

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 24 1984

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DUANE ASSINK AND JUDITH K. ASSINK

UPON THE PETITION OF
DUANE ASSINK,

Petitioner-Appellant/Cross-Appellee,

AND CONCERNING
JUDITH K. ASSINK,

Respondent-Appellee/Cross-Appellant.

) Filed January 24,
1984) 3-408
2-69365

)

)

Appeal from the Iowa District Court for Mitchell County—B.C. Sullivan,
Judge.

Petitioner-husband appeals and respondent -wife cross-appeals from the trial court's order on petitioner-husband's application for modification of the decree dissolving the parties'marriage. AFFIRMED.

Harlan M. Hockett and Joseph G. Bertogli of Flagg, Hockett, Benhart & Bittner, Des Moines, for petitioner-appellant.

Jerry H. Folkers of Dunkelberg, McKinley & Folkers, Osage, for respondent-appellee.

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

OXBERGER, C.J.

Petitioner-husband appeals and respondent-wife cross-appeals from the trial court's order on petitioner-husband's application for modification of the decree dissolving the parties' marriage. We affirm.

I. Scope of Review

Our review of this equitable proceeding is de novo. Iowa R.App. P. 4. While we are not bound by the findings of the trial court, we do give them weight especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7); See In re Marriage of Novak, 220 N.W.2d 582, 597 (Iowa 1974) and In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrl, 241 N.W.2d 923, 926 (Iowa 1976).

II. Were Children Self-Supporting?

Duane asserts that Denette and Doreen became self-supporting in October 1980, when the custodial mother moved from Osage to Charles City and left the girls with other families in Osage to finish their high school education. He contends the child support for those two children should have been terminated at that point in time. The language in the decree that Duane relies on is as follows:

[P]etitioner should pay to the respondent as child support the sum of \$600 per month until Denette attains the age of 18, or marries, or becomes self-supporting. . . until Doreen has attained the age of 18 years, has married or has become self-supporting.

A self-supporting child is an emancipated child. See 67A C.J.S. Parent and Child § 5 (1978). Emancipation as the term is used in the law of parent and child means the freeing of a child from the custody of the parent and from the obligation to render services to him. Vaupel v. Bellach, 154 N.W.2d 149, 150 (Iowa

1967). The fact that a child is outside the home expending his own money does not demonstrate emancipation. Id. at 151. Emancipation is not to be presumed, but determined on the particular facts and circumstances of each case. Id. at 151.

The facts in this case convince us that Denette and Doreen did not become self-supporting in October of 1980. Denette testified that while she was going to school Judith contributed to her school lunches and gave her support money in the form of checks, cash and graduation money which was used to help pay for her car. Although Denette did not pay rent to the family she was living with, Judith did give the family a freezer as rental compensation.

Doreen testified that her mother gave her money if she could whenever Doreen needed it. In addition, Judith contributed groceries and meat for her daughters, took them shopping when they came to Charles City and maintained weekend visitations with them. It is important to note that both Doreen and Denette testified that they could not have supported themselves without the continuing help from Judith. We find the foregoing evidence does not depict self-supporting children.

Doreen did testify, however, that in November of 1981, she moved in with Kurt Elliot, whom she later married. The evidence indicates from that point in time on, Kurt paid virtually all the expenses for both Doreen and him.

The trial court found that there was justification for cutting off the child support to Doreen as of November of 1981 as she became emancipated when she moved in with Kurt Elliot. However, the court concluded that support for Denette should continue until she completes her education at NIACC in Charles City, but not past age 22. See Iowa Code §598.1(2). Our de novo review of the record supports that finding. Therefore, we affirm that portion of the trial court's ruling.

III. Substantial Change

Duane alleges that since his income has decreased dramatically and his wife's increased, he is entitled to a reduction of child support. The power of the court to modify child support exists only when there has been a material and substantial change in circumstances since the date of the original decree. Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973); Iowa Code § 598.21(8)(1981). A divorce or dissolution of marriage decree will not be modified as regards child support provisions unless it is proven by the proponent of the change by a preponderance of the evidence that enforcement of the decree will be attended by positive wrong or injustice as a result of material and substantial changes in the circumstances since the date of the original decree. Mears v. Mears, 213 N.W.2d at 515; Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973). The changed circumstances relied upon must be such as were not within the knowledge or contemplation of the court when the decree was entered and must be of a permanent or continuous nature. Mears v. Mears, 213 N.W.2d at 515. Where a change of financial condition of one or both parties is relied upon as a basis for modification of child support provisions of divorce or dissolution of marriage decree, it must be substantial. Spaulding v. Spaulding, 204 N.W.2d at 635.

Duane Assink appears to be a capable man. In 1979 he made \$22,000 working for Biotech. In 1980 Duane established his own company; however, in 1981 he only made \$6000. On its face, this appears to be a substantial change in circumstances. However, it is one of Duane's own making. The evidence indicates that Duane believes his business is going to improve, that he believes he can make as much money here as in another job and that the low income level is

only temporary. In addition, Duane is drawing \$1000 per month with the corporation paying his travel expenses. The child support payments complained of amount to \$300 per month. We do not believe contributing 30 percent of his income for his children's benefit will result in a positive wrong or injustice.

Therefore, we affirm the trial court's ruling in total.

AFFIRMED.