

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 26 1984

CLERK SUPREME COURT

IN RE THE MARRIAGE OF PENNY MARIE LEE AND JAMES LEON LEE

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Upon the Petition of	)	
PENNY MARIE LEE,	)	Filed June 26, 1984
Petitioner-Appellee/ Cross-Appellant,	)	
And Concerning	)	
JAMES LEON LEE,	)	<u>4-201</u>
Respondent-Appellant/ Cross-Appellee.	)	83-986

Appeal from the Iowa District Court for Washington County - Dan F. Morrison, Judge.

Respondent husband appeals and petitioner wife cross-appeals from the trial court's modification of the parties' dissolution decree. **AFFIRMED.**

Charles F. Helsten of Spayde, White & Helsten, Oskaloosa, for respondent-appellant.

Richard S. Bordwell, Washington, for petitioner-appellee.

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

Respondent-husband appeals and petitioner-wife cross-appeals from the trial court's modification of the parties' dissolution decree. Respondent claims that there has not been a substantial change of circumstances since the original decree warranting an increase in his child support obligation, while petitioner contends that the obligation should be increased further. We affirm on both appeals.

The 1978 decree dissolving the marriage of Penny and James Lee incorporated the parties' stipulation regarding child custody and child support; it awarded Penny custody of the parties' children (Troy, born in 1965, and Tracy, born in 1968) and directed James to pay child support of \$225 per month, to be reduced to \$150 per month when Troy became emancipated or graduated from high school, whichever occurred later. In the stipulation, James also agreed to pay half the college expenses, if any, of each child.

In 1982, Penny applied for a modification of the decree. She asked that her child support award be increased and she asserted as the changes in circumstances since the decree the following factors: (1) her living expenses had increased due to inflation; (2) she was presently unemployed; (3) James' income had increased since the decree; and (4) shortly after the decree, James had sold real estate and received a substantial net profit. Penny also asked that the duration of her child support award be extended to cover the period the children were in college. James resisted Penny's application, and a hearing was held on June 7, 1983.

The trial court found that: (1) in 1978, inflation was a fact of life and both parties had been aware of rising costs; (2) Penny was now employed and had a gross income of \$1,125 per month; (3) James' salary would be about \$18,000 in 1983; (4) James' new wife earned \$8,400 gross per year; and (5) the parties had contemplated that their children would go to college, and they had provided for college expenses in their 1978 stipulation. Based on its conclusion that James's income had increased significantly since 1978, the court increased Penny's child

support award, for Tracy alone, to \$250 per month. James has appealed and Penny has cross-appealed.

I. We review orders on applications to modify child support provisions de novo. Mears v. Mears, 213 N.W.2d 511, 515-16 (Iowa 1973). "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).

II. Child support awards may be subsequently modified "when there is a substantial change in circumstances. The court contemplating a change in child support because of alleged change in circumstances shall consider each parent's earning capacity, economic circumstances and cost of living." Iowa Code § 598.21(8).

The principles governing modification of child support provisions have been summarized as follows:

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.

In re Marriage of Vetterneck, 334 N.W.2d at 762. The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa Ct. App. 1979).

III. Both parents are liable for the support of their children, not necessarily in equal shares but proportionately according to their ability to pay. Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973). Penny testified that the expenses for the parties' remaining minor child, Tracy, have increased. Tracy was a sophomore in high school at the time of trial and had been unable to participate in various school activities because of insufficient funds. She also has increased dental bills, but these appear to be insured. See In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981); Spaulding v. Spaulding, 204 N.W.2d at 636 (we may weigh the factors of increased school and medical expenses, and the needs of growing children).

The dissolution decree was entered October 2, 1978. In the four years that ensued before the hearing in this case, the Consumer Price Index increased 45 points stripping the support dollar of nearly one-half of its purchasing power. We take judicial notice of the reduced purchasing power of the dollar when considering child support payments. In re Marriage of Stutsman, 311 N.W.2d at 76; Spaulding v. Spaulding, 204 N.W.2d 634, 636. It is true that this inflationary trend has at least temporarily subsided; however, the level of support necessary to keep abreast of past inflationary trends has not decreased.

We do not believe that the trial court could foresee the rate of inflation which occurred between 1978 and the time of trial. It did not provide for a cost of living adjustment in the decree to eliminate the effects of inflation. See In re Marriage of Stamp, 300 N.W.2d 275, 279 (Iowa 1980). We have difficulty accepting the proposition that the rate of inflation that has occurred between the entry of a decree and the filing of an application for modification is foreseeable by a trial court in a case where there is no C.O.L.A. clause. This would have the effect of requiring a reduction in the future support obligation, presumably equitable when entered, each year by that rate of inflation. We reject this result. While the court and the parties may have been aware of the effects of inflation, it is difficult to believe that they knew what the future levels of that inflation would be in 1978.

Accordingly, we believe that Penny has established by a preponderance of the evidence a right to modification of the dissolution decree.

IV. James asserts on appeal that the amount of child support provided in the decree should not be modified because Penny now has employment at a substantially higher level of income than she has had since the entry of the decree, and because the rate of inflation has not increased by the same proportion as the increase in the level of support ordered by the trial court. Penny recently obtained employment with the University of Iowa at an income level of \$13,500 per year. This is a vast improvement over her past financial condition and she will, accordingly, be able to share this improvement with the parties' child. However, although it is a factor to consider in determining the amount of support each must give their child, we do not believe Penny's improved financial condition relieves James of his obligation to pay his equitable share of child support.

We have carefully examined the record, including the tax returns submitted by the parties as exhibits in this case. James earned \$9,764.37 as salary in 1977, \$13,250 as salary in 1978, \$14,270 as salary in 1979, \$15,351 as salary in 1980, and \$17,947 as salary in 1981. The trial court also found that James earned \$20,000 as salary in 1982 and projected his salary to be \$18,000 in 1983. In addition, James's income has included profits from his farm operations, commodity investments, farm rental, and payments received on a real estate contract. James sold a farm in 1978 after the entry of the dissolution decree and has received over \$20,000 per year since that time on that contract as reflected in his income tax returns. Moreover, James remarried in 1981 and his present wife earns approximately \$8,400 per year. Although she has no obligation to support the parties' child, we consider her income as it contributes to James's overall financial condition in fixing the amount of support he should pay. Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974). We reject James's contention that we may only increase his support

obligation in proportion to the increase in the cost of living due to inflation since 1978.

Under these circumstances we believe that the trial court's decision to increase James's child support obligation for Tracy to \$250 per month is equitable. We decline to modify the provisions in the original decree providing for payment of college expenses for the parties' children. Likewise, in light of the age of the parties' remaining minor child and the evidence of decreased inflation in the record, we decline to include a cost of living adjustment in James's support obligation.

Accordingly, the decision of the trial court is affirmed.

AFFIRMED.

Oxberger, C.J., concurs; Donielson, J., dissents.

I do not believe Penny has sustained her burden of proving the requisite change of circumstances. I would therefore reverse the trial court's order increasing James' child support obligation.

I cannot agree with the majority that inflation in the intervening years constitutes a substantial change in circumstances. While inflation may be considered in determining if modification is required, Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974), the trial court here specifically found that both parties were aware of inflation at the time of the decree in 1978; I find no reason to dispute this finding. Since inflation was within the contemplation of the trial court at the time of the decree, it cannot be the basis of a modification. Thayer, 286 N.W.2d at 223. If the majority sustains the modification imposed here based on a factor (inflation) that was in the knowledge of the parties at the time of the dissolution decree, I do not believe it is too much an exaggeration to say that every child support decree in the State of Iowa will be subject to modification because of inflation.

The only ground relied on by the trial court to increase the support obligation was the increase in James' income. In 1978, the time of the dissolution decree, James' salary was between \$13,000 and \$14,000; the trial court found that his 1983 income would be approximately \$18,000. This represents an increase of 29-38% over those five years. While this certainly represents an increase over the course of nearly five years, it is certainly not so extraordinary or substantial an increase as to justify an increase in support. An increase in James' income was certainly a foreseeable circumstance and one within the contemplation of the dissolution court in 1978. See Thayer v. Thayer, 286 N.W.2d 222, 223-24 (Iowa Ct. App. 1979).

The impropriety of the increase in support is even more apparent upon consideration of Penny's own income. In 1978 and 1979, Penny's income from

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various minimum-wage jobs was \$5,397 and \$8,009 respectively. In 1983, however, she obtained full-time employment at the University of Iowa at a yearly salary of \$13,500. This represents a 150% increase over her 1978 income. Under these circumstances, James' relatively modest and fairly predictable increase in income cannot be the basis for increasing his child support obligation. I would therefore reverse the increase in James' child support obligation and reinstate the support provisions of the parties' dissolution decree.