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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JUDY M. BUTLER AND THOMAS F. BUTLER

UPON THE PETITION OF)

JUDY M. BUTLER,)

Filed February 26, 1980

Petitioner-appellee,)

AND CONCERNING)

THOMAS F. BUTLER,)

0-19
2-63698

Respondent-appellant.)

Appeal from Dubuque District Court - Thomas H. Nelson, Judge.

Respondent appeals from an order denying modification of the alimony provisions of the decree dissolving his marriage to petitioner. AFFIRMED.

Peter W. Klauer and Frank D. Gilloon III of Dubuque, for respondent-appellant.

Alfred E. Hughes of Dubuque for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent, Thomas Butler, appeals from an order denying modification of the alimony provisions of the decree dissolving his marriage to petitioner, Judy Butler. We affirm.

At the time the parties' dissolution, Thomas was forty and Judy was thirty-nine. At that time the court awarded custody of the parties' three children to Judy and awarded her child support of \$225 per month until the youngest child reaches eighteen. The title to their residence property was left in joint tenancy and Judy was given the right of possession until the youngest child reaches twenty-one. Thomas was required to make monthly payments of principal, interest, taxes and insurance on the residence. Judy was awarded alimony of \$225 per month until she reaches sixty-five.

On October 11, 1978, Thomas filed his petition to modify the decree alleging as change of circumstances Judy's employment and his own diminution of earnings. Following an evidentiary hearing on said application, the trial court found Thomas had failed to carry his burden of proving a change of circumstances sufficient to warrant modification. This appeal followed.

Our review is *de novo*. Iowa R. App. P. 4, *see*, In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). The terms of a dissolution decree may be modified only upon a showing of material and substantial change of circumstances subsequent to the original decree, which makes it equitable that other terms be imposed. *Id.* at 158, Divorak v. Divorak, 195 N.W.2d 740, 742 (Iowa 1972), Section 598.21, The Code 1979. The party petitioning for modification of the decree has the burden of establishing the change in circumstances by a preponderance of the evidence. Full, 255 N.W.2d at 159; Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). Moreover, the change in circumstances must be such that it was not within the contemplation of the trial court at the time the original decree was entered. Full, 255 N.W.2d at 159. In reviewing the evidence presented, we give weight to the findings of the trial court but we will not abdicate our function as a trier *de novo* on appeal. Iowa R. App. 14(f)(7).

At the original dissolution trial Judy presented extensive evidence regarding a disabling back problem and testified that, as a result, she did not feel she could be employed for certain types of work such as clerical or reception work. In the decree dissolving the parties' marriage, the trial court made a finding that "petitioner [Judy] is presently unemployed and has no special employment skills other than a vestigial

capacity for typing." At the modification hearing Thomas relied on evidence of Judy's employment subsequent to the dissolution decree as a change of circumstances sufficient to justify termination of alimony.

The record indicates that, subsequent to the dissolution decree, Judy has realized the following annual gross earnings: \$442.61 for 1976; \$7,126 for 1977; and \$6,288 for 1978. Judy's testimony indicated that during 1979 she was earning \$3.70 per hour while working 40 hours per week. At the time of the dissolution decree, Thomas's annual gross income was \$17,357.53. His gross earnings for 1976, 1977 and 1978 have been \$24,376.94, \$25,340.00, and \$26,776.76, respectively. He claims it will only be \$20,600.00 in 1979. A significant factor in evaluating his ability to pay against Judy's needs is the termination of his child support obligation on January 9, 1979.

We do not believe that the finding of the original dissolution court that Judy, at that time, had no special employment skills, precluded contemplation of the fact that she might in the future obtain gainful employment. We conclude that evidence of change in Judy's needs and Thomas's ability to pay is not so material as to require a modification of Thomas's alimony obligation.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J. (dissenting)

I dissent. When the original decree was entered July 21, 1976, Thomas was ordered to pay more than half his net salary for child support, alimony, and house payments. The trial court found Judy was unemployable at that time.

Now the children are raised. Judy now is employed and expected to earn \$7000 in 1979. I believe Thomas should be granted relief from the \$2700 a year he must pay to support Judy.