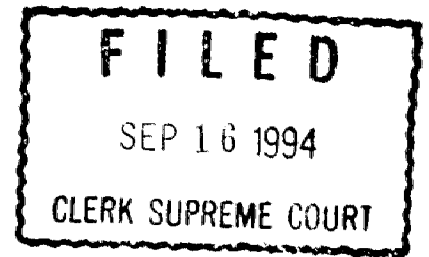


IN THE COURT OF APPEALS OF IOWA

No. 4-309 / 93-1669



IN RE THE MARRIAGE OF YVONNE MARIE GROVES AND
JOHN STALEY GROVES

Upon the Petition of
YVONNE MARIE GROVES,

Petitioner-Appellant,

And Concerning
JOHN STALEY GROVES,

Respondent-Appellee.

Appeal from the Iowa District Court for Linn County,
Thomas M. Horan, Judge.

Yvonne Groves challenges the trial court's refusal to
modify the parties' dissolution decree. **AFFIRMED.**

Lorraine K. Ingels of Klinger, Robinson, McCuskey &
Ford, Cedar Rapids, for appellant.

Stephen A. Swift of the Stephen A. Swift Law Office,
Cedar Rapids, for appellee.

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

SACKETT, P.J.

Petitioner-appellant Yvonne Marie Groves appeals the trial court's refusal to modify her dissolution decree to provide respondent-appellee John Staley Groves pay her child support and contribute to the post high school education expenses of their minor child, Adam, born June 13, 1976. The trial court order was entered October 13, 1993. In the time the appeal has taken to reach us, Adam has reached adulthood. We affirm.

Yvonne and John obtained a dissolution in Iowa in May 1978. Custody of the two children, Andrew, born in October 1972, and Adam, was awarded to Yvonne and John was ordered to pay child support. Subsequently, both parties moved to Arizona and, in January 1987, the Arizona court modified the dissolution decree by adopting a settlement stipulation made by the parties. Yvonne remained the custodian of Andrew and custody of Adam was given to John. As to child support, the Arizona decree provided:

The child support obligation of JOHN STALEY GROVES is terminated, effective January 1, 1987, and neither parent shall pay child support to the other parent, pending further Orders of this Court consistent with this Stipulation.

Then in June 1987, Andrew moved in with John and both children lived with John until March 1989. Then Adam moved in with Yvonne. However, in May of 1991, Adam returned to live with John and stayed until May 1993, when he returned to Yvonne's home. Andrew then stayed with John until he graduated from high school in June 1991. During such time,

neither party paid the other child support. However, on June 15, 1993, Yvonne sought this modification.

After a hearing, the trial court, on October 13, 1993, denied Yvonne's application finding she had failed to meet her burden. Then the parties stipulated Yvonne would have primary care of Adam and that stipulation was approved on November 2, 1993. Yvonne then appealed.

Yvonne contends the trial court should have modified the decree and awarded her child support retroactively to the date of the filing of her petition. She also contends child support should be computed according to the child support guidelines.

Yvonne contends she showed a change of circumstances because physical care of Adam was changed from John to her. Yvonne also contends she need not show a change of circumstances because, under the provisions of Iowa Code section 598.21(9) (1993), the amount of support owed by John to her under the existing order varies by more than ten percent from the amount John is required to pay under the current guidelines.

John contends the trial court was correct. He advances at the time of the modification hearing and the order primary care remained with him. John also argues the parties had an agreement, bore out by the evidence of past conduct, that the parent with whom the child was living would provide financial support for the child. John also points out and the record reflects John has assumed the

major portion of the support of the children since the Arizona modification occurred. Since that time, the children have spent considerably more time in his home and he has supported them. Yvonne and John have comparable incomes.

Generally, to modify a dissolution decree requires proof there has been a material and substantial change in circumstances since the original decree. See Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973). Not every change in circumstances is sufficient; rather, the change in circumstances must be permanent or continuous rather than temporary, see In re Marriage of Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983), and it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in a positive wrong or injustice. Id.

The application to modify the dissolution decree filed by Yvonne did not make application to change the primary care of Adam. The only issue presented to the trial court was whether support should be modified. John was the primary caretaker of Adam by the Arizona decree at the time of the modification hearing. Yvonne did not seek primary care until after the trial court had ruled on the modification.¹ The evidence at the modification was the children moved from home to home and were supported by the

1. We look only at that evidence known to the trial judge at the time he or she ruled in the case. We disregard from our consideration that part of the appendix

parent in the home where they lived. There is no merit to Yvonne's argument there had been a transfer of primary care at the time of the modification hearing. We find she failed to show a change of circumstances. Though Adam was living with Yvonne at the time of the modification hearing, Adam's past history showed he could move to John's at will and John would support him while he was in his home. All the evidence shows John and Yvonne had this agreement. This court will not approve agreements that will jeopardize the welfare of children. However, it is also necessary there be some integrity in dissolution agreements because, if there is not, incentives for settlement and cooperation will be lessened.

The next issue is whether Iowa Code section 598.21(9) (1993) requires modification to award Yvonne child support. The section provides in relevant part:

Notwithstanding subsection 8, a substantial change of circumstances exists when the court order for child support deviates by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established pursuant to subsection 4.

At the time of the modification hearing, there were no child support orders and John had primary care of Adam. Section 598.21(9) anticipates there is an existing order for child support. Before being entitled to an increase in child support, Yvonne must prove changed circumstances so

that shows after the modification order the physical care was changed.

as to entitle her to receive child support. She failed to meet that burden. Section 598.21(9) is not applicable to the issue here.

The final question is whether the decree should have been modified to provide college expenses for Adam. The original decree did not provide for college expenses. There is nothing in the record to show what Adam intends to do when he finishes high school. John said it is his intention to help his son if he goes to college. Yvonne said, because the time Adam will go to college is so close, the amount both she and John should contribute to Adam's expense should be fixed now to avoid further litigation.

No provision was made for college expenses in the original decree. The completion of the child support obligation does not prevent the court from requiring child support for college expenses. In re Marriage of Pieper, 369 N.W.2d 439, 441-42 (Iowa 1985); In re Marriage of Linberg, 462 N.W.2d 698, 701 (Iowa App. 1990). This duty to provide college support extends to both parents. In re Marriage of Vrban, 293 N.W.2d 198, 203 (Iowa 1980); Linberg, 462 N.W.2d at 701; In re Marriage of Lieberman, 426 N.W.2d 683, 685 (Iowa App. 1988); In re Marriage of Byall, 353 N.W.2d 103, 107 (Iowa App. 1984).

This is a modification and to change the decree, Yvonne bore the burden of showing a change of circumstance. There being no evidence Adam will attend college, she has not met her burden.

Each party shall pay his or her own attorney fees.

AFFIRMED.