

FILE

MAY 31 1979

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KENNETH WILLIAM BERNER and NANCY MARIE BERNER

UPON THE PETITION OF
KENNETH WILLIAM BERNER,

Petitioner-Appellee,

AND CONCERNING
NANCY MARIE BERNER,

Respondent-Appellant.)

Filed May 31, 1979

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3-62664

Appeal from Clinton District Court - C. H. Pelton, Judge.

Respondent wife appeals from trial court's order denying her application to modify the child custody provision in the dissolution decree and granting petitioner husband's application by requiring her to pay child support. AFFIRMED.

Simon W. Rasche, Jr. of Camanche, Iowa, and Merritt L. Sutton of Clinton, Iowa, for appellant.

William Norton and Dennis Bates of Norton, Freese, Zearley & Bates. Lowden, Iowa, for appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent appeals from a trial court order denying her application to modify the child custody provision in a decree of dissolution and granting petitioner's application to modify the decree by requiring her to pay child support. We affirm in part and reverse in part.

I. Respondent, Nancy Berner, seeks to obtain custody of her fifteen year old son, Brian, by modification of a decree of dissolution which placed custody of all five of the Berner children in petitioner, Kenneth Berner.

Our review in the instant case is de novo. Iowa R. App. P. 4. The child custody provisions of a dissolution decree will be modified only where the applicant for modification proves by a preponderance of the evidence that subsequent conditions have so changed that the child's welfare requires, or at least makes expedient, such modification. Alex v. Alex, 161 N.W.2d 192, 194 (Iowa 1968). Kenneth's circumstances have changed very little since the entry of the decree, except that he has now married the young woman who was cohabiting with him at the time of the dissolution. The circumstances fail to indicate any significant diminution in Kenneth's capacity to provide Brian with a satisfactory custodial environment since the time of the decree. Nancy's capacity to provide for her son is shown to have improved in the four-month period between the dissolution decree and her petition for modification, but as a non-custodial parent seeking custody of the child, she has the burden of showing some superior claim based upon her ability to minister to the child's well being, not only sufficiently, but more effectively than the custodial parent. In re Marriage of Melton, 256 N.W.2d 200, 205 (Iowa 1977). Although Nancy has clearly shown she could very effectively minister to Brian's well being, she has failed to establish that she has a superior ability to minister to his needs. Although the expressed wishes of the child are entitled to some weight when determining custody, they are not controlling and are entitled to even less weight in a proceeding to change custody than in an original hearing. In re Marriage of Junkins, 240 N.W.2d 667, 668-69 (Iowa 1976). The trial court was correct in refusing to modify the custody provisions of the decree.

II. Nancy also appeals from the trial court's decision granting Kenneth's request for modification of decree so as to compel her to pay child support. The burden of proof is on the party seeking modification to show a material and substantial change in circumstances from the date of the decree which would make it equitable and just that different terms be fixed. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974). These changes

in circumstances must be such that they were not within the contemplation of the court which entered the original decree. Id. In the case at bar, the original decree was silent regarding any award of child support.¹ At the modification hearing the trial court found sufficient change in circumstances to require Nancy to pay \$12.00 per week per child as support for the five children. We find this change was merited and also affirm this part of the trial court's decision.

In reaching this conclusion we are cognizant of the fact that certain matters relied upon by the trial court are lacking in evidentiary support. These matters relate largely to Kenneth's claim of a depressed financial outlook. But we believe that discounting these claims on Kenneth's part, there is a sufficient showing of a change in Nancy's ability to share in the costs of child support to justify the modification order. In so holding we recognize that amounts which Nancy receives as interest on the property settlement under the original decree and her salary are matters which were within the contemplation of the court which entered that decree. But her remarriage and, more specifically, the results of the remarriage, do not fall within the category of matters reasonably to be anticipated.² Nor does the sudden and unexpected improvement in Nancy's health.

When these latter factors are considered in combination with her earnings and the property award which she received under the original decree, it is now expedient to expect her to contribute toward the support of her children. The amount of that contribution, as fixed by the trial court, is reasonable and will not be disturbed.

AFFIRMED.

¹ No claim is made by Kenneth, however, that this is a matter which was not adjudicated in the original dissolution proceeding so as to relieve him from the burden of establishing a change in circumstances. He concedes that he has such burden.

² See Alex v. Alex, 161 N.W.2d 192, 195 (Iowa 1968) ("it is not the mother's remarriage that is made the basis of the court's decree... but rather the results of that remarriage."). In this regard, the combined incomes of Nancy and her new spouse may be considered in arriving at her total financial situation. See Pucci v. Pucci, 259 Iowa 427, 143 N.W.2d 353 (1966).