

IN THE COURT OF APPEALS OF IOWA

No. 8-216 / 97-1297

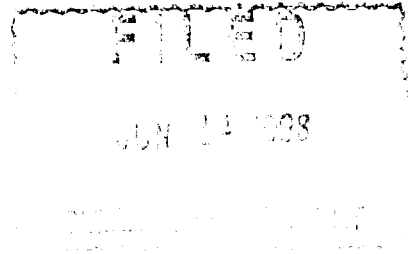
**IN RE THE MARRIAGE OF MICHAEL CARL DATKO
AND PAIGE LORINE DATKO**

**Upon the Petition of
MICHAEL CARL DATKO,**

Petitioner-Appellant,

**And Concerning
PAIGE LORINE DATKO,**

Respondent-Appellee.



Appeal from the Iowa District Court for Jefferson County, Annette J. Scieszinski, Judge.

Michael Datko appeals from the district court's ruling denying his motion to terminate his temporary alimony obligation to Paige Datko. **AFFIRMED.**

Thomas M. Walter of Johnson, Hester, Walter, Harrison & Breckenridge, L.L.P., Ottumwa, for appellant.

Craig R. Foss of Foss, Kuiken & Gookin, P.C., Fairfield, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

SACKETT, P.J.

Petitioner-appellant Michael Datko appeals from the district court's ruling denying his application to modify a temporary alimony award he was ordered to pay respondent-appellee Paige Datko. Michael contends he showed a substantial change in circumstances sufficient to justify a modification of the temporary alimony. We affirm.

Michael and Paige were married on November 5, 1993. Michael petitioned for dissolution of the marriage on November 6, 1996. Paige filed an answer and applied for attorney fees. Michael and Paige filed financial affidavits. Based on the affidavits, the trial court on November 27, 1996, ordered Michael to pay Paige alimony of \$1500 per month and \$1000 in attorney fees. Additionally, the order presumed Michael would continue a \$400 monthly car payment on a vehicle in Paige's possession.

The affidavits considered by the trial court in fixing the support show Paige unemployed and Michael, who was retired, to have income of approximately \$16,600 monthly. The affidavit shows his net worth to be \$619,209. Michael's affidavit showed he had a financial obligation of \$3000 a month for child support and alimony from his prior marriage.

Following the temporary order, discovery commenced. The deposition of Paige was taken. On March 10, 1997, Michael filed a motion to either eliminate or modify the temporary support order. He advanced Paige was living rent-free in a

home in Arkansas owned by her parents, cohabiting with a male lover and assuming part of his support through the alimony she receives. Michael advanced Paige, who has a college degree, was capable of employment. Michael included Paige's evidentiary deposition as evidence supporting his request. He also filed his own affidavit. Paige responded by way of affidavit and certain attachments which the trial court struck as hearsay evidence. The trial court, without a hearing, entered an order on the petition to modify stating the court did not find a substantial change of circumstances to warrant a modification of temporary allowance and holding, "Petitioner's Motion to Modify Order re: Temporary Allowances is denied."

Michael on appeal claims he has shown the required circumstances for modification. He argues that unlike the circumstances Paige advanced at the time the temporary order was entered, she has a place to live and she is living with a man with whom she has a romantic relationship. Michael contends Paige is employable and this fact should be considered after this period of time.

Temporary orders entered pursuant to Iowa Code section 598.11 are final judgments and are appealable as a matter of right. *In re Marriage of Campbell*, 451 N.W.2d 192, 195 (Iowa App. 1989); *In re Marriage of Winegard*, 257 N.W.2d 609, 614 (Iowa 1977).

The trial court has made no factual findings. The trial court heard no witnesses. We review de novo without the benefit of factual findings from the trial court.

Any form of alimony is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996);¹ *In re Marriage of Wessels*, 542 N.W.2d 486, 490 (Iowa 1995).² Before awarding alimony, the district court is required to consider the factors listed in Iowa Code section 598.21(3) (1997). These factors include (1) the length of the marriage; (2) the age, physical, and emotional health of the parties; (3) the property distribution made in the dissolution decree; (4) the educational levels of the parties; (5) the earning capacity of the party seeking maintenance; (6) the ability of the party seeking maintenance to become self-supporting at the standard of living enjoyed during the marriage; (7) the tax consequences to each party; (8) any

¹ In *In re Marriage of Ask*, the court said:

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In re Marriage of Ask, 551 N.W.2d 643, 645 (Iowa 1996).

² In *In re Marriage of Wessels*, the court said:

In making or modifying an alimony award, the trial court considers the factors set forth in Iowa Code section 598.21(3). Our review of the trial court's modification of the dissolution decree is de novo. *In re Marriage of Wahlert*, 400 N.W.2d 557, 559 (Iowa 1987). The trial court nevertheless has reasonable discretion in passing upon the advisability or necessity of a dissolution decree provision. *Id.* at 560. On appeal, we do not disturb the trial court's conclusion unless there has been a failure to do equity. *Id.*

In re Marriage of Wessels, 542 N.W.2d 486, 490 (Iowa 1995).

mutual agreements by the parties concerning financial or service contributions; (9) the provisions of any antenuptial agreement; and (10) any other factors the court determines relevant on a case-by-case basis.

An award of temporary support may be modified if there is a showing of a substantial change in circumstance. *See* Iowa Code § 598.21(8) (1997). Michael bears the burden of showing the change. Because of the temporary nature of the order and the fact the equities of the parties shall be resolved in the final decree, we consider Michael has a substantial burden to meet in order to justify a decrease.

Michael has the ability to pay the alimony ordered. Paige advances she is not currently employed because she needs time to consider future choices. We note Paige has a college degree and is employable and able to be self-supporting. While these factors are very relevant in the trial court's assessment of her financial need in crafting the final decree, they are not sufficient at this time to justify a modification of the temporary award. We affirm.

AFFIRMED.