

FILED

JAN 24 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARLYS K. HEIT AND GARY L. HEIT

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Upon the Petition of	)	
MARLYS K. HEIT,	)	
Petitioner-Appellant,	)	Filed January 24, 1984
And Concerning	)	
GARY L. HEIT,	)	<u>3-321</u>
Respondent-Appellee.	)	83-320

Appeal from the Iowa District Court for Floyd County - John F. Stone,
Judge.

Petitioner appeals from the trial court's modification of the child support provisions of the parties dissolution decree. **REVERSED AND REMANDED.**

Judith O'Donohoe of Erb, O'Donohoe & Frye, Charles City, Iowa, for
petitioner-appellant.

E. W. Henke of Henke, Eggert & Ott, Charles City, Iowa, for respondent-
appellee.

Considered by Snell, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Petitioner, Marlys K. (Heit) Ketchum, appeals from the trial court's modification of the child support provisions of the parties' dissolution decree. She asserts that no substantial and material change in circumstances justifying modification of the decree was shown. Specifically, Marlys asserts that the change in circumstances relied upon was not permanent and that the trial court failed to take her economic circumstances into consideration. We reverse and remand.

The parties' 1980 dissolution decree incorporated the parties' stipulation regarding child support. The decree required Gary to pay \$100 per month for each of the parties' two children. This amount was to be increased each year for five years after the entry of the decree by five dollars per month for each child. At the end of five years total child support would be \$250 per month or \$125 per child per month. Gary was paying \$220 per month child support at the time this action was brought.

Gary worked for John Deere Company at the time the dissolution decree was entered. His income for 1979 was \$18,561. Gary remarried in 1981 and now lives with his wife and his wife's son from a previous marriage. Gary was laid off work from John Deere Company in February, 1982, but continued to receive unemployment compensation. His gross income was reduced to \$16,975 in 1982. Gary secured employment as a salesman with a vending machine company in December, 1980. His gross salary is guaranteed at \$1,000 per month for the first six months as a training period and thereafter is on a commission basis with a gross guarantee of \$600 per month. He also receives \$250 per month for travel expenses. Although Gary has one year and four months remaining for possible recall to his job at John Deere, he testified that recall was unlikely due to his relatively short period of seniority.

Gary's present wife is employed and her gross income for 1982 was \$12,000.

Gary testified that in January and February of 1983, he had not been able to meet the quotas set by his new employer necessary for earning \$1,000 per month. These months, however, fall within his training period and his future income is difficult to predict. Gary testified that his present monthly living expenses were \$758.41 per month for his present family. (This figure includes \$128.20 per month for truck expense and insurance, which apparently is not covered by the \$250 per month travel allowance. This figure does not include clothing expense for his wife and her son.) Gary and his wife purchased a house for \$21,000 in October, 1982, and spent an additional \$17,000 for improvements. They presently owe \$19,000 on the house. They also own two vehicles for personal and business use. Gary owes \$3,000 on the truck he uses in his business. The record indicates that Gary has two years of college and has received some training in electronics.

Mariys worked at two part-time jobs at the time of the entry of the parties' dissolution decree in 1980. She worked as a waitress for minimum wage plus tips and was an administrative secretary for \$90 per week. Mariys quit her job as a secretary as a result of a complaint of sexual harassment against her employer in April, 1981. Her gross income was \$8,500 for 1980; \$800 for 1981; and nothing for 1982. The record does not indicate what became of her job as a waitress. She remarried in 1980. Mariys' present husband worked for Northwestern Bell, but was laid off in 1981. Her husband, however, continued to receive unemployment of \$163 per week until December 10, 1982.

Mariys' expenses at the time of the entry of the parties' dissolution decree was \$616 per month for herself and her two children. She testified in the modification proceeding that the expenses for herself and her two sons had increased to \$709.62. It was upon this basis that she requested an increase in child support to \$320 per month in her counterclaim.

Mariys and her present husband own their own home and have a net equity in the home of \$5,965. They own a vehicle and their household furnishings. Both

have been unemployed for some time, but neither has received any unemployment compensation since December, 1982. Mariys testified at the modification hearing that they had searched extensively for employment, but to no avail. Mariys' financial affidavit indicated that the only income they were receiving at the time of the modification hearing was \$220 per month child support and \$247 per month food stamps. There was also testimony that Mariys' family had received A.D.C. in the amount of \$360 per month for January and February after assigning child support payments to the A.D.C. program. The record indicates that Mariys has a high school education, but has been employed only intermittently since her marriage to Gary.

The trial court concluded that since Gary's income had been reduced by 35%, his child support obligation should be reduced by a similar amount. Gary's support obligation was reduced to \$71.50 per child per month (\$142 per month total). Mariys has appealed the reduction made by trial court. She does not, however, appeal the trial court's denial of her own modification petition which sought increased support payments. We therefore consider only whether the trial court's order reducing the support payments was inequitable. See Rector v. Alcorn, 241 N.W.2d 196, 200 (Iowa 1976).

We review orders on applications to modify child support provisions *de novo*. Mears v. Mears, 213 N.W.2d 511, 515-16 (Iowa 1973). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7). Nevertheless, the trial court has considerable 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 Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983).

Authority to modify dissolution decrees is given in Iowa Code § 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.

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.

Id. (citations omitted). The burden rests on petitioner for modification of child support provisions of a dissolution decree to establish a change of circumstances by a preponderance of the evidence. Mears v. Mears, 213 N.W.2d at 515. Gary filed the modification petition to reduce child support payments, therefore, the burden rests upon him to show a substantial change of circumstances warrants reduction of the support payments. Marlys contends that he has failed to do so. We agree.

Although Gary's financial condition was weakened by his loss of employment at John Deere Company, his subsequent employment as a vending machine salesman and his remarriage has significantly improved his financial condition. See In re Marriage of Johnson, 299 N.W.2d 466, 467 (Iowa 1980). We also believe the trial court's order failed to take into consideration the financial disaster being experienced by Marlys and her reduced earning capacity. We recognize that both parents are liable for the support of their children. That support obligation, however, is to be proportioned according to their respective ability to pay, rather than in equal shares. Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973). Moreover, we are concerned with the welfare of the children in this case. The

severe financial problems being experienced in the custodial home can only adversely impact upon the children. We urge petitioner to resolve these problems as quickly as possible.

We hold that the trial court failed to properly consider both parents' earning capacity and economic circumstances as required by Iowa Code section 598.21(8). We also hold that Gary failed to sustain his burden to show that the change in his financial status was such as to constitute a substantial change of circumstances making it positively wrong or unjust to enforce his child support obligation under the original decree. The trial court erred in ordering the change of child support to be paid from \$110 per child per month to \$71.50 per child per month.

The order for reduction of child support payments is reversed. This case is remanded for an order consistent with our holdings herein.

REVERSED AND REMANDED.