IN THE COURT OF APPEALS OF IOWA

No. 9-535 / 89-127

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Woodbury County No. 10262

IN RE MARRIAGE OF PEGGY LEILA GREGG AND PHILLIP G. GREGG

Upon the Petition of **PEGGY LEILA GREGG,**

Appellee/Cross-Appellant,

And Concerning **PHILLIP G. GREGG,**

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Woodbury County, Cameron B. Arnold, *Judge*.

Appeal and cross-appeal from a modification of a dissolution decree concerning provisions for child support, alimony, and attorney fees. **AFFIRMED AS MODIFIED.**

Mary Jane Sokolovske of Green, Faith & Hendrickson, Sioux City, for appellant.

David L. Gill, of McCoy, Goodwin, Thomas & Gill, Sioux City, for appellee.

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

HAYDEN, J.

This is an appeal and cross-appeal from a district court order modifying the dissolution decree between Peggy Gregg and Phillip Gregg.

The marriage between Phillip and Peggy Gregg was dissolved by decree filed in September 1986. Two minor children were born of the marriage.

Peggy was awarded the primary physical care of the parties two sons. Phillip was ordered to pay $37.50 per child, per week child support and $20 per week alimony. The alimony was to continue until Peggy remarried or cohabited with a man or either party died, whichever first occurred. Peggy was allowed to remain in the parties' residence for as long as Phillip was required to pay child support. Phillip was required to pay the first and second mortgage payments on this property. The decree made no provision for the payment of medical costs for the children.

On January 27, 1987, Phillip was discharged in the United States Bankruptcy Court from certain preexisting debts. On February 5, 1987, the United States Bankruptcy Court discharged Phillip's obligation to pay the first and second mortgages on the property of the parties. By virtue of this discharge, Phillip was relieved of paying approximately $392.82 per month mortgage payments. Prior to this bankruptcy action, Peggy had left the residence.

On August 5, 1987, Peggy filed an application to modify the decree. In June 1988 trial was commenced with testimony taken in regard to issues of child support and alimony, medical support, and attorney fees.

The district court determined the bankruptcy discharge was a substantial change in circumstances and modified the decree. The court noted the incomes of both parties had remained fairly constant since the initial decree. Phillip was required to make child support payments of $100 per week and alimony payments of $87 per week both to commence on the first payment date after January 1, 1989. In addition, Phillip was ordered to maintain health insurance on his children, provide an insurance card for the children's medical expenses, and be responsible for all uninsured medical expenses. In a later order, the district court required Phillip to pay two-thirds of Peggy's attorney fees or $2,296.27. Phillip appealed both orders and Peggy has cross-appealed from the order awarding attorney fees. Both appeals have been consolidated.

I. Scope of Review. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give considerable weight to them, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision here primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II. Modification of a Decree of Dissolution of Marriage. The basic rule required to modify a dissolution decree is a material and substantial change in the condition or circumstances of the parties must have occurred since the dissolution. This was aptly expressed by our court in the case of In re Marriage of Mayer, 347 N.W.2d 681, 683 (Iowa App. 1984), as follows:

> Such changed conditions must be such as were not within the knowledge or contemplation of the court when the former decree was entered, and a modification should be based upon a change of circumstances more or less permanent or continuous, not temporary. (Citations omitted.)

A. Modification of Alimony. Since the dissolution, Peggy's annual earnings have increased from $2,100 to $6,475 in 1987. She works twenty-five hours per week and is capable of full time employment. In awarding Peggy alimony of $20 per week at the time of dissolution, it is apparent the trial court contemplated Peggy would obtain gainful employment and support herself. Phillip's change in his financial condition is not sufficient to warrant increasing Peggy's alimony. Her alimony shall remain at $20 per week as provided in the decree of dissolution of marriage. We modify the trial court on this issue. We have considered the criteria set out in Iowa Code sections 598.21(3) and (8).

B. Modification of Child Support. At the time of dissolution the parties were in debt. Phillip was ordered to pay numerous outstanding debts in the amount of $3,400. He was ordered to make the mortgage payments on the home of the parties in the sum of $392.82 each month. In addition to paying the mortgage payments as they become due, Phillip was ordered to pay $37.50 per child per week (at that time a total of $75). The payments were to continue until the child for whom such payment is made dies, becomes emancipated, attains age twenty-two, or, after attaining age eighteen, ceases to be a student as defined in Iowa Code section 598.1(2), whichever occurs first.

Clearly, the dissolution court considered the mortgage payments as part of the support for the children. Peggy and the parties' two boys were residing in the home at that time. Peggy moved out of this home after the dissolution and before Phillip petitioned for bankruptcy.

The fact Phillip is now relieved from the obligation of the mortgages, because those debts along with others were discharged in the bankruptcy proceedings, was not within the contemplation of the dissolution court. This is a material and substantial change of condition or circumstance as it relates to Phillip's child support obligation. The fact Phillip took bankruptcy, per se, is not such a change. The fact Phillip is no longer responsible or liable for those mortgage payments, for any reason, is such a change.

Phillip earns approximately $1,900 per month. Peggy earns approximately $540 per month. We determine Phillip shall pay $585 each month or $135.11 per week for support of the two boys. After one of the boys is no longer the subject of support, then Phillip's obligation shall be reduced to $405 per month or $93.46 per week for the one boy remaining. We modify the trial court accordingly on this issue. The duration of child support shall remain as ordered in the dissolution decree. The trial court ordered the increase in the child support payments to commence on the first payment date after January 1, 1989. We do not disturb this.

We have considered the criteria set out in Iowa Code sections 598.21(4) and (8). It is well established that both parents have a legal obligation to support their children. The obligation to support should be apportioned according to the ability of each parent to contribute. In re Marriage of Bornstein, 359 N.W.2d 500, 504 (Iowa App. 1984).

III. Attorneys Fees at Trial. 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. 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).

Guided by these general legal principles, we find the sum of $2,296.27 to be a fair and reasonable amount for Phillip to pay toward Peggy's trial attorney fees in this modification proceeding. The trial court did not abuse its discretion based upon the parties' respective abilities to pay. We affirm the trial court on this issue.

IV. Attorneys Fees on Appeal. 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 Hayne, 334 N.W.2d 347, 353 (Iowa App. 1983); In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Guided by these general legal principles , we order Phillip to pay $1,000 towards Peggy's appellate attorney fee obligation. Except as modified herein, we affirm the trial court on all other issues raised on appeal and cross-appeal. Costs of appeal are taxed to Phillip.

AFFIRMED AS MODIFIED.