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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-224 / 93-1432

IN RE THE MARRIAGE OF CHARLES E. CODNER AND PHYLLIS M. CODNER

Upon the Petition of
CHARLES E. CODNER,

Appellant,

And Concerning
PHYLLIS M. CODNER,

Appellee.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Petitioner appeals a judgment of the district court declining to terminate his alimony obligation. **REVERSED IN PART AND MODIFIED IN PART.**

Thomas P. Hyland of Hyland, Laden & Pearson, P.C., Des Moines, and Teresa A. Beyer, Des Moines, for appellant.

Ann Ver Heul and Mark L. McManigal of Shearer, Templer, Pingel & Kaplan, P.C., West Des Moines, for appellee.

Heard by Hayden, P.J., and Habhab and Cady, JJ. Donielson, C.J., takes no part.

HAYDEN, P.J.

Charles and Phyllis Codner were divorced in 1974. Pursuant to the decree of dissolution, Charles was ordered to pay Phyllis $450 per month in alimony for the remainder of her life or until she remarried. Phyllis was awarded the marital homestead as well as all household goods and furniture. Charles was awarded the family florist business and all the indebtedness thereon.

Following the divorce, Charles entered into a number of poor business transactions that culminated in Charles incurring a debt of $296,298. Although Charles owned a home valued at $185,000, he had two mortgages on the property totaling $241,798. In November 1990 Charles sold the business for $145,000. Under the terms of the sale, Charles was to receive $314 per month from the buyer for thirty-four months. In addition, Charles was offered employment for eighteen months by the buyer at an annual salary of $22,000. Charles's new wife, Blanka, was offered employment at a rate of $8.50 per hour. The buyer, however, chose not to renew this agreement and did not offer Charles further employment. Charles ultimately obtained employment with Iowa Lumber and at the time of trial was earning $602 per month. Charles also receives $888 per month in social security retirement benefits.

Phyllis sold the family home shortly after the divorce and moved to Georgia, where she obtained employment with Travelers Insurance. Phyllis owns a home in Atlanta worth

$100,000, with an encumbrance of $13,266. Phyllis has accumulated an IRA valued at $75,000. However, Phyllis is no longer able to work due to stenosis of the spine. As a result, Phyllis receives retirement benefits in the amount of $519 per month from Travelers and $521 per month in social security disability benefits.

Charles filed a petition to modify the decree, seeking to terminate his alimony obligation. The district court ruled the alimony award was part of the property settlement, in lieu of Phyllis's interest in the business, and therefore was not modifiable. The district court, however, did reduce the amount of alimony from $450 per month to $200 per month for two years. The $250 per month not paid was to become a judgment against Charles's estate and his insurance policies until repaid. After the two years of lowered payments, his alimony obligation would revert back to $450 per month. Charles has appealed.

Charles contends the district court erred in concluding the award of $450 per month alimony was part of a property settlement. Charles notes Phyllis includes these payments on her income tax returns as income. Charles further notes the stipulation adopted by the parties, and approved by the court, stated Phyllis would receive $700 per month for two years, and $450 per month thereafter, or until her death or remarriage. Charles asserts if this amount was included in the property settlement, it would not have been subject to termination upon death or remarriage. Charles also

contends if the award was part of the property settlement and not modifiable, the district court would not have modified it as it did.

I. **Scope of Review.**

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

II. **Alimony Distinguished from Property Settlement.**

The threshold question in this appeal is whether the trial court erred in holding monthly payments of $450 made to Phyllis, pursuant to the original decree of dissolution, were a part of the property settlement rather than alimony and therefore not subject to modification. Section 598.21 of the Code of Iowa provides for subsequent modification of orders to pay alimony where there has been a "substantial change in circumstances." Iowa Code § 598.21(8) (1993). Property settlements, however, are not subject to modification regardless of whether or not there has been a change of circumstances. Iowa Code § 598.21(11) (Supp. 1993). Therefore, we must first distinguish an order to pay alimony from a property settlement. We next examine

the original decree of dissolution to determine whether the periodic payments to be made to Phyllis constitute alimony or a property settlement.

It is well settled in Iowa jurisprudence that we distinguish between alimony and property settlements based upon their distinct purposes. In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983) (citing In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981)). Alimony is defined as an allowance to the former spouse in lieu of the legal obligation for support. See In re Marriage of Sjulin, 431 N.W.2d 773, 775 (Iowa 1988) (citation omitted). The primary purpose of alimony is to provide financial assistance when necessary. Provisions for alimony are thus separate and distinct from a determination of the property rights of the parties. Knipfer v. Knipfer, 144 N.W.2d 140, 143 (Iowa 1966). Division of property has for its basis the spouse's right to a just and equitable share of that property which has been accumulated by the parties as a result of their joint efforts during the years of the marriage. Sjulin, 431 N.W.2d at 775. Therefore, in distinguishing alimony from property settlements, we must consider the purpose for which the award was granted.

In the instant action, the parties prepared a stipulation and property settlement agreement which was approved by the court and incorporated by reference into the decree of dissolution. The stipulation and agreement is clearly divided into seven paragraphs with the following headings:

1. Court's Decree and Approval
2. Alimony
3. Property Settlement
4. Costs and Attorney Fees
5. Payment of Obligations
6. No Collusion
7. Benefit

Under the heading "Property Settlement," Phyllis was awarded the homestead along with the mortgage thereon. Charles agreed to pay Phyllis $500 as a property settlement in conjunction with the award of the homestead to Phyllis. Phyllis was further awarded all of the household goods, including furniture, and one of the parties' two automobiles. Charles was awarded the family floral business and assumed all indebtedness thereon. He agreed not to sell the business for a period of four years, except in the case of serious illness or in the event of the sale of the business to his son. In the event of the sale of the business prior to the expiration of four years, the court retained jurisdiction for determining whether or not, in light of the sales price, Phyllis had received a satisfactory settlement. Charles also received the other automobile and was responsible for maintaining a life insurance policy, payable to his estate for the benefit of Phyllis, for the period in which she was entitled to alimony.

Under the heading "Alimony," Charles agreed to pay Phyllis $700 per month as alimony for two years. Thereafter, he agreed to pay $450 per month as alimony until the death of Phyllis or her remarriage.

Charles asks us to focus on the intent of the parties in entering the stipulation and agreement. He argues "if this payment had been intended by the parties to be a part of the property settlement, then it would have been outlined in the stipulation underneath the heading of property settlement as were six other things." The fact it was given its own subheading, according to Charles, "clearly indicates that the parties knew they were talking about alimony as separate from property settlement." The intention of the parties, however, will not be dispositive.

As a preliminary matter, we note it is the decree and not the stipulation which creates whatever rights the parties have. Id. Although a stipulation and settlement in a dissolution proceeding is a contract between the parties, it becomes final only when accepted and approved by the court. In re Marriage of Lawson, 409 N.W.2d 181, 182 (Iowa 1987) (citing Prochelo v. Prochelo, 346 N.W.2d 527, 529 (Iowa 1984)). When the stipulation is merged in the dissolution decree, it is interpreted and enforced as a final judgment of the court, not as a separate contract between the parties. Prochelo, 346 N.W.2d at 530 (citing Bowman v. Bennett, 250 N.W.2d 47, 50 (Iowa 1977)). Therefore, in interpreting the dissolution decree, the

determinative factor is the intent of the trial court as gathered from the decree and other proper evidence. In re Marriage of Knott, 331 N.W.2d 135, 137 (Iowa 1983) (citing Bowman, 250 N.W.2d at 50). The intent of the parties to a stipulation in a divorce, where the stipulation has been incorporated by reference into the decree, will have no effect on the construction of the decree after the decree is entered. In Bowman v. Bennett, the Supreme Court of Iowa said:

> The predivorce views of these parties cannot be imputed to Judge Hand or deemed to constitute his intent or purpose in approving and incorporating said stipulation in the divorce decree.

Bowman, 250 N.W.2d at 51. We set aside from our consideration Charles's contentions regarding the intent of the parties when entering the stipulation. We focus instead on the intent of the trial court in approving the stipulation and incorporating it into the decree. In determining that intention, effect is to be given to that which is clearly implied as well as to that which is expressed. In re Yoss' Estate, 24 N.W.2d 399, 401 (Iowa 1946).

For purposes of determining whether the financial provisions contained in a decree of dissolution constitute a property settlement or alimony, the trial court's employment of the term "alimony" is not alone dispositive of the matter. Knipfer, 144 N.W.2d at 142. It is not what the arrangement is called, but what it actually is that

fixes its legal status. Id. In other words, it is the substance of the financial provisions and not their form which is controlling. Id. This is not to say, however, that the deliberate employment of the term alimony should not be accorded some weight.

In determining whether the award here constitutes alimony or a property division, no single factor is controlling. Id. The court must take into consideration all the relevant factors, including (1) the provisions of the agreement between the parties, (2) the circumstances under which the agreement was made, (3) the nature and value of the property owned by and to be divided between the parties, (4) the original divorce proceedings, and (5) the terms of the divorce decree sought to be modified. Id. at 143. In short, we look to the totality of the circumstances.

It is clear from the decree the trial court intended to and did in fact approve the stipulation and settlement which was made a part of the decree. In considering the substance of the stipulation, there is no indication the division of property was in any way inequitable. Nor is there any indication the monthly payments of $450 made to Phyllis were for the purpose of effectuating an equitable division of the parties' marital assets. The very terms of the stipulation indicate the payments were not made in lieu of Phyllis's interests in those assets. On the contrary, these payments appear to have been intended for the future

support of Phyllis since they are subject to termination upon her death or remarriage. At the time of the dissolution, Phyllis had no means of support and was in need of financial assistance from Charles. If the payments had been included as a part of the property settlement, they would certainly not terminate upon Phyllis's death or remarriage since there is no way to determine whether a just and equitable division would have been achieved upon the happening of either of those events. As such, the monthly payments meet the criteria for alimony under the Knipfer standards and are therefore subject to modification. We reverse the district court on this issue.

We observe in paragraph two of Charles's petition for modification, Charles alleges he was ordered to pay the sum of $450 per month as alimony until the death or remarriage of Phyllis. In her answer, Phyllis admits the allegations contained in paragraph two of the petition. If she intended to contest the designation of those payments as alimony, she should have denied that portion of the petition.

III. Modification of Alimony.

We next consider Charles's contention the original decree of dissolution should be modified and his obligation to pay alimony should be terminated.

Modification of the alimony provisions of a dissolution decree is justified only if there has been some material and substantial change in the circumstances of the parties,

financially or otherwise, making it equitable that other terms be imposed. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Id. Circumstances that have changed, to justify modification of alimony, must be those that were not within the contemplation of the trial court when the original decree was entered. Id. Moreover, the change in circumstances must be continuous, not temporary. Id.

The knowledge of the trial court at the time the award was made is the basis for determining whether there has been a change of circumstances. In re Marriage of Van Doren, 474 N.W.2d 583, 586 (Iowa App. 1991). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. Id.

Charles is now sixty-four years of age and in a state of financial crisis. As a result of his unfortunate business dealings, he has accumulated almost $300,000 in debt since the divorce. Charles does not have enough assets to cover this debt, and it is unlikely he will in the future. In addition, his business has been sold, and he is precluded from working in the florist field for five years due to a covenant not to compete clause in the sales contract. His earning capacity is therefore significantly reduced since he apparently has no other marketable

skills. He has worked in the floral business since age fourteen, and it is all he knows. At this late stage in life, the reduction in his earning capacity is permanent.

Currently, Charles is working in sales and has a gross monthly income of $602. He also collects $888 per month in social security. Charles is one year from retirement age and has no retirement fund. He once had an I.R.A. worth $30,000, but he has had to use all but $4,500 of that money to pay his bills, including alimony.

Phyllis on the other hand sold the family home shortly after the divorce in 1974 and realized $22,000 in proceeds. She now owns a home in Atlanta, Georgia, worth $100,000 and owes only $13,000 on that property. She collects $519 per month in retirement benefits and receives $521 per month in social security. At present, she owns an I.R.A. worth $75,000 from which she draws $109 per month in interest. The rest of the interest is rolled back into the account.

Based upon these facts, we determine there has been a material and substantial change of circumstances since the 1974 decree of dissolution. Charles's current financial crisis could in no way have been within the contemplation of the trial court when Phyllis was awarded $450 per month in alimony.

Finally, we find no merit in Phyllis's contention Charles has voluntarily reduced his income. While there is ample authority in support of the principle that a self-inflicted or voluntary reduction of income is not

grounds for modification, the cases upholding that principle are factually distinguishable from the present action. Phyllis cites In re Marriage of Vetternack, 334 N.W.2d 761 (Iowa 1983), and In re Marriage of Kern, 408 N.W.2d 387 (Iowa App. 1987). In both of those cases a voluntary reduction of income was found where a husband had been incarcerated for committing a felony. We are not presented with those facts in the case at hand.

Phyllis also cites Ellis v. Ellis, 262 N.W.2d 265 (Iowa 1978). In Ellis, the supreme court found the planned early retirement of an ex-husband, who was highly educated and had marketable skills, to be a voluntary reduction of income. Id. at 268. Charles Codner is not planning an early retirement, nor is he highly educated or in possession of marketable skills. Ellis is therefore inapposite as well.

We modify the decree, reducing Charles's alimony obligation to $100 per month.

REVERSED IN PART AND MODIFIED IN PART.