

IN THE COURT OF APPEALS OF IOWA

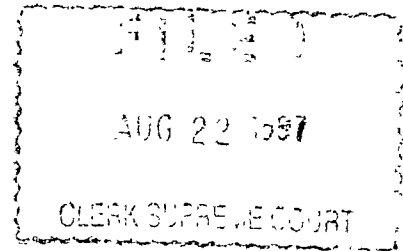
No. 7-262 / 96-0343

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**IN RE THE MARRIAGE OF JOHN T. FORD
AND EILEEN M. FORD**

Upon the Petition of
JOHN T. FORD,
Appellant,

And Concerning
EILEEN M. FORD,
Appellee.



Appeal from the Iowa District Court for Humboldt County, Joel E. Swanson,
Judge.

John appeals from the denial of his application for a modification of the
parties' dissolution decree. **AFFIRMED.**

C. Joseph Coleman, Jr., Fort Dodge, for appellant.

Dan T. McGrevey, Fort Dodge, for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ.

HUITINK, J.

John Ford appeals from the district court's judgment denying his application to modify the alimony provisions of the decree dissolving his marriage to Eileen Ford. Eileen cross-appeals the district court's failure to award attorney fees.

I. Background Facts and Proceedings.

The Ford's twenty-eight year marriage was dissolved in November 1989. Eileen was awarded \$1250 per month alimony. In making this award, the district court noted Eileen's limited employment prospects, and economic dependency.

John initiated these proceedings in September 1994. He cited Eileen's failure to seek employment and her cohabitation with another man as circumstances justifying termination of his alimony obligation.

The district court denied John's application. Although Eileen requested attorney fees, the district court failed to address this issue. No post trial motions were filed.

On appeal John contends the district court mischaracterized Eileen's original alimony award as reimbursement or traditional alimony. He argues she was awarded rehabilitative alimony for a limited duration of time. Eileen contends she is entitled to trial and appellate attorney fees. John disputes her claims for fees citing her failure to preserve error on this issue and the merits of his case for modification.

II. Scope of Review.

Our review in this case is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact but we are not bound by them. Iowa R. App. P. 14(f)(7).

III. Modification of Alimony.

An alimony award may be modified upon a proper showing of a change in circumstances. The party seeking modification bears the burden to establish a substantial change of circumstances. *Mears v. Mears*, 213 N.W.2d 511, 515 (Iowa 1993). We only consider circumstances not shown to be within the contemplation of the trial court when the original decree was entered. *In re Marriage of Full*, 255 N.W.2d 155, 159 (Iowa 1977).

The original decree includes these findings of fact:

"The record . . . is insufficient to competently predict when Eileen may gain more financial independence. The only evidence concerning Eileen's future employment was that she "may pursue dental assistant training. . . . Her plans in that regard, however, are speculative at best. While Eileen certainly has the obligation to do all she can to better her financial plight, the evidence is purely speculative as to Eileen's future employment and earning prospects. . . . she has been out of the job market for many years and presently has no special job skills. . . . As Eileen's employment future becomes more certain, John certainly will have the option of requesting a modification of the alimony award upon demonstrating a substantial change in his or Eileen's financial circumstances."

At the time the decree was entered, John's earning capacity was \$3000-\$3500 net per month. Eileen's earning capacity was nominal. The record indicates John's

earning capacity is at least what it was in 1989. Eileen claims her present earning capacity is no more than \$500 per month.

Based on our review of the record, we conclude John has failed to meet his burden to show a change of circumstances beyond the contemplation of the dissolution court. Contrary to his contentions, the original decree awarded Eileen traditional alimony.¹ The duration of the award and the district court's findings regarding Eileen's prospects for financial independence are consistent with an award of traditional alimony. Moreover, the decree makes no reference to circumstances supporting an award of rehabilitative or reimbursement alimony. There is no indication that Eileen's employment prospects would have improved with additional education or that she contributed to John's increased earning capacity. We agree with the district court's conclusion Eileen would still be economically dependent on John even if her income were consistent with her earning capacity.

John's claim that Eileen's cohabitation with another man justifies modification of the decree is without merit. The record indicates Eileen maintains a separate residence and frequently visits her male friend on the weekends. The evidence falls far short of that required to find cohabitation sufficient to terminate alimony. *See In*

¹ Traditional alimony is payable for life or so long as the dependent spouse is incapable of self support. Rehabilitative alimony is awarded to support a dependent spouse through a limited period of retraining to become self sufficient. Reimbursement alimony is intended to compensate a spouse for sacrifices made during the marriage that enhance future earning capacity of the other spouse. *In re Marriage of Frances*, 442 N.W.2d 59, 63 (Iowa 1989).

Re Marriage of Harvey, 466 N.W.2d 916, 918 (Iowa 1990) (cohabitation requires unrelated person living in same dwelling house and living together as husband and wife). We affirm on this issue.

IV. Attorney Fees.

As noted earlier, John contends Eileen has not preserved error on her claim for trial attorney fees. We disagree. Eileen's answer to John's application to modify the original decree includes a request for attorney fees. The trial record also includes an itemized statement of legal expenses Eileen incurred in the course of these proceedings. The district court, despite her request and supporting statement, did not address this issue in its modification decree. Eileen's failure to raise this issue by post trial motion is not fatal to her appeal because as the prevailing party, she did not have to file a I.R.C.P. 179(b) motion to preserve error for appeal. *See Johnson Equip. Co. v. Industrial Indemnity*, 489 N.W.2d 13, 16-17 (Iowa 1992). Moreover, the record indicates that Eileen raised the issue of trial attorney fees in a timely filed cross-appeal. *See In re Marriage of Novak*, 220 N.W.2d 592, 598 (Iowa 1974).

An award of attorney fees to the prevailing party in the modification action is discretionary. *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa App. 1995). Attorney fee awards are based on the parties' respective needs and ability to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982). We determine, based on the parties' respective financial circumstances, that John should pay \$1000 of Eileen's trial attorney fees.

An award of appellate attorney fees is also discretionary. We for the same reasons supporting an award of trial attorney fees determine that Eileen should be awarded \$500 for appellate attorney fees. The decision of the district court is affirmed.

AFFIRMED.