

IN THE COURT OF APPEALS OF IOWA

No. 2-398 / 91-1592

IN RE THE MARRIAGE OF TIMOTHY F. SCAGLIONE
AND MARY JO SCAGLIONE

FILED

OCT 27 1992

CLERK SUPREME COURT

Upon the Petition of

TIMOTHY F. SCAGLIONE,

Petitioner-Appellant,

And Concerning

MARY JO SCAGLIONE,

Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County,
Ross A. Walters, Judge.

The petitioner husband appeals from a judgment of the district court modifying the original decree and increasing his child support obligation. **AFFIRMED.**

Donald L. Carr, II, of Scalise, Scism, Sandre, McConville, Miller, Holliday, Scharz, Carr & Renzo, Des Moines, for appellant.

Jo Ellen Whitney of Davis, Hockenburg, Wine, Brown, Koehn & Shors, Des Moines, for appellee.

Considered en banc.

SACKETT, J.

Petitioner-appellant Timothy F. Scaglione appeals and respondent-appellee Mary Jo Scaglione cross-appeals from a trial court order modifying their dissolution decree to increase the sum Timothy is required to pay for the support of the couple's child, Christine, born January 15, 1980. Timothy contends Mary failed to show the necessary change of circumstances to support a modification, and Mary should not have been awarded attorney fees. Mary contends the increase in child support should have been made retroactive to the date of the filing of her petition seeking a modification. We affirm.

The marriage of Mary and Timothy was dissolved in December 1980. The decree provided Timothy pay child support of \$50 a week until January 15, 1982, when support increased to \$60 a week. The decree provided for subsequent increases. The last increase was to \$80 a week starting January 15, 1986. Timothy was also required to maintain health insurance, name the child as a beneficiary on a life insurance policy, pay fifty percent of the expenses of a Catholic school education, and pay all the child's college expenses. When the decree was entered, Timothy was earning about \$15,000 annually, and Mary was earning about \$5,000 annually.

In July 1990, Mary filed a petition to modify their dissolution decree contending Timothy's income had

increased, and the cost of rearing Christine had increased. On September 11, 1991, the trial court found a change of circumstances, applied the child support guidelines to Timothy's current income, and increased child support to \$776 per month as of September 20, 1991. Timothy was also ordered to pay one-half of Christine's dental expenses and \$500 toward Mary's attorney fees.

Timothy, while recognizing both parties' income has increased since the time of the dissolution decree, contends Mary has failed to show a substantial change of circumstances justifying modification of the decree. The trial court found the parties' increased income a substantial change of circumstances justifying modification of the decree. Timothy argues increases in his income were contemplated in the original decree because the decree provided for step increases and, additionally, required Timothy to pay one-half of Catholic school tuition.

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. See Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973); see also In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987). To justify a modification there must be a substantial and material change in the circumstances occurring after the entry of the decree. See In re Marriage of Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983). Not every change in

circumstances is sufficient. Id. The change in circumstances must be permanent or continuous rather than temporary. Id. The change in financial conditions must be substantial. Id. And the change must not have been in the contemplation of the trial court when the original decree was entered.

Timothy's income increased from \$15,000 annually at the time of the dissolution to \$63,479 annually at the time of the modification hearing. Mary's income increased from \$5,000 to \$29,000 annually during the same time period.

We agree with Timothy that the original dissolution decree anticipated some increase in his income and factored it in the decree through step increases of child support, and the requirement that he would pay one-half of the Catholic school tuition for the child who was an infant at the time of the dissolution.

However, the mere fact the trial court, in entering the original decree, anticipated some increase in the noncustodial parent's earning does not mean the trial court anticipated the substantial increase in earning Timothy has realized. We agree with the trial court that the decree should be modified.¹

1. We note, but have not considered, Iowa Code section 598.21(9) (1991), as amended effective July 1, 1992, which provides in pertinent part: "Notwithstanding subsection 8, a substantial change in circumstances exists when the court order for child support deviates by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established pursuant to subsection 4."

The trial court applied the guidelines to Timothy's income. There is no challenge that the income figure the trial court used was not correct, or that the guidelines were not properly applied. We, therefore, affirm the trial court's decision to increase child support.

Mary on cross-appeal contends the support should have been increased retroactively to the date she filed the petition. The trial court did not order the increased support to be paid until the next support payment following the decree modifying was due. It is not unusual for increases in support awards to be made retroactive. In re Marriage of Hayne, 334 N.W.2d 347, 352 (Iowa App. 1983); see, e.g., Willcox v. Bradrick, 319 N.W.2d 216, 219 (Iowa 1982); Spaulding v. Spaulding, 204 N.W.2d 634, 636 (Iowa 1973). However, saying that a court may order higher support payments to be paid retroactively is not the same as saying that it must do so. In re Marriage of Keopke, 483 N.W.2d 612, 614 (Iowa App. 1992). We do not find the trial court abused its discretion in ordering that increase support payable commencing after the date of the modification order. We affirm the trial court on this issue.

Timothy also has challenged the trial court decision to award Mary attorney fees of \$500. The trial court did not abuse its discretion. See In re Marriage of Stanley, 411

N.W.2d 698, 702 (Iowa App. 1987). We affirm on the appeal and cross-appeal. Costs on appeal are taxed one-half to each party. Each party shall be responsible for his or her own attorney fees.

AFFIRMED.

All judges concur except Donielson and Hayden, JJ., who dissent.

DONIELSON, P.J. (dissenting)

I respectfully dissent to the majority's finding that there was a material and substantial change in the circumstances since the time of the original decree which justified the modification of Timothy's child support obligation. I would reverse the district court's judgment which modified the original decree and increased Timothy's child support obligation.

To justify a modification of a dissolution decree, the material and substantial changed circumstances must not have been in the contemplation of the trial court when the original decree was entered. In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991) (citing Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973)). While the increase in Timothy's income admittedly has been substantial, it is clear the original dissolution decree anticipated increases in Timothy's income and factored in these anticipated increases through step increases of child support, the requirement that Timothy would pay one-half of the Catholic school tuition for the child, and the requirement that Timothy would pay for the child's college expenses.

Furthermore, In In re Marriage of Dawson, 467 N.W.2d 271 (Iowa 1991), the supreme court held an increase in income, standing alone, did not constitute a substantial change in circumstances. Id. at 275. In Dawson, the wife's net income had substantially increased, tripling in its amount over the course of one decade. Id. Here, while

Timothy's income increased four-fold over the past decade, during the same time period Mary's income increased nearly six-fold. This is not a case where one party's income increased substantially and the other party's income either decreased or did not change.

In the district court's decree, the only reason cited by the court for the change of circumstances was the substantial change in Timothy's income since the time of the original decree. In fact, the court specifically stated: "The Court does not believe the evidence shows any material or substantial change in the needs of the parties or the child which would independently support a modification of child support."

In light of the step increases and the provisions on the child's educational expenses which were specifically ordered in the original decree, I do not find the increase in Timothy's income constitutes a material and substantial change in circumstances to warrant modifying this decree. I would reverse the district court on this issue.

Hayden, J., joins this dissent.