

FILED

FEB - 5 1980

97

IN THE COURT OF APPEALS OF IOWA SUPREME COURT

IN RE THE MARRIAGE OF JANICE ELAINE RING AND CURTIS PHILLIP RING

Upon the Petition of)

JANICE ELAINE RING,)

Petitioner-Appellee,)

Filed February 5, 1980

and Concerning)

CURTIS PHILLIP RING,)

321
3-62461

Respondent-Appellant.)

Appeal from Woodbury District Court - George F. Davis, Judge.

Respondent appeals child custody, child support, and attorney fees provisions of modification of parties' dissolution decree. Affirmed in part; Vacated in part.

Gary J. Boveia of Waverly, for respondent-appellant.

Lorna A. Gilbert of Sikma & Gilbert, Sioux City, for petitioner-appellee.

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Respondent, Curtis P. Ring, appeals modification of child custody, child support, and attorney fees provisions of parties' dissolution decree. For reversal, respondent contends a substantial and material change of circumstances supports giving him custody of all three of the parties' children rather than custody of only the eldest child. Respondent also contends no substantial or material changes in circumstances support the trial court's modification of child support payments for the two younger children from \$80 per month per child to \$207.50 per month per child. Respondent's third contention is that the trial court erred in awarding petitioner attorney fees incurred incident to petitioner's application for modification and respondent's cross-claim for child custody. We affirm the trial court's judgment on petitioner's first two points and vacate the attorney fees award.

I.

Our review is de novo. Iowa R. App. P. 4. We are bound to review the facts and law, determining anew from credible evidence all properly presented contentions of the parties. While we give weight to the trial court's findings of fact, especially when credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7).

II.

Child custody provisions of a dissolution decree are final as to circumstances existing at the time of the original decree and should be modified only where subsequent conditions have so changed that the child's welfare requires modification and the party seeking modification can more effectively minister to the child's well-being than the current custodial parent. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976). Our paramount concern is the best interests of the child. Iowa R. App. P. 14(f)(15).

Respondent failed to establish sufficient change in circumstances or that he is better able to minister to the needs of the parties' two youngest daughters, Emilie and Della. Although the case for changing custody of their oldest child, David, was supported by clear and convincing reasons, those reasons are not directly relevant to the custody of the two youngest children. David, age sixteen at the time of the modification hearing, was experiencing problems with school, police, drugs, and alcohol, and petitioner was having difficulty controlling his actions. The transfer of custody

from petitioner to respondent was justified as respondent was better able to provide a disciplined environment for David. No evidence was presented, however, that petitioner was performing less than satisfactory as a mother to their two younger children, ages twelve and nine at the time of the hearing. Petitioner's inability to deal with David's problems does not disqualify her from retaining custody of her two younger daughters. No evidence was presented that either child's welfare was being jeopardized. Accordingly, modification of their custody is not warranted.

III.

Modification of child support provisions is permissible only when there exists a material, substantial, and permanent change in circumstances of the parties since the time of the original dissolution decree—changes not within the decretal court's contemplation. In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977); In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977); Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). The party seeking modification bears the burden to establish changed circumstances by a preponderance of the evidence. Mears, 213 N.W.2d at 515. Here also, the children's best interests are our primary and governing concern. Pucci v. Pucci, 259 Iowa 427, 434, 143 N.W.2d 353, 358 (1966); Sandler v. Sandler, 258 Iowa 84, 86, 137 N.W.2d 591, 592 (1965).

Viewing the evidence as a whole, we conclude petitioner established by a preponderance of the evidence a substantial, material, and permanent change in circumstances to support the trial court's modification. The ever-increasing disparity between respondent's strong and petitioner's modest financial conditions warrants the modification. This allows respondent to more fully satisfy his support obligation while not being unduly burdensome to him.

At the time of the previous modification hearing in January 1977, petitioner earned \$9600 per year. When the hearing involved here was held in August 1978, her earnings were \$10,620 per year. During that same period, respondent's annual income increased from \$17,076 to \$20,604. Moreover, respondent has purchased two investment properties that have served as tax shelters and owned another that was not disclosed at the previous hearing, with a total equity interest of about \$20,500; his stock holdings have increased during the relevant period from \$3500 to \$7300. Petitioner's sole assets

- 3 -

are a 1972 Chevrolet valued at \$1200 and household goods valued at \$1000. She has also been faced with increased child-rearing costs due to inflation, Jensen, 251 N.W.2d at 254; see Page v. Page, 213 N.W.2d 556, 558 (Iowa 1974), repayment of educational loans, see Pucci v. Pucci, 259 Iowa 427, 434-35, 143 N.W.2d 353, 358 (1966), and termination of alimony payments of \$100 per month. We hold under these facts a sufficient change in circumstances warrants this modification.

IV.

Lastly, we discuss whether the trial court erred by awarding attorney fees to petitioner. It is well-settled that no authority in chapter 598, The Code 1979, allows awarding attorney fees on an application to modify a dissolution decree. Jensen, 251 N.W.2d at 252; In re Marriage of Havener, 240 N.W.2d 670, 671 (Iowa 1976); Dworak v. Dworak, 195 N.W.2d 740, 743 (Iowa 1972). We vacate the trial court's award of attorney fees.

AFFIRMED IN PART; VACATED IN PART.