reasonably expected increase in Sara's income provides a substantial change in circumstances as a matter of law to warrant modification.

The alleged agreement between John and Sara to reduce certain support payments of John's in exchange for his assistance in moving Sara to Arizona has no effect on payments ordered by the decree. Only the court that entered the original decree may subsequently modify it; the parties possess no such power. See Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of changed circumstances. Id. Accepting John's contention that the parties are free to agree between themselves what is to be paid would emasculate section 592.21, The Code 1979. The circumstances of the agreement also leave much to be desired in terms of a knowing and voluntary contractual agreement.

We also reject the notion that the cohabitation relationship between Sara and Steve Gaul is sufficient grounds for modification of alimony or support payments. The decree of dissolution, which incorporated the stipulation agreement, provided the payments would cease when Sara remarried. There is nothing to indicate the parties

contemplated anything but a traditional marriage, or, at the least, a common law marriage, when they set down this agreement. Sara and Steve were not formally married until after the modification hearing. The record is devoid of any evidence of even a common law marriage. See In re Marriage of Grother, 242 N.W.2d 1, 1-2 (Iowa 1976) (elements of common marriage: intent and agreement in praesenti to be married by both parties; continuous cohabitation; public declaration that parties were husband and wife). We do not consider cohabitation to be marriage within the traditional meaning of that word.

IV.

John has failed to show by a preponderance of the evidence that modification of custody or alimony and support payments is warranted; we, therefore, affirm the judgment of the trial court. Ellis, 262 N.W.2d at 267. Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973).

AFFIRMED.