

FILED

NOV 30 1987

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

N RE THE MARRIAGE OF MARY LOU MICHAEL AND CHARLES S. MICHAEL

Upon the Petition of)

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MARY LOU MICHAEL,)

Petitioner-Appellee,)

Filed November 30, 1987

And Concerning)

CHARLES S. MICHAEL,)

7-367
87-386

Respondent-Appellant.)

Appeal from the Iowa District Court for Fayette County (No. 39882),
James L. Beeghly, Judge.

Respondent father appeals from a trial court decision rejecting respondent's application for a further reduction of his child support payments and his request for attorney fees and court costs from the petitioner mother in this case.

AFFIRMED.

Dale E. Goeke of Hageman, Goeke & Egli, Waverly, for
respondent-appellant.

Ronald L. Van Veldhuizen, Oelwein, for petitioner-appellee.

Considered by Donielson, P.J., and Schlegel and Hayden, JJ.

DONIELSON, P.J.**215**

Respondent father appeals from a trial court decision rejecting respondent's application for a further reduction of his child support payments and his request for attorney fees and court costs from the petitioner mother in this case. Respondent contends that the court erred by failing to adequately consider his poor financial situation vis-a-vis petitioner. Petitioner mother requests attorney fees on appeal. We affirm.

The parties herein were divorced on October 16, 1985. At that time, joint custody of the parties' four children was awarded to both parties with the physical custody of all the children with petitioner. Respondent was required to pay \$50 per child per week child support. Subsequent to this decree, respondent was terminated from his \$2,500 a month position with John Deere. Also, one of the children desired to remain with respondent. Thus, a modification stipulation was entered into on April 29, 1986, changing the custody arrangement and temporarily reducing respondent's child support obligation to \$25 per week per child (for a total of \$50 per week) "in response to respondent's unemployment." The stipulation further noted that either party may apply for an adjustment of support without demonstrating a substantial change in the circumstances. By this time, one of the parties' children in petitioner's custody reached eighteen, thereby terminating the child support payments on his behalf. On December 24, 1986, respondent moved to further reduce his obligation and to have this reduction applied retroactively to September 1, 1986, since his unemployment benefits had terminated requiring him to resort to ADC and food stamps. This request was denied by the trial court, and respondent filed this appeal. Respondent requests this court award him attorney fees for the hearing below, while petitioner requests attorney fees from respondent for defending this appeal.

Our scope of review is de novo. Iowa R. App. P. 4. The authority of our courts to modify dissolution decrees is grounded in both statute and the cases. Iowa Code section 598.21(8) (1985) states that "[t]he court may subsequently modify orders made under this section [dealing with, inter alia, child support payments] when there is a substantial change in circumstances." We are guided in our application of this authority by a number of principles which have emerged from our cases. The change must be material and *substantial and must occur after the entry of the decree*. In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977). It must appear that *continued enforcement of the original decree would, as a result of the changed circumstances, result in positive wrong or injustice*. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). The change in circumstances must be permanent or continuous rather than temporary. In re Marriage of Mayer, 347 N.W.2d 681, 683 (Iowa App. 1984). The change in circumstances must not have been within the contemplation of the trial court when the original decree was entered. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974). The district court is granted 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., In re Marriage of Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983) (application to modify child support provisions); Norenberg v. Norenberg, 168 N.W.2d 794, 797 (Iowa 1976) (application to modify visitation).

Respondent contends his child support payments should be suspended because his unemployment benefits were terminated and he began receiving welfare assistance in September 1986. He relies on the language in the modification decree that either party could apply for review and adjustment of child support payments without demonstrating a substantial change in circumstances occurring subsequent to the decree.

Evidence was adduced at the hearing concerning both parties' financial situations. Petitioner still had her secretarial job but her hours had been reduced so that she earned less than \$650 per month. The second job she had was eliminated because the pizza place where she worked went out of business. Thus, her gross income has been reduced from \$1,000 per month to less than \$650 per month since the initial decree. Respondent countered that he had been unable to find work despite making two or more contacts per week while on unemployment. Petitioner responded by noting that respondent has had a long-standing offer from his brother to work in insurance, yet he has failed to take the necessary steps to become licensed until only recently. Respondent's mention of pursuing a job with the postal service was countered by noting he had not yet taken the necessary exam. At trial, respondent stated that his sole income was \$445 per month consisting of welfare benefits.

The trial court's ruling on respondent's application to modify stated in pertinent part:

Having heard the evidence and arguments of counsel, the Court finds that the Respondent has not made a good-faith effort to obtain productive employment since the termination of his employment with John Deere Company. Apparently only recently he has applied for educational materials to become licensed in the insurance business, though he has had a long standing offer to enter such business from his brother. The Petitioner has been cut back in her hours and her income has been substantially reduced. She has more children to support than does the Respondent. She is also facing a child-support recovery action by reason of the Respondent having applied for, and received, Aid to Dependent Children benefits.

Under the record made here, the Court is concerned that a reduction in child support payments would further encourage the Respondent to procrastinate in finding productive employment. Also the needs of the children have not decreased just because his income has.

Iowa Code section 598.21(8) (1985) recites those factors to consider in analyzing claims for modification of a decree's support provision, which include earning capacity, economic circumstances, and cost of living. Application of

those factors to the evidence in this case supports the trial court's overruling respondent's application for modification. We find of particular importance in our own determination the following facts: 1) respondent's change in circumstances is temporary and not permanent (see In re Marriage of Vetterneck, 334 N.W.2d 761, 763 (Iowa 1983), wherein the court noted that a current inability to pay has become less a consideration and long-range capacity to earn money has become more a consideration); 2) the modification stipulation of the parties, incorporated by the trial court in the modification decree, states that the new child support level of \$25 per week per child "is in response to the Respondent's unemployment"; 3) respondent's current status is due to a reduction in earnings, not a reduction in earning capacity, a factor of Iowa Code § 598.21(8); and 4) respondent has not made a good faith effort in finding new employment when he has had available opportunities. We affirm the trial court's finding that respondent is obligated to pay \$25 per week per child.

Because of our ruling, we need not address respondent's argument that a reduction in child support payments should be retroactive to September 1, 1986, the date his unemployment benefits ceased and he began receiving public assistance.

Respondent requests attorney fees and court costs for the trial be paid by petitioner; petitioner requests attorney fees on appeal. Based on the financial resources of the parties, we order each party to pay his or her own attorney fees. Costs are taxed to respondent.

AFFIRMED.