

FILED

MAY 30 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF PEGGY LOU SCHONE AND RONALD GENE SCHONE

Upon the Petition of	)	
PEGGY LOU SCHONE,	)	
Petitioner-Appellee,	)	Filed May 30, 1980
and Concerning	)	
RONALD GENE SCHONE,	)	0-118
Respondent-Appellant.	)	<u>2-63640</u>

Appeal from Scott District Court - Lowell D. Phelps, Judge.

Respondent appeals modification of support and visitation provisions of parties' dissolution decree. **AFFIRMED.**

Edward N. Wehr of Wehr & DeLange, Davenport, for respondent-appellant.

James D. Hoffman of Hoffman, Abbott & Silver, Davenport, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Respondent, Ronald Gene Schone, appeals modification of support and visitation provisions of parties' dissolution decree. On appeal, he asserts petitioner, Peggy Lou Schone, failed to establish a basis for the trial court's increasing his child support obligation from \$50 to \$65 per week and ordering him to return their daughter at 7:00 p.m. on the last day of each weekend and holiday visitation, rather than later in the evening as he had been doing. We affirm the trial court's modification.

Our scope of review in this equitable proceeding is de novo. Iowa R. App. P. 4. We review the facts as well as the law and determine from credible evidence rights anew on those propositions properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While weight is given to the trial court's findings, especially in the consideration of witnesses' credibility, we do not abdicate our function as trier de novo on appeal. Id; In re Locke, 246 N.W.2d 246, 249 (Iowa 1976).

I.

In the dissolution decree filed on January 6, 1977, Peggy was awarded custody of the parties' daughter, then one year old, and child support of \$50 per week. On February 5, 1979, Peggy applied for modification of the visitation and child support provisions of the decree, alleging as material changes of circumstance Ronald's alleged noncompliance with the visitation provisions of the decree and a change in the financial conditions of both parties. On May 24, 1979, the trial court modified the decree by increasing the child support to \$65 per week, reflecting one-half of the increased child care expense, and ordering Ronald to return their daughter at 7:00 p.m. on the last day of each weekend and holiday visitation.

II.

The power of the court to modify child support provisions exists only when the party seeking modification establishes a substantial, material change in circumstances from the time the decree was entered making it equitable and just that different terms be fixed. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978); Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974); Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). A decree should not be modified unless its enforcement will be attended by positive wrong or injustice as a result of the changed conditions. Ellis, 262 N.W.2d at 267.

The chief change in circumstances urged by Peggy in support of her claim relates to child care expenses for their daughter. She contends she and Ronald contemplated she would be employed at Ronald's firm to permit her to care for the child herself at home and avoid the need for child care and its attendant costs. Relying on this belief, she entered into the stipulated agreement accepted by the court. When Ronald terminated her employment there, she was forced to obtain other employment that required her to incur child care expenses of \$30 per week. Peggy asserts this additional expense justifies modification because of its detrimental impact on her financial condition. She also points for support to Ronald's increased income from the time of the decree. The trial court agreed with her stating:

... [Substantial] changes in circumstances include the fact that it was contemplated by the parties and by the Court on the entry of the Decree that Petitioner [Peggy] would be employed by Respondent [Ronald] in a manner that she could remain at home and care for the child without the expense of a babysitter, and Respondent by his actions made it impossible for this situation to continue after the month of October in 1977.

Ronald contends their discussion of avoiding the use of a babysitter was not a contemplation of its financial burden, but rather his preference the child be with Peggy and not a sitter, when not with him. This contention is not even supported by Ronald's own testimony. We agree with the trial court's conclusion that the parties contemplated this arrangement as a means to avoid the necessity of leaving their child with a sitter. Iowa R. App. P. 14(f)(7).

However, Ronald also argues it is the decretal court's, not the parties', contemplation of this arrangement and the need to provide for child care that should govern. He asserts the uncontested nature of the dissolution proceeding precluded the decretal court from learning of this arrangement, which in turn would cause the court to contemplate that Ronald's share of any child care expenses were provided for within his \$50 per month support obligation. Ronald would place the burden on Peggy of putting their arrangement before the court.

The changed circumstances relied upon for modification must be those not within the knowledge or reasonable contemplation of the court when the original decree was entered. Full, 255 N.W.2d at 159; Page, 219 N.W.2d at 557; Simpkins v. Simpkins, 256 Iowa 989, 991, 129 N.W.2d 723, 724 (1964); Welch v. Welch, 256 Iowa 1020, 1025, 129

N.W.2d 642, 644 (1964). The existing circumstances at the time of the decree are "those known or which with reasonable diligence should have been known to the parties and to the court at the time of the entry of the original decree; that is to say, those which were within the contemplation of the litigants and the court when the decree was entered." Simpkins, 256 Iowa at 991, 129 N.W.2d at 724. Since both parties concede the trial court did not have any actual knowledge of their arrangement, the question becomes whether with reasonable diligence the decretal court should have surmised their agreement and child care expenses.

We think it unlikely the court could have reasonably known of the employment relationship between Ronald and Peggy and its nexus to child care expenses. Ronald, however, contends it is reasonable to assume the decretal court contemplated the need for child care for a one-year old child, particularly since no alimony was awarded, thereby increasing the likelihood Peggy would have to work. Ronald further asserts Peggy bore the burden of calling to the court's attention any special circumstances. We find neither argument to be controlling.

As Peggy points out, there is no clear evidence in the record from which the court could have assumed child care expenses would be incurred. The court had before it the parties' financial statements and stipulated settlement, nothing more. While perhaps it would have been reasonable to contemplate Peggy's need to find employment, it is not necessarily reasonable to assume she would be forced to pay someone to care for their daughter while working. There are numerous work and sitter situations that would not have required the incurring of child care expenses. To assume under these circumstances the court contemplated Peggy's need to pay a sitter is unreasonable.

We also do not find that Peggy should be barred from seeking modification because she failed to notify the decretal court of the arrangements involved here. If there is such a burden, Ronald would seem to share it equally. Imposing such a burden, however, would require each party to anticipate possible problems and present to the court all the facts, negotiations, and expectations underlying a stipulation. This removes much of the efficiency of such an agreement and perhaps places too much of a burden upon the parties to foresee clearly the future.

In the Mears case, Justice Mason, with five justices concurring, stated for the court:

[I]f the parties knew of some fact at time of original decree or at time of a subsequent intervening proceeding which considered modification of child support provisions of such decree but the decretal court did not know of such fact, and this fact is being now advanced as a basis for modification, then that fact, if sufficient to cause a subsequent material change in circumstances, would be grounds for modification.

Mears, 213 N.W.2d at 515. Chief Justice Moore, concurring in the result only, disagreed stating that a right to litigate facts known to one or both parties at a prior hearing does not exist. Mears, 213 N.W.2d at 519 (Moore, C.J., specially concurring, joined by Uhlenhopp and Reynoldson, JJ.). While the majority view in Mears may be dictum, id., we find no directly contrary authority or problem with its approach.

To hold otherwise would require the parties to foresee correctly the future and predict problems that will occur. This requirement is contrary to underlying principles of modification proceedings: a substantial change of circumstances from that known at the time of the original decree that makes enforcement of its provisions inequitable, Ellis, 262 N.W.2d at 267. This view does not eliminate the need for the parties to present before the decretal court all relevant facts, but merely the need to present every factual circumstance that may someday change and cause a problem. Under the facts in this case, we find the change in circumstances was not within the reasonable contemplation of the decretal court and affirm the modification of its decree.

III.

Ronald has also appealed the trial court's imposition of 7:00 p.m. as the time he is to return his daughter at the end of weekend and holiday visitation. He argues his past practice of returning the child at 8:00 p.m. or 8:30 p.m. and the temporary order that permitted the child to be returned at 8:00 p.m. on the holidays should control. Neither of these items are binding. We find 7:00 p.m. to be a reasonable time to return a small child after a weekend or holiday visitation to avoid inconvenience and disruption. See generally In re Marriage of Roff, 228 N.W.2d 98, 100 (Iowa 1975).

Trial court is affirmed.

AFFIRMED.