

FILED
APR 24 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-53 / 89-953

**IN RE THE MARRIAGE OF TERRI ANN SOMMER AND
MICHAEL JOHN SOMMER**

Upon the Petition of

193

TERRI ANN SOMMER,

Appellant,

And Concerning

MICHAEL JOHN SOMMER,

Appellee.

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

Terri appeals from a district court order modifying the
child support and alimony provisions of a dissolution
decree and finding each party in contempt. **AFFIRMED.**

Charles S. Crook III, Des Moines, for appellant.

Tom Hyland of Hyland, Laden & Pearson, P.C.,
Des Moines, for appellee.

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

OXBERGER, C.J.

The petitioner, Terri Ann Sommer, appeals from an order of the district court modifying child support and alimony and finding her in contempt for interfering with her daughter's visitation with the respondent, Michael John Sommer. On appeal, Terri argues that the district court erred in: (1) reducing Michael's child support obligation from \$400 per month to \$200 per month; (2) reducing Michael's alimony obligation from \$100 per month to \$50 per month; (3) deciding it had jurisdiction over her alleged contempt of visitation rights; and (4) finding her in contempt. We affirm.

Terri and Michael were granted a dissolution of marriage on February 18, 1988. The dissolution decree ordered that Michael pay Terri \$400 per month in child support and \$100 per month as alimony. Michael was additionally ordered to pay for school tuition and other school costs for a parochial education, which Michael insisted upon. At the time of the decree, Michael earned a net pay of \$2,000 per month from American Freight, where he had been employed for approximately twelve years. Terri was suffering from carpal syndrome and thoracic cutlets syndrome and earned approximately \$249.14 from worker's compensation.

Subsequent to the parties' divorce, American Freight closed its operation, leaving Michael unemployed. From August 1988 until March 1989, Michael was unemployed, until

Michael secured a new job at Fawn Engineering. Michael's net income at Fawn was approximately \$241 per week, approximately one-half of his previous income. During this period Terri was still on worker's compensation, awaiting surgery.

On November 10, 1988, Michael filed a petition for modification of decree. Terri filed her answer and an application to show cause. On March 9, 1989, Michael filed an amendment to his petition for modification, praying that Terri show cause as to why she should not be held in contempt. Trial was ultimately held on May 9, 1989.

At trial, Michael introduced evidence that he was unable to work for a number of months due to surgery to remove malignant colon cancer. Michael testified that he realized he was seriously behind in support payments, but that he was unemployed throughout most of that period. Michael testified that his net income was cut in half and that he could not afford to pay the support and alimony obligations set forth in the original decree. Michael also testified that Terri had on several occasions prevented him from exercising his visitation rights.

Terri testified that due to the seriousness of her illnesses, she is still unable to work and remains on worker's compensation. Terri testified that Christina could see her father anytime she wished, but that when Christina was not finished with her household chores, Terri would delay her visitation with Michael until they were

done. Terri also punished Christina by telling her she could not go on some planned activities with Michael until all work was done. Terri additionally argued that Michael has not paid tuition at the Catholic schools, despite his insistence that Christina have a parochial education, and that he has done little to foster a relationship with Christina.

Following trial, the district court entered its modification and contempt order, finding there had been a material change in circumstances. The district court consequently ordered Michael to pay \$200 in child support per month and \$50 per month alimony. The court additionally found Michael in contempt for failing to pay past due support, but added such contempt could be purged by making timely payments to Terri. Terri was also found in contempt for interfering with Michael's visitation, but was also able to purge the contempt by not interfering in the future. Terri subsequently appealed.

Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give them considerable weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Terri first argues that the district court erred in reducing Michael's child support obligation to \$200 per month. Terri argues that she is unable to work and that even though Michael's income is significantly lower than at the time of their decree, his obligation should not have been cut in half.

Our courts have long held that both parents have a legal obligation to support their children and that such an obligation should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984). A child support award in a final dissolution decree is not to be regarded as a variable sum to be adjusted upward or downward with each fluctuating change in the parties' respective conditions. In re Marriage of Mueller, 400 N.W.2d 86, 88 (Iowa App. 1986). The power of the courts to modify child support exists only where there has been a material and substantial change in circumstances since the date of the original decree which was not contemplated by the trial court at the time the decree was entered. Id. Such changes should be permanent or continuous, and not temporary. In re Marriage of Meyer, 347 N.W.2d 681, 683 (Iowa App. 1984). We must consider each parent's earning capacity, economic circumstances, cost of living, inflation, and increased needs of growing children. In re Marriage of Byall, 353 N.W.2d 103, 107-08 (Iowa App. 1984).

In the present case, we note that Michael's income decreased from \$2,000 per month to a net income of \$1,044 per month. At the time of the original divorce decree, Michael had worked for American Freight for over twelve years, and there was no apparent contemplation that American Freight would close its operations. Terri does not appear to dispute that this drop of income is a significant change of circumstances, but that it would be inequitable to cut Michael's obligation since she cannot work for an indefinite period.

The Iowa Supreme Court on September 29, 1989, entered an order prescribing uniform child support guidelines pursuant to federal Family Support Act of 1988, Pub. L. No. 100-485. The guidelines state that monthly income means gross income less certain deductions. Michael testified that his net income is approximately \$1,000 per month. Terri's net income is approximately \$1,096 per month through worker's compensation. The guideline chart provides that Michael's obligation for child support for one child is 16.9% of his net monthly income, i.e., \$1,044 per month. The guidelines state that the court shall not vary the amount of child support that would result from application of the guidelines without a written finding that the guidelines would be unjust or inappropriate under certain criteria.

We believe that under the circumstances of the present case the guidelines are just and appropriate. The district

court modification order actually provides for somewhat more than the guidelines. Given the strapped financial situation of both parties, we believe the district court's modification of child support was correct.

Terri also contends the district court erred in reducing her alimony payments from \$100 to \$50 per month. The monthly payments were to continue for eighteen months unless Terri remarried or died. Terri argues that the amount in the original decree, \$1,800, was awarded as a lump sum settlement. We disagree.

It is well established that courts retain the power to modify finite alimony awards at any time when such an award is included in an initial dissolution decree. In re Marriage of Skiles, 419 N.W.2d 586, 588 (Iowa App. 1987). As with child support, modification of an alimony award is proper only where there has been a substantial change in circumstances. In re Marriage of Sjulín, 431 N.W.2d 773, 776 (Iowa 1988). The alimony award in the present case is similar to that fashioned by the trial court in Pederson v. Pederson, 235 Iowa 708, 17 N.W.2d 520 (1945). In Pederson, the district court provided for \$1,410 to be paid in installments of \$40 per month for the wife's support. Pederson, 235 Iowa at 709, 17 N.W.2d at 521. The Iowa Supreme Court held that such an amount was not tantamount to a lump sum payment and that the court therefore had jurisdiction to modify the award. Id. at 713, 17 N.W.2d at 523.

In the present case, it is clear that the trial court did not contemplate the \$1,800 as a lump sum payment as part of the property division, but as a sum for the exclusive support of Terri. Thus, the court retains jurisdiction to modify the award. Upon consideration of the financial conditions of both parties, we do not believe that the trial court erred in reducing the amount of alimony. The record reveals that Michael's income has been halved and that his financial position does not afford an ability to pay \$100 per month.

Terri also argues that the trial court erred in asserting personal jurisdiction over her contempt charge. The record reveals that Terri did not raise this question at the time of trial. We therefore need not consider this issue. Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 434 (Iowa 1984).

Terri lastly asserts that the trial court erred in finding her in contempt for violating visitation provisions in the dissolution decree. Terri argues that the delays in visitation were agreed upon by Michael as punishment for Christina's failure to finish her household duties. Terri further argued that Michael's visitation actually started on Friday evenings, not Saturdays as provided in the original decree. Terri maintains that she was willing to give Michael all the visitation he wanted, but that Michael showed little interest in exercising his visitation rights.

Pursuant to Phillips v. Iowa Dist. Court for Johnson County, 380 N.W.2d 706 (Iowa 1986), no person may be punished for contempt "unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt." Id. at 709. Such actions must be willful in nature. Id. Terri, however, filed for direct appeal, rather than a writ of certiorari. Though ordinarily challenges to a contempt finding are reviewed pursuant to a writ of certiorari rather than on direct appeal, we believe that in the present case we may treat Terri's action as an application for writ of certiorari. Rausch v. Rausch, 314 N.W.2d 172, 173-74 (Iowa App. 1986); Iowa R. App. P. 304.

Terri admits that she has interfered with Michael's visitation rights. The trial court was in the best position to hear all the evidence and listen to and observe the witnesses. The court found that Terri used the excuse of Christina not having her chores done to make Michael wait. On at least one occasion, Terri made Michael wait for over one hour while Christina finished her duties. The trial court found, and we agree, that Terri had used these methods in the past and would do so in the future. Though we disfavor the use of such tactics, we equally encourage Michael to exercise visitation on a more regular basis and take more interest in Christina's activities.

Terri requests that she receive attorney fees and costs from Michael on appeal. An award of attorney fees may be granted based on the parties' respective abilities to

pay. In re Marriage of Stanley, 411 N.W.2d 698, 703 (Iowa App. 1987). Both parties shall be liable for their respective attorney fees. Costs are taxed to Terri.

AFFIRMED.