FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF B. MURLEE BOHR AND GERALD J. BOHR

Upon the Petition of)
B. MURLEE BOHR USOVSKY,)
Petitioner-Appellee,)
And Concerning)
GERALD J. BOHR,)
Respondent-Appellant.)

Filed August 30, 1983

3-204
2-69555

Appeal from Linn District Court - Ansel J. Chapman, Judge.

Respondent appeals from a modification of the child support provisions of the parties' dissolution decree. AFFIRMED AS MODIFIED.

Donna L. Paulsen of Lynch, Dallas, Smith & Harman, Cedar Rapids, Iowa, for respondent-appellant.

Richard A. Pundt of Blanchard, Cless, Hanson & Pundt, Des Moines, Iowa, for petitioner-appellee.

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

SCHLEGEL, J.

Respondent, Gerald Bohr, appeals from a modification of the child support provisions of the parties' dissolution decree. He asserts that no substantial and material change in circumstances justifying modification of the decree was shown, that the amount of the increase in the child support payments was not justified, and that he should be allowed to claim both children as exemptions for income tax purposes. We affirm as modified.

The 1977 decree dissolving the marriage of petitioner and respondent incorporated the parties' stipulation regarding child custody and child support. Petitioner was awarded custody of the parties' two children and was allowed to claim both children as exemptions for income tax purposes. Respondent was to pay child support of $30 per week per child.

The petitioner sought modification of the decree in 1982 requesting an increase in child support payments by respondent. Petitioner asserted as the change in circumstances that she was no longer employed, that the respondent had increased earnings, and that there had been a substantial increase in the cost of living due to inflation. The testimony at trial established that respondent's income had increased from $23,500 per year at the time of the decree to $34,800 per year at the time of the modification trial. The petitioner's income increased from $15,500 per year at the time of the dissolution decree to $25,600 per year at the time of the modification trial. The petitioner, however, had voluntarily quit her job so she could work in a business which she and her new husband had bought. The respondent had not remarried at the time of the modification hearing.

The trial court found that:

> The increased age of the children as well as inflation has increased the financial burden on Murlee. In addition, Gerald's income has increased substantially since the entry of the decree and there is no reason why these two minor children should not benefit to a degree. Murlee should receive an increase in the amount of child support commensurate with the present financial condition of Gerald and the needs of the children.

Based on these findings, the trial court directed respondent, Gerald Bohr, to pay $55 per week per child until the first of the two children became emancipated, and $75 per week thereafter. The trial court also allowed respondent to claim one of the two children as an exemption for income tax purposes.

This appeal is reviewable **de novo**. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977).

I. Modification of Child Support. The power of the court to modify child support exists only when there has been material and substantial change in circumstances since the date of the original decree. Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973); Iowa Code § 598.21(8) (1981). A divorce or dissolution of marriage decree will not be modified as regards child support provisions unless it is proven by the proponent of the change by a preponderance of the evidence that enforcement of the decree will be attended by positive wrong or injustice as a result of material and substantial changes in the circumstances since the date of the original decree. Mears v. Mears, 213 N.W.2d at 515; Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973). The changed circumstances relied upon must be such as were not within the knowledge or contemplation of the court when the decree was entered and must be of a permanent or continuous nature. Mears v. Mears, 213 N.W.2d at 515. Where a change of financial condition of one or both parties is relied upon as a basis for modification of child support provisions of divorce or dissolution of marriage decree, it must be substantial. Spaulding v. Spaulding, 204 N.W.2d at 635.

We believe petitioner has sustained her burden of showing a material and substantial change in circumstances since the date of the dissolution decree. The income of the respondent has risen substantially. (His wages have increased by 46%.) The evidence at trial showed increased school expenses and other needs for the children. See In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981) (we may weigh factors of increased school and medical expenses, and the needs of

growing children). It should be pointed out, however, that neither we nor the trial court relied upon the petitioner's voluntary reduction of income in finding a change of circumstances. See In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973) (voluntary termination of employment is not a permanent change of circumstances). Upon this record, we agree with trial court's conclusion that the parties' children should be allowed to benefit from respondent's increased capacity to provide them with necessities.

Furthermore, we reject respondent's contention that we should only increase the amount of child support by the same percentage which his wages increased. The factors which must be considered in modifying the amount of child support are contained in Iowa Code § 598.21(8). At trial the respondent testified that his income left him with over $8,000 per year after expenses, including child support payments. In light of this ability to pay and the increased costs, we believe the trial court's increase in child support payments to $55 per week per child from $30 per week per child is fully justified. We are careful to note, however, that this award does not decrease petitioner's responsibility to help support the parties' children. See Spaulding v. Spaulding, 204 N.W.2d at 636 (both parents are liable for the support of their children).

The respondent also contends that the trial court erred in failing to proportionately decrease child support by 50% as the first of the two children become unentitled to support. The modification decree provides child support of $55 per week per child while two children are entitled to support, and $75 per week when only one child is entitled to support. Again, we reject any mathematical formulas in determining the level of child support. Many of the cost items of support remain the same for a remaining child after older brothers and sisters are gone from the home. We agree with the trial court that the increased amount for the remaining child is proper in this case.

Finally, the respondent contends that the trial court should have awarded him both children as an income tax exemption. He argues that upon the record presented at the modification hearing the petitioner had little or no income after deducting business expenses and, therefore, the net tax benefit to her is much less than the net tax benefit would be to him if he were allowed both exemptions. We agree. In light of the minimal benefit to petitioner and the increased child support to be paid by respondent, we hold that respondent is to be allowed the income tax exemptions for both children. See In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977) (dependency deductions subject to modification).

AFFIRMED WITH MODIFICATION.

All judges concur except Oxberger, C.J., and Donielson, J., who dissent.

OXBERGER, C.J., (dissenting).

I would affirm.

Donielson, J., joins this dissent.