

IN THE COURT OF APPEALS OF IOWA

No. 1-068 / 90-937

FILED

AUG 27 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF LOIS L. REINKE AND RAYMOND H. REINKE

Upon the Petition of
LOIS L. REINKE,

415

Appellee,

And Concerning
RAYMOND H. REINKE,

Appellant.

Appeal from the Iowa District Court for Sioux County,
Dewie J. Gaul, Judge.

The district court denied respondent's application for modification of the alimony provisions of the parties' dissolution decree. On appeal, respondent argues that his retirement and subsequent reduction of income is a substantial change of circumstances which warrants a reduction or elimination of his alimony obligation. He also asks that the court's ruling that he be required to pay petitioner's attorney fees be reversed. **AFFIRMED.**

Bradley K. De Jong of Klay, Veldhuizen, Bindner & De Jong, Orange City, for appellant.

Randy L. Waagmeester of De Waay & Waagmeester, Rock Rapids, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden,
JJ.

DONIELSON, J.

Lois L. Reinke and Raymond H. Reinke were married on October 9, 1948. Their five children were all adults at the time of their dissolution decree which was entered on November 19, 1981. The parties divided their assets by agreement, and the district court ordered Raymond to pay alimony to Lois in the amount of \$250.00 per month until her death or remarriage.

Approximately one year later Raymond remarried. Lois has not remarried. Both continue to live in Rock Valley. This matter involves Raymond's second attempt to modify the alimony provisions of the November 19, 1981, decree.

At the time of the original decree the parties had been married for thirty-three years. Raymond's net monthly income was \$1,593.00; Lois's net monthly income was \$567.00. Raymond worked as a small crew supervisor for Iowa Public Service Company; Lois worked at a local bank. When Raymond filed the current modification application, he had recently taken early retirement at age sixty-two. Lois continued to work for the bank.

In denying Raymond's request for modification, the district court found Raymond's net monthly income from social security and retirement benefits totals \$1,421.00 per month. Lois's net monthly income is \$650.00 from the bank, \$200.00 from investments, and \$250.00 from alimony. The court compared Raymond's unencumbered assets valued at \$88,400.00 to Lois's unencumbered assets valued at

\$32,670.00. The court also rejected Raymond's arguments that he would not be able to cash his 401(k) plan or his ESOP until he reached age seventy-two without incurring a heavy penalty. The court concluded that Raymond's voluntary retirement was within the contemplation of the parties and the court in 1981 and was not a substantial change in circumstances warranting a reduction or elimination of alimony. The court assessed Raymond with Lois's attorney fees of \$695.40. Raymond now appeals.

I. Modification. 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).

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 Vetterneck, 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 in the contemplation of the trial court when the original decree was entered.

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

The knowledge of the trial court at the time the award is made is the basis for determining whether there has been a change of circumstances. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977); Leo v. Leo, 213 N.W.2d 495, 496 (Iowa 1973). 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. Mears, 213 N.W.2d at 514.

Furthermore, any voluntariness in diminished earning capacity is an impediment to modification of a decree. Vetternack, 334 N.W.2d at 763. When a person's inability to pay alimony is self-inflicted or voluntary, it does not constitute a ground for reduction of future payments. Ellis v. Ellis, 262 N.W.2d 265, 268 (Iowa 1978).

The situation of the parties was last considered in 1986. Since 1986 there has been no material and

substantial change in circumstances. Retirement is such an ordinary change in circumstances that we are convinced the court in 1981 and in 1986 anticipated and considered the possibility Raymond might retire. Raymond's retirement does not amount to a material and substantial change in circumstances. Neither is the fact that Raymond opted for early retirement a significant factor. Any reduction in income as a consequence of his early retirement is purely voluntary.

II. Attorney Fees. Raymond appeals the district court's award of trial attorney fees to Lois. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award, the complaining party must show that the trial court abused its discretion. Id. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

The district court ordered Raymond to pay Lois's \$695.40 trial attorney fee. Lois was the prevailing party in the proceeding, the fee is reasonable, and Raymond is more capable of paying the amount. The district court did not abuse its discretion in granting the award.

Additionally, Lois requests an award of appellate attorney fees. 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).

Raymond is ordered to pay Lois's appellate attorney fees in the amount of \$937.50 and the costs of this appeal.

For all the reasons stated, the judgment is affirmed.

AFFIRMED.