IN THE COURT OF APPEALS OF IOWA

No. 1-309 / 90-1643

369

IN RE THE MARRIAGE OF TERRY KESTER and LARRY KESTER

Upon the Petition of

TERRY KESTER, n/k/a TERRY HOWARD,

Appellant,

and Concerning

LARRY KESTER,

Appellee.

Appeal from the Iowa District Court for Taylor County, Dale B. Hagen, Judge.

Petitioner challenges the district court's modificat n of the parties' prior dissolution decree. **AFFIRMED S MODIFIED.**

Ronald D. Bonnett of Travis and Bonnett, Bedford, for appellant.

Ann M. Nielsen of Nielsen & Nielsen, P.C., Corning, for appellee.

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

SCHLEGEL, J.

Terry and Larry Kester were divorced on September 22, 1983. The decree awarded Terry custody of the parties' two minor children and ordered Larry to pay $300 per month in child support. The decree also ordered Larry to be responsible for the children's dental and optometric expenses. Since the decree, both Terry and Larry have remarried; both have children from their current marriages.

Larry has been employed at Red Star Mills since prior to the original dissolution. In addition, Larry has continued to have a part-time farming operation. For the year 1990, Larry's projected gross income from Red Star Mills was approximately equal to Terry's gross earnings as a manager at the Casey's General Store in Waukee, Iowa. Additionally, Larry's farm income fluctuated between profits and losses. The district court did not include the farming operation income when it increased Larry's child support obligation to $400 per month and gave him the income tax exemption for the parties' youngest child.

On appeal Terry argues the trial court should have held Larry in contempt for not reimbursing her for the money her insurance paid on the children's dental bills. She also believes the trial court should have considered Larry's farm income in determining his net worth. In addition, she claims the trial court abused its discretion by failing to order child support increases retroactive to the date of filing the modification application. Finally, she asserts there is no evidence in the record that Larry even requested the court to award him a tax deduction, nor did Larry show that he would be providing more than one-half of the youngest child's support. Accordingly, she believes she is entitled to the award of the tax exemption.

I.

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "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." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

> 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 in the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762. Our review of a modification proceeding is de novo. In re Marriage of Wahlert, 400 N.W.2d 557, 559 (Iowa 1987).

We agree with the trial court that there have been substantial and material changes in circumstances since the decree of dissolution of marriage.

A.

The trial court increased Larry's child support obligation taking into consideration only his income from employment. The court noted: "[I]f the respondent makes money from a part-time vocation, then it is inequitable that this should be added into his income as well." We disagree.

There is no distinction between full-time and part-time employment in Iowa Code section 598.21(8)(a), and no Iowa case has excluded income merely because it was derived from a part-time job. The trial court found Larry's net income from employment was $19,788. We add to this figure $298, Larry's average annual income from his part-time farming operation from 1986-1990.[1] We then determine his net

1. We reach this average by considering Larry's net income from his general farming operations and from his sale of breeding livestock as shown by his tax forms:

Year	General	Breeding	Annual Farming Income
1986	($4244)	$1408	($2836)
1987	756	-	756
1988	733	4098	4831
1989	(2800)	1243	(1557)

Total farming income: $1194
Average annual income: $298

income per month is $1674. We conclude Terry's net income per month is approximately $1650. Applying the December 31, 1990, child support guideline amount of thirty percent for two children, we find the amount of child support should be increased to $500 per month. See In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991); In re Marriage of McElroy, 475 N.W.2d 221, 224 (Iowa App. 1991). The child support should be reduced to $375 when only one child remains a dependent.

B.

Terry argues the trial court abused its discretion by failing to order the child support increase retroactively. Iowa Code section 598.21(8) does not specify when a child support increase must be effective. The trial court has the discretion to order an increase in child support to begin on the date of the modification application filing, In re Marriage of Shepherd, 429 N.W.2d 145, 147 (Iowa 1988), or on a date after the filing, see Cappel v. Cappel, 243 Iowa 1363, 1367-68, 55 N.W.2d 481, 484 (1952).

Terry's application for modification was filed on April 27, 1990. The hearing was held on September 6, 1990, and the court ordered the increase to begin on September 15, 1990. Terry was not unduly prejudiced by this prospective application. We believe the trial court did not abuse its discretion in failing to retroactively apply the child support increase.

II.

Terry also feels the trial court erred in awarding Larry the tax exemption for their youngest child. She claims there is no evidence in the record Larry requested the court to award him this tax deduction and that, in addition, Larry failed to show he would be providing more than one-half of the child's support.

The award of a tax exemption may be modified when the child support award is increased. In re Marriage of Habben, 260 N.W.2d 401, 404 (Iowa 1977). In his resistance to application for rule to show cause and answer to petition for modification, Larry alleged there had been a material change in circumstances which would warrant awarding him an income tax exemption for the minor children. Larry's modified child support obligation for the younger child now is $250 per month, amounting to $3000 per year. We do not believe this amount is sufficient to meet one-half of the child's expenses. See In re Marriage of Eglseder, 448 N.W.2d 703, 704-05 (Iowa App. 1989). Larry should not get the benefit of the exemption unless he proves that he provides more than one-half of the support for one of the children. Terry is entitled to the tax exemptions for both children.

III.

The trial court found Larry was not in contempt for failing to pay the insured dental expenses of the children. The dissolution decree ordered that during the period Terry maintained hospital and medical insurance on the minor children, Larry was to be responsible for the children's dental and optometric expenses. Terry's present husband has family dental insurance covering the parties' children provided through his employment at no expense to himself. Terry also provides dental insurance for her present husband and their child for $32 per month; the parties' children are also covered under this insurance at no additional cost. Terry has admitted that Larry has paid the uninsured dental expenses of the children.

Terry claims Larry willfully failed to pay for the total dental expense. The trial court found that any expenses not paid by insurance had been paid by Larry. The court noted: "[I]nasmuch as these expenses were paid by insurance and they were not an out-of-pocket expense to the [petitioner], that the respondent should not be responsible for paying those items. To order him to pay those would amount to a windfall to the petitioner." We agree and affirm the trial court on this issue. The court was correct in dismissing the contempt petition and in finding Larry did not need to pay Terry for dental expenses of the children covered by insurance.

IV.

In conclusion, we affirm the modification of child support, but increase its amount in view of the new guidelines and Larry's farm income. We modify the order to disallow the award of a tax exemption to Larry. In addition, we affirm the trial court's finding Larry is not in contempt of court.

Each party is to pay his or her own attorney fees, and costs are taxed one-half to each party.

AFFIRMED AS MODIFIED.