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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-324 / 92-1798

IN RE THE MARRIAGE OF NANCY LORENZEN AND DEAN V. LORENZEN

Upon the Petition of

NANCY LORENZEN, n/k/a **NANCY STICKLER,**

Appellant,

And Concerning

DEAN V. LORENZEN,

Appellee.

Appeal from the Iowa District Court for Clay County, Charles Barlow, Judge.

Petitioner appeals the district court's order refusing to modify respondent's child support obligation. **AFFIRMED.**

Randall G. Sease of the Sease Law Firm, Hartley, for appellant.

William W. Ranniger of the Ranniger Law Office, Manning, for appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ. Sackett, J., takes no part.

DONIELSON, C.J.

In September 1986, the district court dissolved the marriage of Nancy Strickler, f/k/a Nancy Lorenzen, and Dean Lorenzen. The parties had three children: Jason, born May 1973; Jeffrey, born November 1976; and Kelli, born December 1978. Nancy's net monthly income was $430 per month. Dean's net monthly income was $1047 per month. The court awarded Nancy primary physical care of the children and ordered Dean to pay $400 per month in child support. The court ordered the child support reduced to $300 when Jason became emancipated. The court also ordered Dean to pay for the children's health insurance.

After the dissolution, Nancy remarried, quit her job, and became a homemaker. She currently earns no income. Dean also remarried. His current net monthly income is approximately $1748. Jason is now emancipated and Dean's child support obligation is $300 per month.

On October 24, 1991, Nancy filed an application for modification of child support. She alleged substantial changes in circumstances had occurred since the original decree, including an increase in Dean's net income and a reduction in her net income. Dean contended Nancy had substantial earning capacity and she had ended her employment voluntarily. He contended he received only cost of living raises contemplated by the court at the time of the decree. He also claimed the children's health insurance premiums had increased substantially.

The district court found there had not been a substantial change in circumstances and overruled the petition to modify. Nancy appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Modification of Child Support.

Nancy first argues the district court erred in not modifying Dean's child support obligation. Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring

> after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

Since the dissolution preceded the adoption of the Uniform Child Support Guidelines, their adoption, standing alone, does not constitute a substantial change of circumstances necessary to modify the decree. In re Marriage of Bergfeld, 465 N.W.2d 865, 869 (Iowa 1992). The 1992 amendment to Iowa Code section 598.21(9), effective July 1, 1992, provides a ten percent deviation between the child support originally ordered and the child support calculated by the current guidelines constitutes a substantial change in circumstances permitting modification of the child support obligation. 1992 Iowa Acts chap 1195, § 406. This action was filed in October 1991 and tried in June 1992 prior to the July 1, 1992 effective date of the amendment. The court entered its decision in October 1992. We conclude the amendment is not controlling in this case. See In re Marriage of Lee, 486 N.W.2d 302, 304 n.1 (Iowa 1992).

Nancy argues her income has decreased substantially since the decree and Dean's has increased substantially. While we agree Dean's income has increased, he has remained

in the same job with the same duties. We concluded, as did the district court, Dean's increased income is not significantly above the amount attributable to cost-of-living adjustments. We do not find Dean's increased income a substantial change in circumstances warranting modification of his child support obligation. We also agree with the district court it was proper to impute to Nancy a reasonable earning capacity based on her past employment since her departure from the work force was voluntary. State ex rel. Lara v. Lara, 495 N.W.2d 719, 721 (Iowa 1993); see In re Marriage of Powell, 474 N.W.2d 531, 534 (Iowa 1991); In re Marriage of Bales, 439 N.W.2d 228, 230 (Iowa App. 1989). Therefore her voluntarily diminished earnings do not warrant modification of Dean's support obligation.

Nancy also argues the cost of raising children has increased significantly. We agree. This increase, however, unless caused by some unforeseen circumstance such as illness or accident, would have been within the contemplation of the district court when the original decree was issued. In re Marriage of Chmelicek, 480 N.W.2d 571, 574 (Iowa App. 1991); In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983). The initial dissolution decree is issued with a view to reasonable and ordinary changes likely to occur between the parties. Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973). Any changes which are "natural occurrences and as such could be foreseen by

the [c]ourt" will not justify modification. Id. We find Nancy has not shown by a preponderance of the evidence a substantial change in circumstances not within the contemplation of the district court at the time of the initial decree. Jensen v. Jensen, 253 Iowa 1013, 1019, 114 N.W.2d 920, 921 (1962). We therefore affirm the district court's denial of Nancy's petition to modify Dean's child support obligation.

II. Retroactive Modification.

Nancy argues the district court erred in not making any change in Dean's child support obligation retroactive to the date of filing the petition for modification. Since the district court denied the petition for modification, any argument concerning retroactive application of the modification is moot.

III. Attorney Fees.

Nancy asserts she should be awarded attorney fees for the modification action, pursuant to Iowa Code section 598.36 (1991), because she should have been the prevailing party. Nancy was not the prevailing party. Therefore an award of attorney fees would have been inappropriate. We affirm the decision of the district court not to award attorney fees to Nancy.

Nancy also asks for attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390

(Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). We determine, under the facts of this case, the parties shall pay their own attorney fees for this appeal. Costs of this appeal are taxed to appellant.

AFFIRMED.