FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

KENNETH D. ROBERTS,

Appellant,

vs.

KAY E. ROBERTS,

Appellee.

Filed October 21, 1980

0-241
2-64237

Appeal from Polk District Court - Luther T. Glanton, Jr., Judge.

Petitioner-father appeals from trial court's dismissal of his application for modification of his dissolution decree contending a reduction in his income, together with an increase in respondent-mother's income, constitutes a substantial change of circumstances justifying reduction in his child support obligations. REVERSED AND REMANDED FOR ENTRY OF ORDER.

Robert J. Kromminga and William H. Michelson, Des Moines, Iowa, for petitioner-appellant.

Robert W. Pratt of Redberg, Brick, Tan, Pratt & Ward, Des Moines, Iowa, for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

JOHNSON, J.

Petitioner-father, Kenneth D. Roberts, appeals from trial court's dismissal of his application for modification of a dissolution decree. Petitioner contends a reduction in his income, together with an increase in respondent-mother's income, constitutes a substantial change of circumstances thereby justifying a reduction in his child support obligations. We agree, and therefore, reverse and remand this case to trial court for entry of an order reducing respondent's child support obligations from $250 per month per child to $175 per month per child.

The parties' marriage of eight years was dissolved by final decree on July 27, 1977. Petitioner was ordered to pay respondent $200 per month alimony and $400 per month ($200 per child) child support for one year; thereafter, alimony was to cease but child support payments were to increase to $250 per month per child until each child reached majority.

Petitioner filed an application to modify the child support provisions of the decree in July, 1978. Respondent also filed an application to increase the child support award. Trial court denied both requests on August 10, 1978. The court found petitioner's earning capacity at his new job with Midwest Telephone Company, which was scheduled to commence October 14, 1978, remained at the $30,000 figure upon which the decretal court relied in determining child support and alimony amounts. The court found petitioner's application for reduction in child support to have been prematurely brought as the alimony provision had ceased and petitioner's remarriage did not constitute a substantial change in his financial condition.

With reference to the respondent's financial situation, trial court found her earnings to be greater than the projected $100 per week in the dissolution decree, but that higher babysitting fees resulting from her irregular hours of employment reduced her earnings. The court denied respondent's request for increased child support due to inflation, holding she had not made the required showing of a substantial change of circumstances.

Petitioner filed a second application to modify the decree in April, 1979. He claimed that a reduction in his earnings to less than one-half that contemplated by the court at the time of the decree, in combination with respondent's substantial increase in earnings, warranted a reduction in his child support obligations. The court found that, although petitioner's earnings were at least $16,000 per year (rather than the $30,000 net income utilized by the decretal court), this did not constitute a substantial change

in circumstances. The court further found petitioner's job change to be a voluntary or self-inflicted reduction in earning capacity. Respondent's earnings from auto sales employment were found to guarantee no more than $100 per month. The court noted that the instability of employment in the automobile industry would not guarantee the support of the two children. Finally, relevant here in denying petitioner any relief, the court found inflation should be considered in determining the support award. From trial court's adverse ruling, petitioner brings this appeal.

I. Scope of Review. Our review of modification proceedings is de novo. Iowa R. App. P. 4. We review the facts as well as the law and from the credible evidence, determine rights anew on those issues properly presented. In re Marriage of Horstmann, 263 N.W.2d 885, 888 (Iowa 1978); In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to trial court's finding of fact, especially with regard to credibility of witnesses, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Modification of Child Support. Petitioner seeks a "substantial" reduction in his child support obligations of $250 monthly per child. Respondent contends that petitioner's decline in earnings between the first modification proceeding in 1978 and this second proceeding in 1979 was only $114 per month and thus cannot constitute a substantial change in circumstances. Respondent also asserts that in the one year between the two proceedings, the court could not find the required permanent or continuous change necessary to support a modification order.

In light of the construction of section 598.21, The Code 1966, given in Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972), we agree with respondent that we must compare the circumstances present at the time of the modification proceeding in 1979 with those present at the time of petitioner's initial modification proceedings in 1978. The situation of the parties prior to August, 1978, was considered by the first modification court and should not be considered again by the court at this time.

To prevail in his claim, therefore, petitioner must establish by a preponderance of the evidence, that a substantial change in circumstances has occurred during the intervening period between the modification applications. Full, 255 N.W.2d at 159. The change relied on must be permanent or continuous, not temporary. Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973). The circumstances which have changed must be those which were not within the contemplation of the trial court when the original decree was entered or at the time of a subsequent intervening proceeding which considered modification of the original decree. Full, 255 N.W.2d at 159. A decree

should not be modified unless its enforcement will be attended by positive wrong or injustice as a result of the changed conditions. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978).

In the court's findings in the first modification proceedings, the court clearly stated petitioner's application to modify was prematurely brought. The court found petitioner's earnings potential to be $30,000 whether he was with Philadelphia Carpet (his employer at the time of the decree) or Midwest Telephone Company (the new employer). The court made no findings regarding petitioner's 1978 income, basing its decision to deny modification on his 1977 earnings. It appears the court felt petitioner could earn enough at the new sales position to compensate for the greatly reduced earnings during the first half of 1978 at Philadelphia Carpet. In finding petitioner's application to be premature, the court left open the opportunity for reconsideration of petitioner's contentions. This, of course, is in accordance with section 598.21, The Code.

Petitioner contends that his income has dropped to less than one-half the income projected by either the decretal court or the first modification court, while respondent's income has risen, and that these factors are sufficient to meet the substantial, material change requirements for modification of the child support provision. We agree.

The second modification court, in denying petitioner's relief, found his claim to be controlled by Ellis where the supreme court said "[a] defendant cannot voluntarily abandon his employment, reduce his wages, or by other conduct bring about a reduced income and thereby avoid, or cause the reduction of, a reasonable support order . . . ." Ellis, 262 N.W.2d at 268 (quoting Commonwealth ex rel Mazon v. Mazon, 163 Pa. Super. 502, 505, 63 A.2d 112, 114 (1949)).

We agree with petitioner's assertion that the court's reliance upon Ellis is misplaced. The husband in Ellis held four degrees, including a doctor of veterinary medicine degree. At age 62, he decided to voluntarily retire from his $36,500 a year position. His retirement pension was $750 per month. He claimed, without supporting evidence, that he wanted to retire and move to Florida due to job pressures and health problems. Trial court found Ellis's testimony of future plans to be evasive; it appeared, despite Ellis's contention that he was going to retire in Florida, that he had plans to the contrary. Trial court found the retirement voluntary but nonetheless reduced his alimony obligations from $400 to $362.50 per month because his former wife's income

had increased slightly more than the inflation rate. On appeal, the supreme court applied the principles of Reed v. Reed, 260 Iowa 1166, 1168, 152 N.W.2d 190, 191 (1967), where it was said:

> "Commendable as it may otherwise be, the self-imposed termination of employment by any person in order to obtain more schooling cannot be looked upon with favor when it is detrimental to his child's best interests and at the resultant expense of the former spouse."

Ellis, 262 N.W.2d at 267.

The supreme court found Ellis was not free to plan his future without regard to his obligation to his first wife, and that he could not arbitrarily phase her out of his future. The court also noted that similar obligations compel many to keep employment which may be difficult, undesirable, and even physically or mentally painful. Id. In reversing the trial court's modification, the court further found that even if Ellis's termination of his government position was justified, he still had a substantial earning capacity and therefore was able to meet his alimony obligation. The court then held "[w]hen a person's inability to pay alimony or child support is self-inflicted or voluntary, it will not constitute a ground for reduction of future payments." Id. at 268.

In this case, even if petitioner's actual termination of his employment, which in 1978 was anticipated to net $30,000, was voluntary and self-inflicted, the circumstances leading to petitioner's decision were quite different from those in Ellis. In 1978, due to declining profits, petitioner's employer, Philadelphia Carpet, dramatically reduced petitioner's guaranteed minimum draw, commission rate, expense allowances, and benefits. Petitioner testified this would have reduced his 1978 income to approximately one-half of his 1977 income. Petitioner then estimated that his income for 1978 would have been between $11,000 and $15,000. After leaving Philadelphia Carpet in mid-1978, petitioner's next position was in sales with Midwestern Telephone Company. Petitioner found his earnings from this position to be too insecure in light of the obligations he had. He therefore left for a non-sales position with a steady, stable income, netting $12,480 annually. Petitioner testified to accepting this position in order to stabilize his own lifestyle. We see no "design" or deliberate attempt by petitioner to reduce his income in order to reduce his child support payments. Petitioner's intent, as he testified, was to stabilize his income so he could pay his debts. We do not believe petitioner should be, in effect, punished for responsibly seeking stable and secure employment. The evidence shows that petitioner's earnings in all probability would have been in a comparable range whether he had stayed with Philadelphia Carpet or

Midwestern Telephone Company, instead of going to Armstrong Rubber Company. The only major difference appearing in the record is the security of the steady income offered at Armstrong.

From the record, we conclude petitioner's earnings would not have fulfilled the $30,000 net income predicted by both the decretal court and the first modification court. His actual earning capacity likewise falls far short of the $40,000 earning capacity found by the second modification court. Given petitioner's employment history as evidenced by tax returns in the record, it appears the first modification court unrealistically assessed the petitioner's ability to meet his obligations by using as a basis one unusually high income year. A better practice would have been to determine petitioner's child support obligations on the basis of the criteria set forth in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974), which would have included consideration of his earnings history. We therefore find no evidence that such a drastic reduction in petitioner's income was contemplated by the court at the first modification hearing.

Petitioner also contends respondent's employment situation was not within the first modification court's contemplation. That court, in noting that the decretal court did not expect her earnings to exceed $100 net per week, made findings that her earnings were over the prediction, but that the difference was offset by high babysitting fees. The court, therefore, considered her earnings to be very little, if any, over the original court's findings. Yet, respondent testified to averaging $660 net per month, and often more, that her total income for 1978 was $11,600, that she had been steadily employed for two years as an auto sales person, that she had a car furnished by her employer, and that she drew $100 weekly against commissions. From this, the second modification court concluded respondent was not guaranteed a salary in excess of $100 per week and took notice of her employment in the unstable automobile industry.

From our review of the record, we conclude respondent's income was as she testified, $660 net per month, and that she had maintained the same employment for over two years. We find this continuous level of earnings was not within the first modification court's contemplation and was inaccurately assessed by the second modification court.

The second modification court also cited inflation as a further reason not to disturb the child support provisions of the decree. The impact of inflation on purchasing power on both parties may be considered in a modification hearing, but inflation alone is

not enough to justify modification. See Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974); Spaulding, 204 N.W.2d at 634. While acknowledging that inflation effects both parties, we will consider the additional financial burden inflation adds to respondent's costs in rearing the children. Bice v. Bice, 251 N.W.2d 211, 211 (Iowa 1977). We find, however, that a number of respondent's additional expenses appear to be more related to acquisition of possessions and home-improvements, rather than to the needs of the children. We therefore see no difference in the impact of inflation on either party and, contrary to the modification court, do not rely on it as a determining factor.

In conclusion, we believe petitioner has demonstrated a greatly reduced income, resulting from factors largely beyond his control; this alone is sufficient to justify modification. See Mears v. Mears, 213 N.W.2d 511, 518 (Iowa 1973). Petitioner's circumstances, together with respondent's significantly increased earnings, are certainly sufficient to constitute the substantial change in circumstances required to justify a modification of child support. See In re Marriage of Habben, 260 N.W.2d 401, 403-04 (Iowa 1977). Further, both parties are responsible for the support of children, proportionately according to their ability to pay. Spaulding, 204 N.W.2d at 636. In light of the record made, we find it would be an injustice to enforce the original decree. Therefore, we reverse the trial court's order dismissing petitioner's application and remand this case for entry of an order reducing petitioner's child support obligations to $175 per child per month.

REVERSED AND REMANDED FOR ENTRY OF ORDER.

All judges concur except Oxberger, C.J., and Carter, J., who dissent.