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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CHERYL A. RHODES AND STEVEN M. RHODES

UPON THE PETITION OF)
CHERYL A. RHODES,)
Appellee,)
AND CONCERNING)
STEVEN M. RHODES,)
Appellant.)

Filed April 28, 1978

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2-60773

Appeal from Polk District Court - Dale S. Missildine, Judge.

Respondent appeals the ruling of trial court on his application for modification of the dissolution decree. REVERSED AND REMANDED

Joseph B. Joyce, of Des Moines, counsel for appellant.

Brent D. Hege and Susan L. Ekstrom, of Des Moines, counsel for appellee.

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

DONIELSON, J.

Respondent-Steven M. Rhodes appeals the ruling of the trial court on his application for modification of the dissolution decree. Respondent applied for a reduction in his child support obligation established in the decree entered December 7, 1971. The decree provided that petitioner-Cheryl Rhodes was to be awarded custody of the parties' two minor children and that Steven was to pay a total of $50 per week, or $25 per child per week, in child support. At that time, Steven earned a net salary of about $400 per month.

In her answer to Steven's application, Cheryl admitted or denied the allegations contained in the application and requested that the court dismiss the application and grant "such other relief as to the Court may seem equitable in the premises." However, Cheryl neither filed a cross-petition for modification nor has she made any application for modification of her own.

Based upon Steven's testimony at the hearing on his application, the trial court found that he was employed almost continuously between 1971 and November, 1976. During this period, his net income fluctuated somewhat, tending to rise generally, up to as much as approximately $1000 per month during two periods. During this time, Steven became $4,275 in arrears in his child support obligation. He also married a woman who has a net monthly income of $504.18 and who receives $120 per month in child support from a previous husband. In February of 1976, Steven and his second wife purchased a house valued at $45,200, on which they pay $412.72 per month in mortgage payments. During this period, Steven and his wife acquired various other items, such as a sports van, two color television sets, and a deep freeze. In November, 1976, Steven was laid off a job which had provided him about $250 net salary per week. He was unemployed for about six weeks and then secured employment from which he earned a net salary of $567.16 per month. Apparently in response to this reduction in income, Steven sought the instant reduction of his child support obligation.

In its findings of fact, the trial court noted that Cheryl has been forced to accept Aid to Dependent Children in the amount of $294 per month. Based upon all the evidence, the court concluded that there had been a substantial change of circumstances, as alleged by Steven, but that the change represented an increase in Steven's

income and assets rather than a decrease. Accordingly, the court modified the decree so as to increase Steven's child support obligation from $50 to $70 per week.

Steven argues on appeal that the court was without authority to increase his child support obligation inasmuch as there was no application before the court expressly requesting such an increase. Cheryl contends that since the subject of child support was raised by the pleadings, her prayer for "general equitable relief" was sufficient to confer authority upon the trial court to modify the support award in whatever manner that was supported by the evidence.

The law is settled that a request for "general equitable relief" in an action in equity should be construed liberally and will often justify the granting of relief in addition to that contained in the specific prayer, provided it fairly conforms to the case made by the petition and the evidence. Anderson v. Yearous, 249 N.W.2d 855, 859-860 (Iowa 1977); Braverman v. Eicher, 238 N.W.2d 331, 335 (Iowa 1976); Pearson v. City of Guttenberg, 245 N.W.2d 519, 533 (Iowa 1976); Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 526-527 (Iowa 1974); Myers v. Smith, 208 N.W.2d 919, 922-923 (Iowa 1973).

In essence, Steven asserts that the trial court was without authority to increase his child support obligation in the absence of a specific request in an application and that the ruling of the trial court in this regard burst upon him as a totally unexpected "judicial bombshell." See Anderson v. Yearous, supra, at 858. In Skemp v. Olansky, 249 Iowa 1, 6, 85 N.W.2d 580, 583 (1957), the court stated:

> . . . It is true that even though the special relief prayed for in an action in equity is not supported by the evidence, a request for general equitable relief may often justify the court in awarding other relief, and that such a request is generally to be granted liberally. But the rule is not without limitations. (citations omitted) The relief granted under the general prayer must be consistent with the case made by the pleadings and must be such as will not surprise the defendant. He must have an opportunity to defend against whatever relief may be granted against him; it will not be granted if there is nothing in the prayer of the bill or in the facts asserted in the pleadings which fairly apprizes him that such relief is asked or may be granted against him. Fairness in the trial of the case demands that much. (emphasis added).

Accord, Johnson v. Johnson, 188 N.W.2d 288, 291-292 (Iowa 1971); Ferrari v. Meeks, 181 N.W.2d 201, 204 (Iowa 1970); State Board of Social Welfare v. Teeters, 258 Iowa 1113, 1120, 141 N.W.2d 581 (1966); Iowa City v. Muscatine Development Co., 258 Iowa 1024, 1032, 141 N.W.2d 585 (1966); Alcorn v. Linke, 257 Iowa 630, 638, 133 N.W.2d 89 (1965);

Schlotfelt v. Vinton Farmers' Supply Co., 252 Iowa 1102, 1112, 109 N.W.2d 695 (1961); Henry Walker Park Ass'n v. Mathews, 249 Iowa 1246, 1257-1258, 91 N.W.2d 703 (1958).

After reviewing the entire record, we conclude that the relief granted Cheryl was, at the very least, totally inconsistent with the case made by Steven and most certainly surprised him. Further, there are no facts or allegations in petitioner's answer which fairly apprize respondent that the relief eventually granted by the court was either requested or likely to be granted against him. In a case closely analogous to the instant one, Paintin v. Paintin, 241 Iowa 411, 41 N.W.2d 27 (1950), the husband filed an application for modification seeking a reduction in his child support obligation. However, the trial court, **sua sponte**, changed the custodial provisions of the divorce decree. In reversing the trial court, the supreme court stated:

> We cannot accept defendant's argument that the prayer of his application for general equitable relief is sufficient basis for the trial court's order relating to custody. Under such prayer a party is entitled to any relief consistent with the allegations of his petition and sustained by the proof, and no more. (citations omitted)
>
> As indicated, there is neither pleading nor proof of changed circumstances since the divorce which warrants the part of the order here challenged. Both the allegations of defendant's application and the evidence in support thereof relate to his claimed inability to pay the amount of child support fixed by the decree. We have frequently held relief should not be granted which has no foundation in the allegations of the pleading and is not justified by the evidence. **Id.**, 241 Iowa at 417.

Since, in the instant case, there are no allegations or facts in petitioner's answer which would apprize respondent that she was seeking an increase in child support, and since there is no evidence in the record which would indicate that she advocated such an increase at any stage of the proceeding, the relief ultimately granted by the trial court clearly came as a surprise to respondent and, accordingly, we must reverse. Furthermore, on our **de novo** review, we conclude that respondent's application for modification should be denied.

We wish to make it clear that our decision is to be construed without prejudice to petitioner in the exercise of her right to seek whatever redress in a subsequent modification proceeding to which she may deem herself entitled. The judgment of the district court is reversed and the cause is remanded with instructions that judgment consistent with this opinion be entered.

REVERSED AND REMANDED.