FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-325 / 91-62

IN RE THE MARRIAGE OF MARY C. DOYLE AND KEVIN R. DOYLE

Upon the Petition of

MARY C. DOYLE,

Appellant,

And Concerning

KEVIN R. DOYLE,

Appellee.

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Appeal from the Iowa District Court for Linn County, Kristin J. Hibbs, Judge.

Petitioner appeals the district court's ruling which refused to modify the parties' dissolution decree. **REVERSED AND REMANDED.**

Gerald T. Sullivan of Crawford, Sullivan, Read, Roemerman & Brady, P.C., Cedar Rapids, for appellant.

David S. Good of Nazette, Hendrickson, Marner & Good, Cedar Rapids, for appellee.

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

HAYDEN, J.

Mary and Kevin Doyle were divorced on January 23, 1987. They had been married since November 22, 1969, and have three children: Kevin, born May 24, 1970; Michael, born January 5, 1976; and Jennifer, born October 2, 1979.

The divorce decree placed custody of their children with Mary. Kevin would pay child support of $100 per week per child until the children reached age eighteen. The parties agreed Kevin would then provide educational support for the children. The decree also provided Kevin would pay alimony of $400 per month for five years. Mary received the family homestead, and the parties divided their other debts and assets.

At the time of the decree Kevin was thirty-seven, and Mary was thirty-five. Mary had been a homemaker for seventeen years but had recently enrolled in Kirkwood College. In the divorce decree the trial court noted Kevin was a manager for Blahnik Construction Company receiving gross incomes of:

1981	$69,960	1984	$35,808
1982	$72,274	1985	$61,898
1983	$31,911	1986	$44,751

On May 9, 1990, Mary filed an application seeking to modify the child support and alimony and to alter Kevin's visitation schedule. Mary claimed Kevin's income had increased substantially since the original decree was entered. At the time Mary filed her application, she had not yet completed her education.

The trial court concluded Mary failed to prove a material and substantial change in circumstances not within the contemplation of the trial court when the original decree was entered. Although the year prior to the modification action Kevin's income exceeded his income at the time of the dissolution, the trial court determined this change in income was not permanent because of fluctuations in the construction business. The trial court also found Mary's allegations of Kevin emotionally abusing the children were not credible and thus refused to change the visitation. Finally, the trial court directed each party to pay his or her own attorney fees.

On appeal Mary argues the child support guidelines should now be used to calculate Kevin's child support obligation. Mary notes she has no income because she is still in school, and yet Kevin's yearly income has increased substantially since the original decree was entered. Mary also argues Kevin's corporate earnings should be added to his income for purposes of calculating child support. Finally, Mary argues the trial court should have awarded her attorney fees.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "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." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

> 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 in the contemplation of the trial court when the original decree was entered.

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

In In re Marriage of Bergfeld, 465 N.W.2d 865, 869-70 (Iowa 1991), our supreme court stated "the child support guidelines now in effect do not--standing alone--constitute a change in circumstances. . . . If, however, the district court finds such a change because of reasons other than the child support guidelines, then the court shall consider the

guidelines in making any change in the level of support." We determine there has been such a change in the present case.

Kevin's income tax returns indicate his income was $96,968 in 1987, $80,367 in 1988, and $80,492 in 1989. These amounts include Kevin's corporate earnings. In addition, his projected income for 1990 is $90,000 and $80,000 for 1992. We agree with the trial court when the original decree was entered the dissolution court recognized Kevin's income fluctuated according to the availability of construction business. We also agree Kevin's income continues to fluctuate as evidenced in his income tax returns. However, we do not agree this fluctuation is temporary, because it has occurred since 1981. In addition, from 1981 to 1986 the average in Kevin's annual income was approximately $43,500. From 1987 to 1989 this average increased to approximately $86,000. We determine this substantial increase in Kevin's yearly income was not within the contemplation of the dissolution court. Therefore we reverse the trial court on this issue and remand the case for hearing and a ruling pursuant to our current guidelines. We do not retain jurisdiction.

Mary also claims the trial court should have awarded her attorney fees. Iowa trial courts are permitted considerable discretion in allowing attorney fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974). We conclude the trial court

did not abuse its discretion in denying Mary's request for attorney fees.

Costs of appeal are assessed to Kevin.

REVERSED AND REMANDED.