

FILED

MAY 24 1990

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-139 / 89-667

IN RE THE MARRIAGE OF LUANN M. NEESON AND PAUL E. NEESON

Upon the Petition of

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LUANN M. NEESON,

Appellee,

And Concerning

PAUL E. NEESON,

Appellant.

Appeal from the Iowa District Court for Webster County,
Ronald H. Schechtman, Judge.

Appellant appeals a ruling of the district court
denying his request for modification of the parties'
dissolution decree. **REVERSED.**

William H. Habhab, Fort Dodge, for appellant.

Blake Parker, Parker & Fors, Fort Dodge, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett,
JJ. Habhab, J. takes no part.

OXBERGER, C.J.

This appeal is concerned with child support. The parties disagree whether Paul Neeson is required to show a substantial change in circumstances. The trial court found that Paul was required to show a substantial change in circumstances and he failed. Furthermore, the court concluded the original award of \$75 per month for two children was equitable under the present circumstances.

The original decree, entered May 6, 1987, provided Luann was not to pay any child support until October 15, 1987, and thereafter to pay \$75 per month. At the time of the original decree, Luann was unemployed. Since December 1987 Luann has worked full-time for First Federal Savings and Loan Association with a net income of \$680 per month, \$4.90 per hour.

The trial court concluded that the \$75 per month child support was based on the assumption that Luann would obtain a job at minimum wage. She currently is receiving \$4.90 per hour. The trial court concluded there was no substantial change in circumstances. We agree.

We are faced with the issue of whether the following provision in the original decree changed Paul's burden of proof:

Petitioner shall provide notice to the Respondent upon becoming employed along with proof of income. The Respondent shall then be entitled, if he chooses, to seek a modification of the child support amount ordered herein without a change of circumstances.

The following cases are concerned with interpreting provisions in the original decree, as they impact on modification proceeding:

In Betzel v. Betzel, 163 N.W.2d 551 (Iowa 1968), the original decree provided: "the question of custody came on for review after the expiration of one year from the date hereof upon the application of the plaintiff, at which time the Court will consider whether the mental and physical condition of the plaintiff has improved, and at which time the Court will make such order as to custody as the circumstances shall then warrant." Id. at 555. The court held this provision did not change the substantial change of circumstance rule. Id.

In Tallarico v. Tallarico, 164 N.W.2d 805 (Iowa 1969), the original decree provided if the parties were unable to agree at the end of one year on support to be paid, then the matter would be submitted to the court "without relation to any change of circumstances." Id. at 807. The court held no showing of change of circumstances was necessary at the modification hearing. Id.

In Wells v. Wells, 168 N.W.2d 54 (Iowa 1969), the original decree provided: "The matter of custody of the children . . . may be reviewed . . . without the burden on either party of having to show change in circumstances." Id. at 56. The court held the modification petitioner did not need to show a substantial change of circumstances. Id. at 57.

In In re Marriage of Schlenker, 300 N.W.2d 164, 166 (Iowa 1981), the original decree provided: "custody and visitation may be reviewed by the Court upon the application of either party within the next six months." The court held this provision did not change the substantial change of circumstance rule. Id.

In Schlenker and Betzel, the original decree only provided for subsequent review of various aspects of the original decree. In Wells and Tallarico, the original decree specifically stated the substantial change in circumstance rule was changed.

The above cases indicate that when the original decree only reserves jurisdiction for future modification, the court does not interpret the provision to change the substantial change of circumstance rule. The provision only gives the court the power provided by statute. "Only when the decree unequivocally provides for later trial court review without the necessity of showing a change of circumstances will we find this was the court's intent." In re Marriage of Sjulín, 431 N.W.2d 773, 776 (Iowa 1988). When the decree provision provides for a change in the substantial change in circumstance rule, the court will enforce the provision if the language is clear. In the case at bar, the language is clear: "The respondent shall then be entitled, if he chooses, to seek a modification of the child support amount ordered herein without a change of circumstances."

Luann claims Paul waived his right to claim the lesser burden of proof contained in the original provision because he failed to make an objection to the trial court's statement at the beginning of the trial that his burden was to show a substantial change of circumstances. At the beginning of trial, the court asked Paul's counsel if he felt the provision was binding on the court. Counsel said "we do feel . . . that that is a provision that is binding on the parties." We find this statement clearly indicates Paul did not waive this issue.

Turning to the matter of the appeal, the supreme court's order for permanent child support guidelines sets an appropriate amount of child support in this case at \$115 per month. We reverse the trial court's order and direct Luann to pay Paul \$115 per month for the support of the parties' two children.

REVERSED.