IN THE COURT OF APPEALS OF IOWA

No. 3-134 / 92-961

FILED
OCT 5 1993
CLERK SUPREME COURT

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IN RE THE MARRIAGE OF MARILYN LAVERNE DUNCAN AND JAMES JOSEPH DUNCAN

Upon the Petition of
MARILYN LAVERNE DUNCAN,
Appellee/Cross-Appellant,

And Concerning
JAMES JOSEPH DUNCAN,
Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Crawford County, Richard J. Vipond, Judge.

Jim appeals from a ruling in a modification action reducing his alimony obligation and argues alimony should be discontinued altogether. **AFFIRMED.**

Robert Kohorst of Kohorst Law Firm, Harlan, for appellant.

Robert L. Brink of Eller, Brink & Sextro, Denison, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab, JJ.

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OXBERGER, C.J.

Jim and Marilyn Duncan were divorced January 10, 1990, by a stipulated decree of dissolution after thirty-five years of marriage. Jim is fifty-nine years old and Marilyn is fifty-seven. Marilyn did not work outside the home, but raised the parties' six children. She has no marketable skills and no retirement plan. Jim was driving a truck full-time for Farmland Foods and earning $44,000 per year.

The dissolution decree gave Jim his retirement payments from Farmland. He also was awarded most of the couples' indebtedness. These factors were considered in the alimony award. Marilyn was initially awarded $550 per month to give Jim an opportunity to pay the indebtedness. Her alimony was to increase to $750 per month April 1, 1991, and to continue until April 1, 1997, when it would reduce to $500 per month due to Jim's anticipated retirement.

After the dissolution, Jim filed for bankruptcy. His obligation to pay the indebtedness was discharged. On July 25, 1991, Jim filed a petition for modification.

The district court found two material changes of circumstance. First, Marilyn had been cohabiting with her fiancee since April 1991. Second, Jim took early retirement on January 1, 1992. The court found this was medically justifiable. Jim had problems with his hand and asthma which, though not preventing him from working, reasonably threatened to become incapacitating after he had missed the opportunity for early retirement and before he

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qualified for full retirement. The district court modified the alimony award to $500 per month.

Jim appeals and Marilyn cross-appeals.

In this equity action, our scope of 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).

The fighting issue in this appeal involves the alimony agreement between the parties. Jim argues his alimony obligations should cease altogether because Marilyn is currently cohabiting with her fiancee. Marilyn's cross-appeal claims it was inequitable to reduce her alimony based on Jim's early retirement. She argues Jim voluntarily reduced his employment. The parties also disagree as to whether the dissolution decree requires that alimony cease upon the remarriage of the petitioner.

In some cases, when a recipient spouse remarries, he or she has the burden to prove there are extraordinary circumstances which require continuing alimony payments. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). In this case, the district court concluded Marilyn was required to prove extraordinary circumstances. The court reasoned that Marilyn's cohabitation with her fiancee was

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tantamount to remarriage and thus concluded this was a material and substantial change in circumstances. Based on this, the court required Marilyn to prove her alimony should continue due to extraordinary circumstances. We concur with the district court's conclusion that Marilyn proved extraordinary circumstances. However, we do not necessarily agree that Marilyn was required to make such a showing. The district court indicated the decree was unclear, but appeared to provide for the elimination of alimony upon remarriage. We agree with the district court that the decree is unclear, but we do not reach the question of whether it provided for termination of alimony upon remarriage. The decree does not require the elimination of alimony upon Marilyn's cohabitation. We will not expand upon the language of the decree and now include cohabitation as a reason for the elimination of alimony. Furthermore, the alimony award was made in lieu of Marilyn's share of Jim's pension. Accordingly, we affirm the district court's refusal to terminate Marilyn's alimony.

The district court also concluded Jim's health problems necessitated early retirement and thus concluded a material and substantial change in circumstances existed, warranting modification of the decree. The court reduced the amount of alimony Jim is required to pay from $750.00 to $500.00 per month to reflect Jim's reduction in income. We agree with the district court that Jim's health problems

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necessitated his retirement and thus, affirm the reduction in alimony.

Marilyn requests 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).

Based on Marilyn's present health and financial considerations and her initial obligation to defend this action on appeal, we award Marilyn $750.00 in attorney fees on appeal.

The decision of the district court is affirmed in all respects.

AFFIRMED.