

**FILED**

APR - 8 1983

CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**301**

**IN RE THE MARRIAGE OF SHERYL J. REIS AND JAMES L. REIS**

UPON THE PETITION OF  
**SHERYL J. REIS,**

)

)

Filed April 8, 1983

petitioner-Appellee,

)

AND CONCERNING  
**JAMES L. REIS,**

2-430  
3-68208

Respondent-Appellant.

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Appeal from Pocahontas District Court, Newt Draheim, Judge.

Respondent appeals from the trial court's ruling on his petition for modification of the decree dissolving the parties' marriage. **AFFIRMED.**

Joel T. Greer, Spencer, for respondent-appellant.

Donald A. Beneke, Pocahontas, for petitioner-appellee.

Considered en banc.

**PER CURIAM**

Respondent, James Reis, appeals from the trial court's ruling on his petition for modification of the decree dissolving the parties' marriage. He argues that the trial court should have either awarded him custody of the parties' daughter or reduced the amount of child support he was required to pay. We affirm the decision of the trial court.

James and Sheryl Reis were married in 1975. At the time, Sheryl had a son who had been born out of wedlock, and she was four months pregnant by James. Melissa was born in April 1976. The marriage was dissolved in 1980 and the final decree awarded custody of Melissa to Sheryl, along with \$200 per month as child support.

Since the divorce, James has remarried. His second marriage appears to be quite stable, and the two have established an adequate home in Spencer. Sheryl has not remarried. She is, however, maintaining a relationship with a boyfriend. Sheryl maintains an adequate home in Pocahontas.

James filed a petition for modification of the decree as to custody, support, and visitation. At the time he filed the petition, James had been fired from his job for allegedly fighting with a co-worker. After a hearing, and after considering a report prepared by an attorney appointed by the trial court to represent Melissa, the trial court ruled that James had not met his burden of demonstrating a substantial, material change of circumstances such as would support a modification of the decree as to custody or support. The trial court did modify James's visitation rights, however.

James argues two points on appeal. First, he argues that his remarriage and Sheryl's sexual activity with her boyfriend constitute substantial changes of

circumstances sufficient to warrant a change of custody. Secondly, he argues that the fact that he has been discharged from his employment is a substantial enough change of circumstances to warrant a reduction of his child support obligation, in the event that he is not granted custody. We do not agree.

Because this case is an action in equity, our scope of review is de novo. Iowa R. App. P. 4; Iowa Code section 598.3.

In order to justify the modification of a decree of dissolution of marriage, the party urging the modification must demonstrate that there has been a substantial and material change of circumstances which has occurred since the decree was issued. This means that the change must be a major one, it must be permanent or continuous, and it must not have been within the contemplation of the trial court when the decree was entered. Meers v. Meers, 213 N.W.2d 511, 515 (Iowa 1973).

Respondent offers his remarriage as a substantial and material change. It is not. Respondent's remarriage is not a matter which would have been beyond the contemplation of the court which issued the decree of dissolution. Id. at 516. It therefore cannot be used to justify modification of the custody order.

Neither can the fact of petitioner's relationship with her boyfriend. Considering the fact that, when the decree was issued, she had already conceived two children out of wedlock, we do not consider this circumstance to be beyond what was contemplated by the trial court at the time it issued the dissolution of marriage decree. Melissa is progressing well, and has no unusual problems which would indicate that a transfer of custody would be in her best interest.

Respondent asserts that the fact that he lost his job was a substantial enough change to warrant a reduction in his child support obligation. Generally, a parent's obligation to provide support is based upon his or her proportionate ability to pay. In re Marriage of Carney, 206 N.W.2d 107, 112 (Iowa 1973). Respondent

testified at trial that he had the wherewithal to afford his support obligation. Moreover, we do not believe that a permanent unemployment situation was established. We see no reason to reduce his support obligation.

**AFFIRMED.**