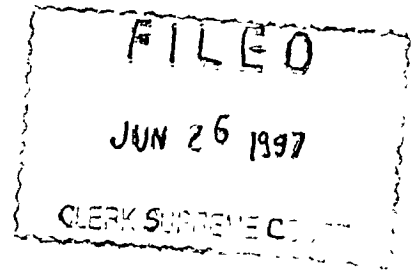
IN THE COURT OF APPEALS OF IOWA

000557

No. 6-642 / 96-0026



IN RE THE MARRIAGE OF LINDA MAUREEN WILSON AND DONALD ROBERT WILSON

Upon the Petition of
LINDA MAUREEN WILSON,

Petitioner-Appellant,

And Concerning
DONALD ROBERT WILSON,

Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Linda Wilson appeals from the district court's order modifying the dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Dan T. McGrevey, Fort Dodge, for appellant.

Stephen G. Kersten, Fort Dodge, for appellee.

Considered by en banc.

CADY, J.

Linda and Donald Wilson dissolved their marriage in 1981. They have two children. Joshua was six years old at the time of the divorce and was in first grade. Jeanna was two years old.

Linda and Donald agreed to split custody of the children. Under a succinct written stipulation, Donald was given custody of Joshua and Linda was given custody of Jeanna. The agreement provided neither party would be "required to pay child support for the noncustodial child." There was no provision concerning a continuing support obligation in the event the children attended college. Moreover, there was no provision covering the point in time when Donald's support obligation would end before Linda's support obligation. The district court adopted the stipulation in its decree for dissolution of marriage.

Joshua turned eighteen years old in April 1993 and graduated from high school two months later. He subsequently obtained employment with Donald's construction company and did not pursue a vocational or college education.

On December 15, 1994, Linda filed a petition to modify the 1981 decree of dissolution of marriage to require Donald to contribute child support for Jeanna. She claimed the completion of Donald's obligation to support Joshua prior to the completion of her obligation to support Jeanna constituted a substantial change in circumstances and justified a modification. She also argued a substantial change in circumstances existed because the child support provision contained the 1981 decree

substantially deviated from the amount which would be due under the current child support guidelines for one child.

Linda testified she never considered in 1981 that the legal obligation of support she assumed for one of their children would extend four years longer than Donald's corresponding obligation to support their other child. Donald testified the agreement contemplated each party would be responsible for all the needs of their custodial child through college. Donald, however, periodically provided financial assistance for Jeanna. He helped pay for such activities as singing lessons, special school functions, private school tuition, YMCA membership and golf lessons.

The district court denied the petition for modification. It found the circumstances supporting modification were necessarily within the contemplation of the trial court in 1981. Relying on *In re Marriage of Hess*, 522 N.W.2d 861 (Iowa App. 1994), the district court also found the ten percent deviation rule did not justify modification because Donald had no underlying support obligation to Jeanna.

Our review is de novo. Iowa R. App. P. 4. Nevertheless, we recognize the trial court has reasonable discretion in determining whether modification of child support is warranted and that discretion will not be disturbed on appeal unless equity does not result. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983); *In re Marriage of Smith*, 501 N.W.2d 558, 560 (Iowa App. 1993).

There are a number of familiar principles that have surfaced in our law to guide courts in the resolution of actions to modify dissolution decrees. Foremost, is

a modification requires a substantial change in circumstances since the prior decree. Iowa Code § 598.21(8) (1995); *Vetternack*, 334 N.W.2d at 762. One companion principle requires the change in circumstances must not have been within the contemplation of the trial court who entered the prior decree. *Id.* It is this principle which the trial court utilized to reject Linda's claim and which lies at the heart of this case. The purpose of the contemplation of the court requirement is to provide a decree of finality to the proceedings. *See In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa App. 1991). Thus, circumstances which were known or should have been reasonably known to the trial court who entered the prior decision may not be used to support a modification. *Id.* Changes that naturally occur are foreseeable and will not justify a modification. *Id.*

Although a pragmatic view of the circumstances of this case could support the conclusion no one actually considered in 1981 that a future disparity in the child support obligation would occur, we conclude the trial court properly found it was foreseeable to the trial court who entered the original decree that Linda's support obligation would likely continue longer than Donald's support obligation.[1]

---

[1] Donald points out Linda worked outside the house at the time of the divorce and earned more income than him. Donald owned a construction business and was suffering some financial distress at the time due to economic conditions. However, there could be no serious claim the parties contemplated Linda should pay four additional years of support because of the disparity in income. Linda was a high school graduate and earned $18,200 at the time of the divorce. Donald owned a business and his diminished income was temporary. The economic conditions did not necessarily diminish his earning capacity.

Considering our standard of review, we agree with the trial court Linda failed to establish the circumstances were not reasonably within the contemplation of the trial court. A reasonable view of the future would have disclosed the scenario Linda now claims supports modification.

Notwithstanding the traditional principles which lie at the threshold of a modification action, our legislature has altered the change in circumstances doctrine as it is applied to a modification of child support. Under Iowa Code section 598.21(9), a deviation of ten percent or more between an existing order for child support and the amount which would be due under the most current child support guidelines constitutes a substantial change in circumstances. Linda claims this ten percent deviation rule supports modification. *See Schuler v. Rodberg*, 516 N.W.2d 902, 904 (Iowa 1994) (statute applied retroactively to child support set prior to its enactment in 1992).

We have previously determined the ten percent deviation rule does not apply to a split physical care arrangement where neither parent was actually obligated to pay child support to the other parent. *In re Marriage of Hess*, 522 N.W.2d at 864. However, the outcome of *Hess* was based more on the injustice which would have resulted to one parent under the particular facts of this case if the guidelines were utilized to change the child support obligation than a sharp rule excluding the ten percent rule in split custody cases where no dollar amount of child support was established. *Id.*

A split physical care arrangement does not extinguish the parents' child support obligation. *See In re Marriage of Hansen*, 465 N.W.2d 906, 910 (Iowa App. 1990). Both parents have a duty to support their children. *In re Marriage of Axmear*, 529 N.W.2d 304, 306 (Iowa 1995). Thus, when physical care of two children is split between parents, the support obligation is merely set off. *In re Marriage of Will*, 489 N.W.2d 394, 400 (Iowa 1992). A set off recognizes each parent's ability to pay, as well as their continuing obligation to support both children. *See In re Marriage of Hansen*, 465 N.W.2d at 910. Moreover, the obligation of support is not altered in the event the set off happens to be zero and neither parent is actually obligated to pay the other parent a specific sum of money.

We conclude a decree of dissolution of marriage providing for split physical care or custody of children with neither parent obligated to pay child support to the other parent nevertheless constitutes a court order for child support. Thus, the ten percent rule set forth in section 598.21(9) would apply to support a modification of a child support provision involving split physical care of children even though there is no actual obligation to pay child support by one parent to the other parent. We overrule *Hess* to the extent it contains a contrary holding.

Donald argues it would be inequitable to order him to pay child support now when there were several years following the divorce in which Linda earned mor income than he did, and she averaged slightly more income annually than him sir the divorce. We reject Donald's argument. Our review of the record indic

Thus, Donald did not give up a child support award from Linda over the years in exchange for Linda's obligation to support Jeanna for a longer period of time than he was obligated to support Joshua. *See In re Marriage of Blum*, 526 N.W.2d 164 (Iowa App. 1994) (parents are obligated to support children in accordance with their ability to pay).

The evidence shows Donald's net income per month is $2,245. Linda's net monthly income is $1,735. Under the guidelines, Donald should contribute $460 each month for the support of Jeanna. We modify the decree accordingly, and make it retroactive to the date of the district court order on the petition for modification. The support obligation shall continue until Jeanna turns 18 years of age or graduates from high school, whichever occurs first, and we remand to the district court to determine Donald's continuing support obligation in the event Jeanna pursues education beyond high school. We otherwise affirm the district court order. We deny all requests for attorney fees. We do not retain jurisdiction.

AFFIRMED AS MODIFIED AND REMANDED.

All judges concur except Sackett, and Huitink, JJ. who dissent.

SACKETT, J. (dissenting)

In 1981, Linda and Donald divorced. They agreed Donald would assume primary physical care of the older child, Joshua, and provide his support, and Linda would assume custody of the younger child, Jeanna, and assume her support. The agreement was honored until 1994 when Joshua became self-supporting and Linda sought to modify the decree to obtain support for Jeanna.

The trial court modified the decree ordering Donald to pay one-half of Jeanna's medical expenses not covered by insurance. In denying Linda's claim for child support, it noted it would be "insulting" to suggest the court did not contemplate support for the children would terminate at different times based upon their ages. Relying upon *In re Marriage of Hess*, 522 N.W.2d 861 (Iowa App. 1994), the court determined there was not a substantial and material change in circumstances because Donald was no longer supporting Joshua, or because there was a ten percent deviation from what Donald was ordered to pay at the time of dissolution and what he would be required to pay under the current guidelines. The court reserved ruling regarding Jeanna's future college expenses.

Linda has sufficient means to support Jeanna. Donald's income currently is more than Linda's. However, there is evidence of periods in the 1980's when his income was substantially less than Linda's and he filed bankruptcy.

Unquestionably both parties realized Donald's support obligation would terminate first. Donald honored his agreement despite having years when his income was substantially less than Linda's.

Hess should control and not be overruled. Donald honored the agreement. Linda has adequate income to support Jeanna and to honor the agreement she made.

I would affirm the trial court.

Huitink, J., joins this dissent.