FILED
MAY 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF 1

IN RE THE MARRIAGE OF DAVID E. BRADISH AND PEARL L. BRADISH

Upon the Petition of)
PEARL L. BRADISH,) Filed May 31, 1978
Appellee,)
And Concerning)
DAVID E. BRADISH,) 506
Appellant.) 2-60377

Appeal from Polk District Court - Dale S. Missildine, Judge.

Appeal from order modifying economic provisions of the parties' decree of dissolution. Affirmed as modified.

Harlan M. Hockett, Des Moines, for appellant.

Bernard J. O'Malley and Steven M. Porto, of Connolly, O'Malley, Lillis & Hansen, Des Moines, for appellee.

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

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PER CURIAM

In this appeal respondent, David E. Bradish, claims that certain provisions of an order modifying the custody and child support terms of the parties' dissolution decree are inequitable. The three particulars about which respondent complains are that the order (1) requires that he pay child support arrearages which accrued while he had actual custody of the parties' three minor daughters; (2) fails to make the child support to be paid by petitioner, Pearl L. Bradish, retroactive to the date of respondent's application for modification; and (3) requires petitioner to pay child support of only $12 per week per child.

I. Trial court was without authority to exonerate respondent's liability for past due and accrued support payments. Gilliam v. Gilliam, 258 N.W.2d 155, 156-57 (Iowa 1977) and citations.

II. We are not persuaded that we should act upon respondent's claim that the child support payments required of petitioner in the modifying order ought to be made retroactive to the date of filing of his application. While we recognize there is authority for making an increase in child support retroactive, Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973), the circumstances here do not justify such a result. Petitioner had no judicially imposed liability for payment of child support prior to entry of the modifying order. Such liability, therefore, should operate only prospectively.

III. There is merit, however, in respondent's claim that the child support award is inadequate. Considering the facts peculiar to this case as disclosed through examination of the entire record and being guided by factors set forth in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974), we find that the child support should be increased from $12 to $20 per week per child.

Affirmed as modified. Costs on appeal shall be taxed one-half to each party. Trial court shall enter a decree consistent with this opinion.

DONIELSON, J., specially concurs in part and dissents in part; OXBERGER, J., dissents in part.

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DONIELSON, J. (concurring in part and dissenting in part)

Although I concur in the results reached by the majority in divisions I and II, I do so only reluctantly with regard to division I. I am aware of the holdings of Gilliam v. Gilliam, 258 N.W.2d 155 (Iowa 1977) and related cases concerning the inability of the trial court to exonerate a party for past due and accrued support payments. However, the instant case demonstrates exactly how harsh and inequitable such a result is.

The record reflects that from April 9, 1973 to July 3, 1974, David and Pearl lived together with the children in the family home, although not as husband and wife. David testified that during this period of time he used his entire income to assist in maintaining the family and home and did not save any money or make any material acquisitions. He also admitted that he made no child support payments to Pearl during that period.

In my view, a requirement that David pay child support for those some 15 months constitutes an unfair and unreasonable penalty, especially in light of the fact that during the period of time in which the parties lived together, Pearl's annual income was almost twice that of David's. Further, during the two years since the parties ceased living together, Pearl's income exceeded David's by an average of $1650 per year. Finally, I believe that the result reached by the majority in this regard is not in the long-range best interests of the children because it prevents them from gravitating to the parent who is ready, willing and able to provide the necessary care.

With regard to division III, I must dissent because I disagree with the result reached. On the basis of the record in this case, I would increase the child support obligation from $12 to $30 per week per child.

OXBERGER, J. (dissenting in part)

I dissent as to Division I. The sole reason a child support decree is entered and enforced, is for the care, maintenance and nurture of the parties' minor children. Since shortly before the filing of the application to modify custody and support, the Bradish minor children have resided with their father David. He has provided their full support for these two years during which time the judicial process has endeavored to decide if the change of circumstances alleged required modification of the original decree. David is now being told by this court he must pay Pearl child support accruing after the filing, and most importantly, after the children were no longer in the physical custody and actual care of Pearl. That is, David is to pay Pearl child support money for a period of time in which she did not support the children and he did support them. I simply cannot countenance a determination that takes from David the present means to provide for these children on the ground that the case law has never allowed cancellation of support prior to the entry of the modifying decree.

In family matters, we sit in equity to do equity. Section 598.21 states: "Subsequent changes may be made by the court in these respects when circumstances render them expedient." It does not say when the trial court or this court is finally able to decide whether circumstances do render a change in the original decree necessary. I would rule that the § 598.21 change of circumstances for this case occurred in July 1974 with this change in actual custody, residence, and support. Delbridge v. Sears, 179 Iowa 526, 533, 160 N.W. 218, 220 (1916) ruled on an application to modify alimony provisions: ". . . the court is not authorized to go back and determine that the allowance in the original decree was unjust or inequitable, in view of the then circumstances of the parties. The right to modify must date from the application for modification; must look to the then condition of the parties; and fix and determine, not what their past rights were, not what their past duties were, but what their rights and duties towards each other, touching alimony, shall be thereafter." (emphasis added) This ruling has never been overruled by the supreme court.

I find no inconsistency in this view and that recently espoused in Gilliam v.

Gilliam, 258 N.W.2d 155 (Iowa 1977). Gilliam was a case in which a custodial parent, by decree and by de facto performance, requested a contempt citation for nonpayment of child support. It dealt neither with an application to modify custody and support, nor with an actual alteration in the support and physical residence of the children, already accomplished when the modification application was filed, and maintained throughout the pendency of the case.

We should apply the Delbridge rule and reverse the trial court order that David pay child support accruing during the pendency of the application for modification.