

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1983

CLERK SUPREME COURT

IN RE THE MARRIAGE OF ALVIN N. OHLINGER AND LEANETTE M. OHLINGER

00119

Upon the Petition of)

ALVIN N. OHLINGER,)

Petitioner-Appellant,)

Filed January 26, 1983

And Concerning)

LEANETTE M. OHLINGER,)

Respondent-Appellee.)

2-423

2-68065

Appeal from Pottawattamie District Court - Keith E. Burgett, Judge.

Petitioner-husband appeals from the trial court's denial of his application to modify the parties' dissolution decree and from its failure to find respondent-wife in contempt for violating the visitation provisions of the decree. AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED.

Charles R. Hannan of Perkins, Sacks, Hannan & Hughes, Council Bluffs, Iowa, for petitioner-appellant.

Fred J. Kraschel of Kraschel & Comes, Council Bluffs, Iowa, for respondent-appellee.

Heard en banc.

PER CURIAM

Petitioner-husband appeals from the trial court's denial of his application to modify the parties' dissolution decree and from its failure to find respondent-wife in contempt for violating the visitation provisions of the decree. He claims that economic circumstances have changed such that his child support and alimony obligations should be reduced, and that the court erred in: 1) failing to specify his visitation rights, 2) admitting certain testimony and 3) failing to find the wife in contempt for denying him visitation with the parties' two children. We affirm the trial court's order with modification and remand.

On June 12, 1980, a decree was entered dissolving the marriage of Alvin and Leanette Ohlinger. Leanette was given custody of the children (Dianne, born September 19, 1966, and Susanne, born October 17, 1970), with unspecified visitation rights to Alvin. He was ordered to pay child support in the amount of \$200 per month per child until each child reaches the age of 18, becomes emancipated or completes high school, whichever comes first. He was also ordered to pay Leanette alimony of \$100 per month until her death or remarriage, whichever comes first.

On August 28, 1980, Alvin made an application for a contempt citation against Leanette, charging, among other things, that she has "refused to allow any communication or visitation by Petitioner with the children of the parties." Leanette defended her actions by claiming them to be in response to Alvin's threatening and harassing telephone calls and her concern for the children's welfare. Alvin then applied to the court to have the 1980 decree modified in various respects. In his application he stated that, since the date of the entry of the decree, he has had to have one of his eyes surgically removed and replaced with an artificial eye. He further claims that he has had to leave his employment, where he was earning approximately \$20,000 per year, because of noxious fumes there which could have caused the loss of his remaining good eye. This leaves him

with only his small lawn care business netting him approximately \$15,000. Because of this allegedly significant reduction in income, Alvin claimed that his alimony and child support obligations should be reduced accordingly.

A hearing was held on the application to modify the decree, and the court's ruling was issued on January 12, 1982. Regarding Alvin's economic claims, the court found that his eye problem was known to the decretal court and that he expected to do well in his lawn care business. The court thus concluded that Alvin failed to sustain his burden of proving a substantial and material change in circumstances since the date of the original decree and refused to modify the child support and alimony provisions of the decree. Regarding the contempt application, the court held that Leanette was not in contempt for not allowing visitation because she honestly believed that the girls' emotional problems were a direct result of Alvin's conduct and abusive language. The court concluded that Alvin should be allowed some visitation but did not specify any terms since he made no such request in his application. Alvin then brought this appeal.

I. We first consider Alvin's claim that his child support and alimony obligations should be reduced. We may modify such provisions only when there has been a substantial change in circumstances. Iowa Code § 598.21(8). The burden of proving such change is on the party seeking modification who must show, by a preponderance of the evidence, that the changed circumstances were not within the contemplation of the trial court at the time the original decree was entered. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa Ct. App. 1979).

We believe Alvin has sustained his burden of proof on this issue. Although the decretal court was aware of his eye condition, we do not think the court knew the seriousness of the condition and that Alvin would have to leave his employment and rely solely on the income from his lawn care business. As a result of these factors, his total income has been reduced by at least one-third, even if his own business does as well as expected. Under these circumstances, we

conclude that Alvin's child support obligation should be reduced to \$125 per month per child, subject to the same termination provisions as contained in the original decree. We approve the trial court's refusal to reduce the alimony award.

II. Alvin next claims that the trial court should have found Leannette in contempt for failure to allow him visitation. We note first that Alvin should have raised this issue in a certiorari proceeding rather than in this appeal; however, we may treat this issue as having been raised on certiorari and thus deal with it on the merits. Iowa R. App. P. 304; Rausch v. Rausch, 314 N.W.2d 172, 173-74 (Iowa Ct. App. 1981).

Our supreme court has recognized two defenses available in a contempt proceeding: 1) indefiniteness or uncertainty of the order, and 2) absence of willfulness in disobeying the order. Beyers v. Kilburg, ___ N.W.2d ___, ___ (Iowa 1982). We agree with the trial court here that Leannette's conduct was not in contempt of court. Both defenses recognized in Beyers are applicable here. First, the original decree states only that Alvin is to have a "right of visitation" without specifying when he is to exercise that right. Without such specificity, Leannette had no way of knowing when Alvin was entitled to see their children and when he was not. Second, the record gives no indication of any willful disobedience of the decree by Leannette. She testified that she has done all she could to foster a normal parent-child relationship between Alvin and their two daughters, but to no avail. The girls have been subjected to many abusive and threatening telephone calls by Alvin and his new wife to the point where the girls are afraid of Alvin and have experienced emotional problems. In light of these circumstances, we agree that Leannette did not willfully disobey the original decree with any malicious intent to deprive Alvin of visitation; rather, she acted pursuant to her honest belief that Alvin's conduct was harmful to the girls. The trial court correctly found Leannette not in contempt. In reaching this conclusion, we have not considered the testimony of Franklin Weber, the admissibility of which was

challenged by Alvin below and in this appeal. Therefore, we need not consider his argument in this regard.

III. Despite our misgivings about Alvin's conduct toward his daughters, we agree with him that he is entitled to specific visitation rights. Although he did not make this request in his application to modify, this issue was raised in his application for contempt and was tried by consent at the modification hearing. We hold that Alvin is entitled to visitation, and is entitled to have that visitation specified. Due to the apparent alienation of the children, it is probable that some form of counselling to resolve the apparent fears and anxieties of Diane and Susanne may be necessary. Such service is available to the parties, and provision for the same, as well as the management of the cost thereof, can best be determined by the trial court, after hearing.

This matter shall be remanded to the trial court for hearing to determine the appropriate specific visitation, and the provision of such counselling as may be found to be necessary or desirable. All parties should use diligence in assuring to the parties, as well as the minor children, an opportunity for a wholesome parent-child relationship. The case is remanded for proceedings in conformity with this opinion.

AFFIRMED IN PART; MODIFIED IN PART; AND REMANDED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting.)

I would affirm the trial court on the matter of the child support. Alvin's reduction of income due to his job change appears to be temporary in nature.