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CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**IN RE THE MARRIAGE OF DEBORAH MARIE LINN AND GREGORY LINN**

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| UPON THE PETITION OF **DEBORAH MARIE LINN,** | ) | |
| Petitioner/Appellee/ Cross-Appellant, | ) | Filed April 8, 1983 |
| AND CONCERNING **GREGORY LINN,** | ) | 2-388 3-67950 |
| Respondent/Appellant/ Cross-Appellee. | ) | |

Appeal from Carroll District Court, Louis F. Beisser, Judge.

Respondent-husband appeals from trial court's refusal to modify the decree dissolving the parties' marriage. Petitioner-wife cross-appeals. Custody is affirmed in respondent-father; wife is ordered to pay child support in the amount of $100 per month. AFFIRMED AS MODIFIED.

Thomas W. Polking of Wilcox, Polking, Gerken & Schwarzkopf, for respondent-appellant.

James R. Van Dyke, Carroll, for petitioner-appellee.

Heard en banc.

**PER CURIAM**

Petitioner Deborah Marie Linn and respondent Gregory Linn were married in 1973. They have one child, Jeremy, born in 1974. The 1977 decree dissolving the parties' marriage approved their agreement regarding custody and child support; Deborah was given custody of Jeremy, and Gregory was required to pay $60 per month child support. Three months after the decree was entered, the parties agreed that Gregory should have custody of Jeremy, and the decree was modified accordingly; Deborah was not required to pay child support.

In 1980, Deborah filed a petition for modification of the decree, requesting that custody of Jeremy be transferred to her. Gregory answered and also filed a petition for modification, requesting that Deborah be required to pay child support. Conflicting evidence was presented at trial regarding the parties' parenting abilities. Both parties have remarried and each now has a child by his or her new spouse. Evidence was also presented regarding the parties' income.

The trial court, in its ruling on the motion to modify or enlarge the decree, found that there had been no material and substantial change of circumstances which would warrant modifying the decree as to either custody or child support. From this ruling, Gregory appealed and Deborah cross-appealed.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law and determine anew those rights properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). We give weight to the findings of the trial court, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

I. We first address the argument raised by Deborah on cross-appeal that the trial court erred in refusing to modify the decree by changing custody of Jeremy from Gregory to her. The Iowa Supreme Court has consistently held that once custody has been fixed with one parent, that determination should be disturbed only for "the most cogent reasons." E.g., In re Marriage of Snyder, 276 N.W.2d 402, 404 (Iowa 1979). A noncustodial parent who seeks custody accordingly has the burden of establishing, by a preponderance of evidence, that since the court decree was entered circumstances have changed so substantially that the child's best interests make it expedient that custody be changed. Iowa Code § 598.21(8); Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976). This change of circumstances must meet the following criteria: it must be substantial and material; it must be more or less permanent or continuous; it must relate to the welfare of the children; and it must not have been within the contemplation of the trial court when the former decree was entered. Hobson, 248 N.W.2d at 139-40; see Snyder, 276 N.W.2d at 404. The noncustodial parent also must demonstrate an ability to more effectively minister to the child's well-being. In re Marriage of Ivins, 308 N.W.2d 75, 78 (Iowa 1981); Snyder, 276 N.W.2d at 404.

In the situation before us the parties stipulated that the father, Gregory, should have permanent custody of Jeremy, the parties' only child, and the court entered an order on April 19, 1977, providing the same. Since that time, Jeremy has remained in the custody and care of his father. The burden is therefore on Deborah to establish the requisite change of circumstances and to demonstrate that she can more effectively minister to the child's well-being.

The trial record and Deborah's brief on appeal indicate three areas of emphasis cited by Deborah as support for the proposition that she could more

effectively minster to Jeremy's well-being and that the decree should therefore be modified. These were that she and her new husband loved Jeremy; that they could provide better personal attention since one of them would always be home due to their job schedules; and that she felt there were some deficiencies in Jeremy's discipline, clothing, and religious training. Without reiterating the trial court's detailed disposition of each of these allegations here, we conclude that none of them meets the requirements for a material and substantial change of circumstances necessary for modification set forth in Hobson.

II. Having concluded that the trial court reached the proper result on the custody issue, we proceed to address Gregory's argument on appeal that the trial court erred in finding that he was not entitled to receive payments from Deborah for the support of Jeremy. Again, since this is a modification proceeding, Gregory must demonstrate the requisite change of circumstances with regard to support in order to reopen the issue. See Iowa Code § 598.21(8); Dworak v. Dworak, 195 N.W.2d 740, 741-42 (Iowa 1972). We believe that he has done so.

Since the time the former decree was entered, Deborah's annual income has increased from approximately $1,500 to approximately $8,000 and she has received $14,500 from a trust created by her grandmother. The cost of living has also increased dramatically during this period. In Spaulding v. Spaulding, 204 N.W.2d 634 (Iowa 1973), the Iowa Supreme Court held that the requisite material and substantial change of circumstances justifying modification was met under the following similar facts: the noncustodial's parents annual income had increased from $4,880 to $9,271 from the time of the original decree to the time of the petition seeking modification, and the cost of living had increased. Id. at 635-36. See also In re Marriage of Stutsman, 311 N.W.2d 73, 76 (Iowa 1981)(increase in child support found proper where noncustodial parent's income increased substantially,

child started school, and inflation stripped support dollar of about one-third of its purchasing power); Mears v. Mears, 213 N.W.2d 511, 518-19 (Iowa 1973)(increase in child support found proper in view of noncustodial's "substantial" increase in income from $9,000 to$12,450 per year and diminished purchasing power of dollar). On the basis of these and similar cases we conclude that the combination of factors cited by Gregory is sufficient to constitute the material and substantial change of circumstances required for modification.

In Iowa both parents are liable for the support of their children, not necessarily equally but proportionately based on relative ability to pay. In re Marriage of Carney, 206 N.W.2d 107, 112 (Iowa 1973); Dworak v. Dworak, 195 N.W.2d 740, 743 (Iowa 1972). Under the applicable law and the facts of this case we conclude that Gregory has established by a preponderance of evidence a right to modification of the former decree. We hold that Gregory is entitled to receive the amount of $100 per month from Deborah for the purpose of child support. This order shall be retroactive to September 25, 1980, the date upon which Gregory's application for modification was filed. See Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973); Cappel v. Cappel, 243 Iowa 1363, 1367-68, 55 N.W.2d 481, 484 (1952). The decision is hereby modified accordingly and affirmed in all other respects. Our consideration of the relevant cases leads us to the conclusion that the inclusion of a cost-of-living adjustment provision would not be appropriate in this case. See In re Marriage of Stamp, 300 N.W.2d 275, 276-81 (Iowa 1980).

AFFIRMED AS MODIFIED.