

IN THE COURT OF APPEALS OF IOWA

No. 1-491 / 90-1735

FILED

FEB 25 1992

CLERK SUPREME COURT

IN RE THE MARRIAGE OF CHRISTINA LEE McCLUNG,
n/k/a CHRISTINA L. HOWELL, AND MICHAEL M. McCLUNG

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Upon the Petition of
CHRISTINA LEE McCLUNG, n/k/a CHRISTINA L. HOWELL,

Appellee/Cross-Appellant,

And Concerning
MICHAEL M. McCLUNG,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County,
Gene L. Needles, Judge.

Michael appeals and Christina cross-appeals district
court's modification of the parties' Florida dissolution
decree. **REVERSED.**

James H. Gilliam of Brown, Winick, Graves, Donnelly,
Baskerville & Schoenebaum, Des Moines, for appellant/
cross-appellee.

Harlan M. Hockett, Des Moines, for appellee/
cross-appellant.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

SCHLEGEL, J.

Christina and Michael McClung were formerly married to each other. They have one child, Joseph, a boy born in 1976. In 1978 the marriage was dissolved in Florida, where the parties then lived. The Florida dissolution decree was modified by subsequent Florida court orders in 1979 and 1981. As modified, the Florida decree placed the child in Christina's primary physical care and directed Michael to pay child support. The 1981 Florida modification order set Michael's child support obligation at \$250 per month, subject to annual cost-of-living adjustments keyed to the federal Consumer Price Index. Each year on May 1 Michael computes and then pays the increased amount.

Christina and the child moved to Iowa in 1986, where they have since remained. Michael continues to reside in Florida. Michael has been employed since before the dissolution in the business of selling heavy construction equipment. His income is variable; in recent years he claims it has averaged slightly over \$50,000 per year. Christina claims his average income is substantially higher. While living in Florida, Christina was employed as a high school teacher. Upon moving to Iowa, however, she discontinued that profession and held a variety of other jobs. Currently she is a part-time corporate wellness coordinator and tennis instructor earning slightly over \$1000 per month.

In 1990 Christina filed the present petition in Iowa seeking a modification of the child support awarded her by the 1981 Florida decree. She also sought a reduction in Michael's visitation with the child. After a hearing, the Iowa district court directed Michael to pay support of \$815 per month, based on the Iowa child support guidelines which became effective on December 31, 1990. The court also directed Michael to contribute \$750 toward Christina's trial attorney's 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).

Michael sets forth several arguments in his appeal. He contends the Iowa court lacked jurisdiction to modify the Florida child support decree. He claims the district court erred in concluding there had been a substantial and material change in circumstances warranting an increase in child support. He also argues that if modification was proper, a downward adjustment in his child support is warranted because the cost of living in Florida is higher than the cost of living in Iowa. Finally, he challenges the court's award of attorney's fees to Christina.

In her cross-appeal Christina contends Michael's summer visitation with Joseph should be reduced from sixty to thirty days. She also argues Michael should be required to pay her entire district court attorney's fees of \$3945 and her appellate attorney's fees.

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 supreme court in In re Marriage of Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983), lists factors to consider in a possible modification.

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.

We determine the trial court erred in finding a material and substantial change in circumstances had occurred warranting a modification in child support. The court made no specific findings to justify a modification. In response to Michael's motion to amend and enlarge, the court set forth its reasons for the modification:

The Court concluded that there was a substantial change in circumstances warranting an increase in the child support because of the low child support

originally ordered in this case. That is evidenced by the large disparity between the present child support of \$375 a month now being paid and the support that would be ordered using the present guidelines. The present guidelines would call for child support of about \$609 a month. Applying the guidelines that will take effect January 1, 1991 the support would be \$815 per month. Nearly twice the present support, notwithstanding the fact that Michael has increased the original support each year for the last several years based upon the cost-of-living adjustment.

It seems the court found the change in circumstances to be the application of Iowa's child support guidelines. The guidelines alone do not constitute a change in circumstances. In re Marriage of Bergfeld, 465 N.W.2d 865, 869-70 (Iowa 1991).

The court did not find there was a substantial change in either of the parties' incomes since the most recent Florida modification. We find none of the factors which warrant a modification present here. See Iowa Code § 598.21(8) (1991). Michael has worked in the same industry since before the parties' dissolution. His income has fluctuated since he began that career, rising and falling with the construction industry. The parties stipulated to and the Florida court ratified a cost-of-living increase clause raising the child support payments as inflation rose. See Bergfeld, 465 N.W.2d at 870 (changes in circumstances must be "such as were not within the knowledge or contemplation of the court when the decree was entered").

We find Christina failed to meet her burden of proof in establishing a substantial and material change in circumstances which would warrant an increase in child support. There is no proven permanent change that was not contemplated by the Florida court. Applying the criteria set out above, we find no material and substantial change occurred.

Because we find there are no grounds for modification of the Florida decree, we do not address the issues of jurisdiction, computation of Michael's income, and downward adjustment of support due to cost-of-living differences. We do address, however, the issues of attorney fees and visitation.

We reverse the trial court and hence reverse its award of attorney's fees to Christina. Christina also requests attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Taking these factors into consideration, we determine the parties shall each pay their own appellate attorney fees.

In her application to modify the dissolution decree Christina requested Michael's visitation be reduced from sixty days to thirty days. To justify a change of visitation rights, the petitioner must show there has been a change in circumstances since entry of the visitation order. Donovan v. Donovan, 212 N.W.2d 451, 453 (Iowa 1973). Christina feels she has sustained her burden to prove there has been a substantial change in circumstances since the parties' June 24, 1986, stipulation regarding summer visitation.

The record shows Michael is able to exercise visitation (due to the distance) only three times per year: at Christmas, spring break, and during the summer. We find no evidence exists justifying a reduction from the current order. There is evidence Christina wishes to reduce this visitation, but there is no evidence Joseph desires such a reduction. In addition, Joseph was ten years old when the 1986 modification was entered; we believe his activities and age were in contemplation of that court. We do not modify the visitation provision.

In conclusion, we find no material and substantial change in circumstances warranting a change in either the child support or the visitation provisions of the Florida decree. On our de novo review, we reverse the trial court modification of the decree and reverse its award of attorney fees to Christina.

REVERSED.

Oxberger, C.J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I concur in that part of the majority opinion that in effect dismisses the action.