

FILED

NOV 26 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ANNIE M. PINNEKE AND GERALD R. PINNEKE

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Upon the Petition of)

ANNIE M. PINNEKE,)

Petitioner-Appellant,)

Filed November 26, 1985

And Concerning)

GERALD R. PINNEKE,)

Respondent-Appellee.)

5-464
84-1803

Appeal from the Iowa District Court for Webster County - James C. Smith,
Judge

Petitioner wife appeals from the trial court's denial of her application for modification of the decree dissolving the parties' marriage, asserting that the court erred in failing to increase the amount of child support. **REVERSED.**

Allan Goode of Price, Goode, Breen & Breen, Fort Dodge, for petitioner-appellant.

Carol Wendl, Carroll, for respondent-appellee.

Considered by Snell, P.J., and Schlegel and Hayden, JJ.

PER CURIAM

Annie and Gerald Pinneke were married in 1971. One child, Stacey, was born to the marriage in 1974. The parties were divorced in 1977. The parties agreed by stipulation that Gerald would pay \$25 per week child support plus the child's medical, dental and clothing expenses, and establish a college fund. At the time of the decree Gerald was earning approximately \$210 per week; Annie was earning \$6,300 per year.

In 1980, Gerald voluntarily increased his child support payment to \$160 per month. He also agreed to pay \$300 per year for Stacey's clothing expenses. In 1984, Gerald voluntarily increased his child support payments to \$200 per month. Gerald also pays Stacey's travel expenses when she flies from Louisiana to Iowa for visitation.

At the time of the modification proceeding, Gerald's net income was \$1,744 per month. He had remarried and his wife's net income was \$1,185 per month. The couple had one child. Annie's net income was approximately \$1,089 per month at the time of the modification proceeding.

The trial court, ruling from the bench, found that no substantial change of circumstances had occurred and refused to formally modify the decree of dissolution. However, the court stated that Gerald had been "getting by a little cheap" and that "the Court's going to adopt what you voluntarily have agreed to pay already" and "that's what you at least should continue to do." The court ordered Gerald to pay \$200 towards Annie's attorney fees.

Our review is de novo. Iowa R. App. P. 4 (1983). We are not bound by the findings of the trial court, but we give them weight. Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972). It is well settled that:

To justify modification of a child support provision some material change must be shown in the circumstances of the parties, financially or otherwise, making it equitable

that other or different terms be imposed. A decree will not be modified unless its enforcement will be attended by positive wrong or injustice as a result of the changed conditions. Modification should be based upon a change of circumstances more or less permanent or continuous, not temporary, and where a change of financial condition of one or both of the parties is relied upon, it must be substantial.

Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973).

The circumstances which have changed since the time of the dissolution include the fact that Gerald's salary has almost doubled and Stacey's needs have increased with her age.

Increased costs due to the needs of growing children may be taken into account when determining whether a modification of a child support provision is warranted. In re Marriage of Stutsman, 311 N.W.2d 72, 76 (Iowa 1981). We also must consider the ability of the payor to make increased payments. Id.; Spaulding, 204 N.W.2d at 635. There was clear evidence that Gerald increased his net earnings from \$903 per month in 1977 to \$1,744 per month in 1984. In addition, he married a salaried individual who contributes to living expenses in their new home. In this case Gerald's ability to pay is substantiated by his increased earning capacity and the fact that for the last several years he has been paying higher child support than the dissolution decree ordered.

We find that Annie has demonstrated a substantial change of circumstances which was not within the contemplation of the court at the time the dissolution was granted. We, therefore, conclude that an increase in the child support is warranted. We modify the dissolution decree to increase Gerald's weekly child support obligation to \$50 plus Stacey's medical, dental, and clothing expenses. Stacey's travel expenses for visitation shall also be paid by Gerald. In light of Gerald's increased support obligation and the fact that Annie's earnings have more than doubled since the time of the dissolution, Gerald need no longer

contribute to a college fund at this time. At such time as Stacey is of age and planning to go to college, application may be made to the court for her college support. Furthermore, Gerald shall be entitled to claim Stacey as a dependent on his federal and state income tax returns so long as he remains current on his child support payments at the end of each of his tax years. Annie shall execute a multiple support agreement and/or any other requisite I.R.S. and Iowa Department of Revenue forms necessary to accomplish Gerald claiming Stacey as a dependent for income tax purposes. Annie shall deliver the executed forms to Gerald on or before January 20th each calendar year.

The trial court is vested with considerable discretion in allowing attorney fees to be awarded. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa 1983). The allowance here appears fair and reasonable and should not be disturbed. Each party shall pay his or her own attorney fees incurred on appeal. Costs are assessed to Gerald.

REVERSED.