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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF SUSAN LOUISE SWEET AND HARVEY SWEET

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Upon the Petition of)
SUSAN LOUISE SWEET,)
Petitioner-Appellee,)
And Concerning)
HARVEY SWEET,)
Respondent-Appellant.)

Filed February 21, 1984

3-416
83-169

Appeal from the Iowa District Court for Black Hawk County - William J. Klotzbach, Judge.

Respondent appeals from a modification of the child support provisions of the parties' dissolution decree. *AFFIRMED IN PART; REVERSED IN PART;* AND REMANDED.

Max E. Kirk of Ball, Kirk & Holm, Waterloo, Iowa, for respondent-appellant.

Robert J. Dieter of Redfern, McKinley, Mason & Dieter, Cedar Falls, Iowa, for petitioner-appellee.

Considered by Oxberger, C.J., and Snell and Schlegel, JJ.

Respondent, Harvey Sweet, appeals from a modification of the child support provisions of the parties' dissolution decree. He asserts that no substantial change of circumstances justifying modification of the decree was shown and that the duration of his child support obligation should not have been increased because neither party requested the increase. We affirm in part, reverse in part, and remand.

The parties' 1975 dissolution decree awarded the petitioner, Susan Sweet, custody of the parties' three children, aged 18, 16, and 11, at the time of the hearing, together with child support of $25 per week per child. The child support was to be paid until each child either reached age nineteen, married, became self-supporting, or died, whichever came first. Petitioner, Susan Sweet, applied for a modification of the dissolution decree in 1982. Susan requested that the child support be increased to $60 per week per child but she did not ask that the duration of the payments be extended. The change of circumstances relied upon at trial was the increase in Harvey's income and the increased needs of the parties' children.

The parties filed a stipulation prior to trial, pursuant to Local Rule 17 of the First Judicial District of Iowa, which indicated that Harvey had earned $12,500 annually at the time of the dissolution decree and was earning $34,000 at the time the stipulation was filed. The stipulation also indicated that Susan had earned $4,500 annually at the time of the dissolution decree and was earning $17,400 at the time the stipulation was filed.

The trial court, on the basis of the stipulation and evidence presented at trial, found that Harvey had earned $12,500 at the time of the decree and was earning $32,000 now, and that Susan had earned less than $5,000 at the time of the decree and was earning $17,400 now. It concluded that:

> Petitioner, by a preponderance of the evidence, has shown a substantial change in circumstances. Although the income of each has increased in about the same ratios, Respondent has a greater sum of disposable income now that can be used to support the children of the marriage than was available at the time of the dissolution.

On this basis, the trial court (1) increased Harvey's child support obligation to $50 per week per child, and (2) provided that the payments were to continue until each child reached age twenty-two, married, became self-supporting, or died, whichever came first.

This appeal is reviewable **de novo**. In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983). Nevertheless, 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. Id.

I. Change in Circumstances. Authority to modify dissolution decrees is given in Iowa Code section 598.21(8) (1981), which provides:

> The court may subsequently modify orders made under this section when there is a substantial change in circumstances. Any change in child support because of alleged change in circumstances shall take into consideration each parent's earning capacity, economic circumstances, and cost of living.

The supreme court summarized in Vetternack several principles that apply in modification of child support proceedings.

> 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 within the contemplation of the trial court when the original decree was entered. (citations omitted).

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

Harvey argues that Susan failed to establish a substantial change in circumstances to justify trial court's decree increasing his weekly child support obligation and extending the duration of payment. We disagree.

The dissolution decree was entered April 18, 1975. In the seven years since the entry of the decree, Harvey's income has increased substantially. Harvey commenced teaching at the University of Northern Iowa in 1974. Since that time, Harvey has gained tenure, opened up a consulting business in a related field and has more than doubled his income. The parties' oldest child, Debra, has graduated from high school and enrolled in a junior college. She has indicated an interest in a four-year program but is financially unable to do so. When the child support terminates under the dissolution decree, Debra will have one semester of junior college to complete. Susan's income has also increased substantially since the entry of the decree. This increase is due to her successful completion of her education after the dissolution of the parties' marriage, and obtaining employment as a medical lab technician. Although she is now able to better provide for the parties' children, her increased monthly expenses nearly equals her disposable income.

A child's graduation from high school and actual enrollment in junior college, coupled with a parent's increase in income, may constitute a sufficient change of circumstances to justify modification of a decree to require that parent to increase the amount of child support. Willcox v. Bradrick, 319 N.W.2d 216, 219 (Iowa 1982). The court may weigh the factors of increased school expenses and the needs of growing children in determining whether there has been a change of circumstances sufficient to justify a modification of the decree. In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981). Moreover, we believe that where the needs of the children otherwise warrant an increase in support, the fact that the custodial parent's income has also increased does not prevent a finding of a substantial change in circumstances based on an increase in the noncustodial parent's income. See Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973) (both parents liable for support of their children).

Harvey's complaint that the increase in his income was not sufficient to justify the finding of a substantial change in circumstances is based upon his assertion that his income at the time of the dissolution decree was approximately $17,000 per year rather than $12,500 as determined by the modification court. Susan "assumed" during questioning by her counsel that Harvey's income was seventeen thousand per year at the time the dissolution decree was entered. However, the parties' pretrial stipulation stated that Harvey's annual income was $12,500 at the time the dissolution decree was entered. There is nothing in the record to indicate the reason for the discrepancy nor any attempt by Harvey to show his income at the time of the dissolution decree to be different than that shown by the stipulation. We believe the trial court was correct in determining Harvey's income was $12,500 per year at the time of the dissolution decree.

We hold that Susan established a substantial change in circumstances justifying both the increase in child support and the increase in the duration of the child support. We affirm the trial court's decision to increase the respondent's weekly child support obligation to $50 per child.

II. Unrequested Relief. Harvey asserts that the trial court erred by extending the period of time for which he is obligated to pay child support when neither party requested the relief. We noted above that the record demonstrated a substantial change in circumstances justifying the increase in the duration of the child support. We must determine whether, under these circumstances, the trial court was correct in increasing the duration of the child support.

When a court considers changing a decree in a case before it in a respect that has not been litigated, it should provide the parties an opportunity to be heard on the possible change. In re Marriage of Frederici, 338 N.W.2d 156, 159 (Iowa 1983). If neither party desires the change, the court may nevertheless order it if the need for the change has been established by the usual standard of proof. Id. "Litigate" means "[t]o make the subject of a lawsuit; to contest in law; to

prosecute or defend by pleadings, evidence, and debate in a court." Black's Law Dictionary 841 (rev. 5th ed. 1979).

The request for an increase in child support was contained in the pleadings and the issue at trial was clearly modification of the child support provisions of the parties' dissolution decree. The duration of the payments was not made an issue before the trial court. Unlike the situation in Frederici where the court found the change should not have been made in any event, the record in this case indicates that the change should have been made. However, the parties were not given notice of the necessity of litigating that particular change and Harvey has not acquiesced in the change. The trial court erred in modifying the decree in a manner not requested by the parties without giving both parties notice and an opportunity to be heard on the issue. The provision of the trial court decree modifying the duration of Harvey's child support obligation must, therefore, be reversed.

The court in Frederici did not find it necessary to determine the consequences of making a change in a decree without the parties having had notice or opportunity to be heard where the need for that change is otherwise established by the record. In re Marriage of Frederici, 338 N.W.2d at 159. We note the critical importance of child support in protecting and promoting the best interests of a minor child. See Lamansky v. Lamansky, 207 N.W.2d 768, 770 (Iowa 1973) (the welfare of the child is the overriding consideration in matters involving child custody and support). Due to the importance of the issue presented as it affects the best interest of these children, this case must be remanded to the trial court. This remand should present both parties the opportunity to argue the propriety of extending the duration of the respondent's child support obligation and, if necessary, the opportunity to present further evidence relevant to the issue.

Accordingly, the trial court's decision to increase the respondent's child support obligation is affirmed, its decision to extend the duration of respondent's child support obligation is reversed and this case is remanded to the trial court for further proceedings consistent with our decision. Costs of this appeal are taxed one-half to each party.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.