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IOWA SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KAREN A. JONES AND BRIAN W. JONES

Upon the Petition of)
KAREN A. JONES,) Filed August 30, 1983
Petitioner-Appellant,)
And Concerning)
BRIAN W. JONES,) 3-135 / 2-68546
Respondent-Appellee.)

Appeal from Webster District Court - R. K. Richardson, Judge.

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

Mark S. Cady of Mitchell, Coleman, Perkins & Enke, P.C., Fort Dodge, Iowa, for petitioner-appellant.

Kurt L. Wilke of Bennett, Wilke & Tarbox, Fort Dodge, Iowa, for respondent-appellee.

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

SCHLEGEL, J.

Petitioner, Karen A. Jones, appeals from modification of the child support provisions of the parties' dissolution decree. She asserts that no substantial and material change in circumstances justifying modification of the decree was shown. We affirm as modified.

The parties' 1981 dissolution decree awarded the wife custody of the three children, now aged 19, 15, and 11, together with child support of $250 per month per child. Provision was made for an annual cost-of-living adjustment and continuation of child support beyond the age of eighteen for children attending school beyond that time. At the time of the dissolution trial the husband was a truck driver with a gross monthly income of $2,285.56 supplemented by part-time trucking work. Evidence was presented that his future employment was uncertain due to the projected closing of his employer but the decree did not mention that possibility.

Approximately six months after the dissolution trial the husband sought modification of the child support payments alleging as change of circumstances a reduction in his income. His employer had closed and he had obtained new employment giving him a gross monthly income of $1,368.32. Since the dissolution trial he had suffered a heart attack and discontinued his part-time employment. The modification court eliminated the annual cost-of-living adjustment and modified the child support payments of $400 per month to be reduced to $300 per month when the first child is no longer eligible for support and further reduced to $150 per month when the second child becomes ineligible for support.

Respondent's weekly net income before losing his job at Hormel was determined to be $440.17 in the dissolution proceeding. This is approximately $1900 a month when averaged. Respondent's present monthly net income is $1,225. Respondent has remarried and his wife, Priscilla Jones, nets an average monthly income of $240. Respondent's expenses have increased due in part to his

remarriage from $896 per month to $1,062 per month. Petitioner did not have any income at the time of the dissolution proceeding, but has since obtained part-time employment with an average net income of approximately $238 per month. The petitioner's expenses of $1,100 a month have not changed since the dissolution proceeding. The parties' oldest child, Kim, age 19, has started to college, but her additional expenses appear to be defrayed by a government grant and a part-time job. The child still resides in the family home, so those expenses remain the same as in the initial dissolution proceeding. The initial child support award left the petitioner with expenses of $350 per month which the trial court contemplated would be covered by her subsequent employment. The respondent's net income covered the child support payments and his expenses.

This appeal is reviewable **de novo.** In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977); Iowa R. App. P. 4.

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.

Respondent, in support of his petition for modification of the dissolution decree, alleged that since entry of the original decree he has suffered a 35% drop in net income through no fault of his own. There was also evidence at trial that respondent had suffered a heart attack and was, at least, temporarily not working. This latter ground was not, however, asserted in the respondent's petition for modification or by the respondent as a ground supporting modification upon appeal. The trial court's order considered the respondent's health only as a ground for denying petitioner's request for a wage assignment. Evidence as to whether the respondent's heart condition is a permanent change in circumstances affecting respondent's ability to pay, moreover, was not presented at trial. (See Donovan v. Donovan, 212 N.W.2d 451 (Iowa 1973)). We, therefore, consider only respondent's reduction in income in determining if there was a material and substantial change in circumstances to justify a modification.

Respondent, Brian Jones, testified at the dissolution proceeding that he had received notice of possible closing of the Hormel operations in Fort Dodge. Further, he testified that similar truck driving jobs in the Fort Dodge area paid less because Hormel had the highest pay scale for truck drivers in the area. Reviewing the testimony of the divorce proceeding which was incorporated into the modification hearing, we find that a substantial reduction of respondent's income as a result of possible loss of employment at Hormel was speculative and not within the contemplation of the dissolution court. The evidence indicated the respondent had many years experience and it was reasonable for the trial court in the dissolution proceeding to assume respondent would find similar employment at a substantially similar level of income. The respondent has shown, by a preponderance of the evidence, that subsequent to the entry of the decree his income has substantially decreased and enforcement of the original child support award of $750 per month would result in a positive wrong. Mears, 213 N.W.2d at 515.

While we agree with the trial court that a substantial change of circumstances has occurred, we find in our **de novo** review the child support should be reduced to $200 per child per month rather than $400 per month for all the children. The amount of $400 per month was the amount by which respondent had, without prior court approval, reduced his child support payments to the petitioner. The respondent's calculations show this is the amount he has available above his present expenses after the reduction in income. The petitioner's needs in providing for the parties' three children, however, have not decreased.

As required by Iowa Code § 598.21(8) (1981), we have considered the needs of the children and relative earning capacity of both parents. See In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974) (factors to be considered in making a child support allowance.) It appears that the expenses of both the parents exceed the income available to them. We believe that each party should be required to share the burden of the reduction in respondent's income. It may be that to require respondent to pay the $200 per month per child child support will require rigid economy and some self denial. It is equally true, however, that for the petitioner to provide for all the necessities for the parties' three children out of the child custody award and with her limited earning capacity will require the exercise of care and economy. Keyser v. Keyser, 193 Iowa 16, 18, 186 N.W. 438, 439 (1922).

We also believe this is an appropriate case for a cost-of-living adjustment. See In re Marriage of Stamp, 300 N.W.2d 275, 279-280 (Iowa 1980) (gross salary is readily obtainable without resort to income tax forms and employment history of the respondent is stable.) The COLA adjustment as provided in the original dissolution decree is reinstated.

II. Award of Alimony. The trial court, in the dissolution proceeding, awarded petitioner no alimony. The ruling was appealed and we modified that decision to include alimony of $250 per month. In re Marriage of Jones, No. 2-67238 (Iowa Ct. App., June 29, 1982). There we said:

> Karen contends the trial court's denial of alimony is inequitable given the parties' earning capacities, standards of living, her education and her desire to pursue higher education. After applying the criteria set forth in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), excluding fault, In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972), we arrive at the conclusion the evidence does support Karen's request for alimony. We have considered factors including the earning capacities and prospects of each party, the relative level of education attained by each party, the potential effects of inflation, the parties' ability to pay, particularly Brian's prospective pension benefits, and the property division effectuated by the trial court's decree. See In re Marriage of Winter, 223 N.W.2d 165, 169 (Iowa 1974); In re Marriage of Burham, 283 N.W.2d 269, 277 (Iowa 1979). We conclude Karen should be awarded alimony of $250 per month. The alimony shall start on the date the child support payments are reduced, for reasons other than COLA adjustments, under the terms of the trial court's decree.

Under the terms of the original decree, the child support obligation was to be reduced by $250 when a child became ineligible for child support. Upon the happening of the first reduction, our award of alimony was to automatically commence. Respondent's obligations, for both child support and alimony, barring COLA adjustments, would not have been greater than $750 per month. Under the modification approved by us, the award of alimony is not to commence until the child support obligation is reduced by one of the children becoming ineligible for child support. That will cause a reduction of child support by $200 per month and trigger the alimony provisions of $250 per month. Respondent's total support obligations, barring COLA adjustments will, therefore, not be greater than $650. Considering the parties' expenses and the children's needs, we believe this is equitable.

AFFIRMED AS MODIFIED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I agree with the majority that Brian has sustained his burden of proving a substantial change in circumstances justifying a reduction of his child support obligations. I would, however, affirm the modification ordered by the court below. I therefore dissent from the holding of the majority modifying that order.

The trial court reduced Brian's monthly support obligation from $750 ($250 per month per child) to $400 and eliminated the COLA provision. This corresponds to his approximately 35% decrease in net income (from $1892 per month to $1225 per month) from the time of the original decree through no fault of his own. The majority, however, raised the obligation to $200 per month per child, or $600 per month at this time. In addition, as the majority indicates, in a previous appeal to this court we ordered Brian to pay alimony of $250 per month. This alimony obligation will begin when the oldest child becomes ineligible for support. At that point and while the other two children receive support, Brian's monthly obligation will be $650. The alimony award was not made subject to Karen's remarriage or cohabitation with another adult male; in other words, Karen is to receive alimony for life. Under these circumstances and given Brian's reduced financial resources, his previous heart attack, and the current unstable job market, I believe the majority's decision to increase his support obligation to 50% above that ordered below is unjustified. I would affirm the trial court's decision in its entirety.