

FILED

NOV 19 1979

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MADELINE BUTLER AND LEON BUTLER

Upon the Petition of)

MADELINE BUTLER,)

Petitioner-Appellee,)

Filed November 19, 1979

And Concerning)

LEON BUTLER,)

262
2-63071

Respondent-Appellant.)

Appeal from Polk District Court - Ray Hanrahan, Judge.

Respondent appeals trial court order modifying dissolution decree, increasing support obligation for children from \$40 per week to \$70 per week. Reversed.

Ted E. Marks of Marks, Marks & Marks, Des Moines, for respondent-appellant.

Charles J. Cardamon, Des Moines, for petitioner-appellee.

Submitted to Oxberger, C. J., Donielson, Snel, Carter and Johnson, JJ.

- 1 -

DONIELSON, J.

Respondent, Leon Butler, appeals trial court order modifying decree of dissolution of marriage, increasing his support obligation for his two children from \$40 per week to \$70 per week. For reversal, respondent contends petitioner, Madeline Butler, failed to establish by a preponderance of the evidence a substantial and material change in circumstances justifying modification. Petitioner requests attorney's fees on appeal. We reverse and order the support provisions of the decree be reinstated.

A modification of a child support provision of a dissolution decree can be allowed only if there has been shown a material, substantial, and permanent change in circumstances since entry of the original decree making it equitable that different terms be fixed. In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977); In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977); In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973). The change in circumstances must not have been within the contemplation of the decretal court. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974); Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). The burden rests on the party seeking modification of the support provision to establish a change in circumstances by a preponderance of the evidence. Mears, 213 N.W.2d at 515. The best interests of the children, however, are our primary and governing concern. Pucci v. Pucci, 259 Iowa 427, 434, 143 N.W.2d 353, 358 (1966); Sandler v. Sandler, 258 Iowa 84, 86, 137 N.W.2d 591, 592 (1965).

Our review is de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court but are not bound by them. Iowa R. App. P. 14(f)(7).

Petitioner asserts a combination of changed circumstances to justify modification. These include: Respondent's increased salary as a police officer since the time of the decree; his capacity to hold a part-time job in addition to his full-time job as evidenced by his employment at K-Mart from February 9, 1977 to September 6, 1978; the income of respondent's present wife, approximately \$65 per week; the \$2500 loan respondent secured at the time of the decree, which was an alleged reason for the initially awarded low support; would have been paid if respondent had not refinanced it for purposes not specified in his testimony; the erosion of the dollar's purchasing power due to inflation; and the increased costs of raising children because of their older ages.

We conclude that these changed circumstances do not establish by a preponderance of the evidence a substantial and material change in circumstances making it

- 2 -

equitable to modify the terms of the original decree. Respondent's annual salary as a police officer had increased from \$13,700 at the time of the decree in 1976 to \$14,872 at the time of the modification. This increase of almost nine percent over a span of three years is hardly a substantial increase. In essence, the trial court's modification would give the children the entire increase. We deem respondent's earnings from his part-time job as a security guard to be of a temporary nature and not a basis for warranting modification. See Mears, 213 N.W.2d at 515; Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973); McDonald v. McDonald, 183 N.W.2d 186, 188 (Iowa 1971). Respondent testified that the reason why he quit this job was because he attributed part of the problems with his first marriage to his demanding work schedule and that he became afraid that his second marriage was likewise being jeopardized by continuing to hold two jobs. The earnings of respondent's present wife do not contribute significantly to their income and is not a substantial change in circumstances. Page, 219 N.W.2d at 558. The repayment of the \$2500 debt was obviously within the contemplation of the decretal court and cannot be claimed as a change in circumstances. See Page, 219 N.W.2d at 557; Mears, 213 N.W.2d at 515. Likewise, the attendant increased costs of raising children as they grow older was within the contemplation of the trial court. See Page, 219 N.W.2d at 557; Mears, 213 N.W.2d at 515. While inflation may be considered by the trial court in determining the change in circumstances, Jensen, 251 N.W.2d at 254; Page, 219 N.W.2d at 558, it is not determinative by itself. Additionally, the inflation argument could be used by respondent as a reason to decrease the support payments. The changed circumstances cited by petitioner are either insubstantial, temporary, or within the contemplation of the decretal court.

After a careful consideration, we hold that there has not been a substantial and material change in circumstances justifying the trial court's decision. The well-being of the children does not appear to be in jeopardy at the current support level. Petitioner's present husband earns approximately \$14,000 per year, about the same as respondent, and the family appears to be living comfortably. The modification by the trial court was erroneous. We, accordingly, reverse and order the reinstatement of the original decree.

Petitioner's application for attorney fees is denied because there is no authority in chapter 598, The Code 1979, for allowance of attorney fees on an application to modify

a dissolution decree. Jensen, 251 N.W.2d at 254; Dworak v. Dworak, 195 N.W.2d 740, 743 (Iowa 1972).

REVERSED.