

FILED

JAN 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**IN RE THE MARRIAGE OF DIANE SUE WILLHOIT
AND JOHN AARON WILLHOIT**)

**UPON THE PETITION OF
DIANE SUE WILLHOIT,**)

Petitioner-Appellee,)

**AND CONCERNING
JOHN AARON WILLHOIT,**)

Respondent-Appellant.)

Filed January 26, 1982

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Appeal from Woodbury District Court, George F. Davis, Judge.

The husband appeals from the modification of the parties' dissolution decree, which reduced his alimony obligation, asserting that the change of circumstances justifies a termination or greater reduction of alimony. **AFFIRMED.**

Mayer Kanter, Sioux City, for respondent-appellant.

Donald W. Sylvester, Sioux City, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

The husband appeals from the modification of the parties' dissolution decree, which reduced his alimony obligation, asserting that the change of circumstances justifies a termination or greater reduction of alimony. We affirm.

The parties obtained a dissolution on January 8, 1976. The decree incorporated a stipulation awarding the wife \$584 per month alimony, to continue until she reached age 65, died, or remarried. Any unpaid alimony payments were to be allowed as a claim in the husband's estate. On February 13, 1980, the husband filed an application for modification, and a hearing was held. In a judgment and decree entered August 18, 1980, the trial judge found a material change of circumstances justified a reduction of the alimony payments from \$584 per month to \$500 per month. The husband appealed.

He first argues that the trial court erred by reducing the payments by only \$84.00 per month when his annual income and net worth declined substantially. He asserts that his income was \$66,323 at the time the decree was entered, and it was \$38,000 at the time of the modification hearing. The wife testified that the original decree based its alimony award on John's \$35,000 per year salary and did not include his other income which was profit sharing, because that amount fluctuated. The trial judge found that the wife's testimony was "somewhat corroborated by the fact that the support money and alimony and other portions of the decree while generous for that amount of income, were probably less than would have been fixed by a Court based on the \$66,000 income for that year." We agree with the trial court. See Marriage of Sanders, 255 N.W.2d 109 (Iowa 1977)(husband's income \$20,000, wife's income insubstantial, alimony awarded \$6000 per year); Fenchel v. Fenchel, 268 N.W.2d 207 (Iowa 1978)(husband's income \$50,000, wife could earn one-fifth that amount, alimony of \$500 per month

inadequate and adjusted up to \$1000 per month). It was the husband's burden to show material and substantial change of circumstances. Thayer v. Thayer, 286 N.W.2d 222 (Iowa Ct. App. 1979). He failed to show that his salary has been substantially changed. The trial court found that the husband's net worth has declined from \$104,904 to \$22,500. The evidence supports this finding and we affirm it. However, the trial court did not err in finding that this reduction alone was not enough to warrant termination of the alimony payments.

The husband also argues that the fact that the wife is currently living with her boyfriend is a substantial change of circumstances requiring termination or further reduction of alimony. We disagree. In making awards of alimony, the Iowa court has on numerous occasions stated that the conduct or fault of either party is not to be considered. Behrle v. Behrle, 228 N.W.2d 25, 27 (Iowa 1975); In re Marriage of Freese, 226 N.W.2d 800, 802 (Iowa 1975); In re Marriage of Zoellner, 219 N.W.2d 517, 524 (Iowa 1974); In re Marriage of Bare, 203 N.W.2d 551, 555 (Iowa 1973). The rule for modification of alimony awards should not be any different. Furthermore, the change of circumstance justifying modification must be continuous, not temporary. Thayer, supra at 223. Since the wife and her boyfriend are not married, there is nothing to stop him from moving out at any time. If we were to modify or terminate the alimony payment based on the fact that the wife is living with her boyfriend, we would also have to modify the award if he moves out. Therefore, the fact that the two are living together cannot be considered a continuous, permanent, change of circumstance.

The husband argues that he should not be required to support his ex-wife's lover by his payment of alimony. The wife testified that her boyfriend shares in the payment for groceries and utilities, even though he is currently unemployed.

The husband next argues that the trial court erred in not finding a substantial change of circumstance had occurred based on the fact that one attorney represented both parties in the dissolution without the knowledge of the judge. The stipulation approved by the court clearly states that the husband will be responsible for both his and her attorney fees, payable to the law firm of Crary, Huff, Yates & Clem, P.C. Therefore, the trial judge must have been aware of the dual representation and this cannot be the basis for any modification. See Matter of Evans, 267 N.W.2d 48, 50 (Iowa 1978).

The husband's last assertion is that the trial court erred in not finding a change which required modification of the provision allowing unpaid future alimony payments as a claim against the husband's estate. The husband has shown no change which would justify a modification of this provision.

The trial judge found that there was a material change in circumstances justifying reduction of alimony from \$584 per month to \$500 per month. This was based on (1) the husband's reduction in net worth; (2) the wife's employment at a salary of \$4.50 per hour; and (3) the husband's obligation to pay for the higher education of his children. The obligation to pay for higher education cannot be the basis of a modification since it has not changed since the entry of the original decree. Section 598.21(8), The Code. However, the reduction in the husband's net worth is a material and substantial change in circumstance not within the contemplation of the trial court when the original decree was entered. Therefore, the reduction of alimony from \$584 to \$500 per month is justified. Thayer, supra at 223.

AFFIRMED.

All judges concur except Donielson, who dissents.

I dissent.

The trial court found that the petitioner was not fortunate in the choice of her live-in roommate because he was unemployed and not contributing in any way to household expenses. While I agree that fault should play no part in the initial award of alimony or the modification of alimony awards, I believe the majority opinion misses the main issue in this case.

The key issue is not the notion of fault or moral misbehavior on the part of the respondent. The key is support. One purpose of alimony is to ensure that the former spouse properly discharges his or her duty to support the other former spouse. The dissolution decree itself provides the potential for both physical and emotional independence from the former spouse, but these depend on some form of financial independence. Therefore, either permanent or temporary alimony is often necessary. One factor to be considered by the trial court in the initial award of alimony under § 598.21(3)(f) is "the feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal." I believe this goal should not be ignored with regard to modifications.

When proper resources are available, sufficient alimony should be awarded to support the former spouse as he or she builds a new life. Whether or not the new life includes remarriage is, of course, up to the parties involved, but the obligation to support runs only to the former spouse, not to third parties. If the amount of alimony paid is sufficient to support two people, then, in my view, it should be adjusted downward in amount. In the instant case, the respondent has shown a very significant reduction in income (in the area of 43%) and his court-ordered alimony payments are evidently sufficiently generous to support two adults and are, therefore, more than the amount necessary to allow petitioner to

become self-supporting at a standard of living comparable to that enjoyed during the marriage.

The sanctity and desirability of marriage has long been supported by both law and public policy. If the courts fail to acknowledge the economic consequences of live-ins, such as here, then the courts will encourage behavior which is contrary to existing public policy and existing law. Why, indeed, should any divorced person remarry when this act will cut off the receipt of alimony from a former spouse? Quite obviously, marriage as an institution would be severely damaged if a divorced person can merely "live-in" so to speak, and continue to receive support from the former spouse. I can think of no long-term public policy that would be served by the majority's decision. On the other hand, I believe this decision will do long-term damage to marriage as an institution. Divorced spouses receiving alimony will be quick to realize that it makes "dollars and cents" to stay single and "live-in" rather than remarry and lose money. It is interesting to note that the trial court did consider the fact that respondent's new wife is working as a secretary and earned approximately \$5800.00 in 1979. This fact should be contrasted with the fact that under the majority opinion petitioner will receive \$6000.00 per year in alimony which she can use to assist her in supporting her unemployed boyfriend. This contrast does not, in my view, encourage either the respondent's new wife or petitioner's boyfriend to work because the new wife's income falls short of replacing the money paid out in alimony for petitioner and the accompanying dependent boyfriend.

I would reduce the alimony to a lesser figure in light of the fact that while respondent's income has been reduced by 43% and his net worth has been reduced by 80%, his alimony payments were only reduced by 14%.