FILED
APR 30 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KIRK A. ROTH AND KATHRYN ROTH

Upon the Petition of	)	
KIRK A. ROTH,	)	Filed April 30, 1985
Petitioner-Appellant,	)	
And Concerning	)	
KATHRYN ROTH,	)	5-103 84-1039
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Montgomery County - Glen M. McGee, Judge.

Petitioner appeals an order modifying the parties' dissolution decree. REVERSED.

Jennifer J. Rose, Shenandoah, Iowa, for petitioner-appellant.

Jeffrey Millhollin, Corning, Iowa, for respondent-appellee.

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

HAYDEN, J.

Petitioner, Kirk Roth, appeals an order modifying the parties' dissolution decree. He asserts that: (1) the trial court erred in holding that there was a substantial change in circumstances which justified an increase in child support; and (2) the trial court erred in making the increased child support retroactive from the date of filing the petition for modification.

The parties' marriage was dissolved May 2, 1979. The dissolution decree awarded custody of the parties' two children to respondent, Kathryn Roth. Kirk was ordered to pay $100 per child per month as child support.

Kathryn filed a petition for modification of the dissolution decree on August 11, 1983. The petition asked that Kirk's child support obligation be increased. A hearing was held on May 24, 1984. Five days later an order was entered that modified the dissolution decree. The order increased the child support payments to $200 per month per child and required Kirk to pay one-half of all the children's medical and dental expenses not reimbursed by Kirk's insurance. In addition, the trial court ruled that the increase would be made retroactive to the date that Kathryn filed her petition for modification.

The legal principles to be applied in actions for modification of child support were summarized in In re Marriage of Vetternack as follows:

> We review orders on applications to modify child support provisions de novo. Mears v. Mears, 213 N.W.2d 511, 515-16 (Iowa 1973); Iowa R. App. P. 4. Nevertheless the trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. E.g., Norenberg v. Norenberg, 168 N.W.2d 794, 797 (Iowa 1969).
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> Authority to modify dissolution decrees is given in Iowa Code § 598.21(8) (1981) which provides:
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> > The court may subsequently modify orders made under this section when there is a substantial change in circumstances. Any change in child support because of alleged change in circumstances shall take into consideration each parent's earning capacity, economic circumstances and cost of living.

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

334 N.W.2d 761, 762 (Iowa 1983) (citations omitted).

We agree with Kirk that the record does not show there has been a material change in circumstances, or that any such change was not within the contemplation of the trial court when the original decree was entered.

The record shows that Kirk's yearly income increased from $14,880 in 1979 to $19,544 in 1983. At the time of the modification hearing in May of 1984, Kirk earned gross weekly wages of $311.23 or approximately $16,180 per year. Kathryn's yearly income increased from $6,289 in 1979 to $10,228 in 1983. She expected to earn $11,000 in 1984. These changes in financial conditions are certainly not substantial.

Kathryn argues, however, that Kirk has an increased ability to pay child support due to his remarriage. The record shows that Kirk and his wife have a combined household income in excess of $30,000. Although the two of them at one time supported four of Kirk's stepchildren and his mother, only one child was staying with them at the time of the hearing. There was also evidence that Kirk's wife suffers from kidney disease and may be forced to terminate her employment and undergo dialysis.

We do not agree that the change in economic conditions is a substantial and permanent change not in the contemplation of the trial court when the original decree was entered. Remarriage to a working spouse should have been contemplated by the trial court. In this day and age statistics prove that both

husband and wife in many households across our land are employed, either full or part time, independently own property, or have independent income from investments. The basic truth of today's society is that many households are dependent upon dual incomes for support and survival.

The trial court in the modification action abused its discretion in modifying the decree since the circumstances of the case do not justify it. Therefore, we reverse the decision of the trial court and leave the provisions of the dissolution decree intact. Our holding makes it unnecessary for us to consider the propriety of making a modification of support payments retroactive.

REVERSED.

Oxberger, C.J., concurs and Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent. I believe there has been a material and substantial change in circumstances justifying an increase in Kirk's child support obligations.

The record shows that Kirk's yearly income had increased from $14,880 in 1979 to $16,180[1] at the time of the modification hearing. Such an increase would not alone be sufficient to find that there has been a material and substantial change in circumstances. However, because of events affecting Kirk's second marriage, there has been a permanent and substantial increase in Kirk's ability to pay child support.

The record shows that Kirk and his wife have a combined household income in excess of $30,000.[2] Although the two of them at one time supported four of Kirk's stepchildren, only one child was staying with them at the time of the hearing. The increased prosperity in Kirk's household, when combined with his increased income, show that there has been a substantial change in Kirk's ability to pay support.

This conclusion is not unprecedented. Page v. Page, 219 N.W.2d 556 (Iowa 1974), is a case similar to this one. Even though Mr. Page's annual income had only increased $1,250, the court considered his second spouse's income as a factor and found that a material change in circumstances had occurred. See also In re Marriage of Johnson, 299 N.W.2d 466, 467 (Iowa 1980) (ex-husband's reduced salary not substantial change in circumstances in view of marriage to second spouse with substantial income).

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[1] Gross weekly wages of $311.23 multiplied by 52 weeks.

[2] Although Kirk testified his wife's salary was $11,000, the tax returns for 1980-1983 show she did not earn less than $14,000. Further, the record shows that her kidney disease has not affected her employment, and that future dialysis is a matter of sheer speculation.

I also believe that modification is not barred on the grounds that the change in circumstances was contemplated at the time of the original decree. The trial court may have contemplated Kirk remarrying. It may also have contemplated that Kirk's new spouse would be employed. Neither event would be unusual. The question we face, however, is not whether the court contemplated marriage to a working spouse, but whether it contemplated Kirk having an increased ability to pay child support. Because of silence in the original decree, our determination of this question is necessarily based upon inference. I cannot say that a decree ordering total annual support payments of $2,400, when the payor gets to claim two dependent tax deductions, shows contemplation that the payor would someday have the ability to pay child support that was exhibited by Kirk at the modification hearing.

The change in circumstances does not, however, justify doubling the support amount. I would modify the decree to provide for payment of $160 per month per child, and affirm the provision of the trial court's modification order that requires Kirk to pay one-half of medical and dental expenses not reimbursed by insurance. I would order the modification to become effective as of the date the trial court's modifying decree was entered: May 29, 1984.