

IN THE COURT OF APPEALS OF IOWA

No. 1-212 / 90-1189

IN RE THE MARRIAGE OF GLENN E. WALLACE AND
SHIRLEY J. WALLACE

FILED

AUG 27 1991

CLERK SUPREME COURT

Upon the Petition of

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GLENN E. WALLACE,

Petitioner-Appellee,

And Concerning

SHIRLEY J. WALLACE,

Respondent-Appellant.

Appeal from the Iowa District Court for Linn County,
William R. Eads, Judge.

Respondent Shirley J. Wallace appeals the trial court
order modifying an alimony award. **REVERSED.**

Mary K. Hoefer of Mears, Zimmermann & Mears, Iowa City,
for appellant.

J. Richard Johnson and Allison M. Heffern of White &
Johnson, P.C., Cedar Rapids, for appellee.

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

SACKETT, J.

The issue in this appeal is whether the trial court was correct in modifying downward an alimony award petitioner-appellee Glenn Wallace was ordered to pay respondent-appellant Shirley Wallace under a 1984 dissolution decree. We reverse the trial court and leave the 1984 alimony award intact.

The thirty-one-year marriage of petitioner-appellee Glenn E. Wallace and respondent-appellant Shirley J. Wallace was dissolved in 1984. The 1984 decree provided Glenn was to pay Shirley alimony of \$75 per week until his retirement when alimony would reduce to \$50 a week. In January 1986 Glenn filed a petition for modification of alimony. A trial was held, and the trial court denied his application. On March 22, 1989, Glenn filed a second application. Trial was held April 4, 1990, and May 14, 1990. On June 11, 1990, the trial court entered an order finding a substantial change in circumstances, and decreased the alimony to \$50 per month until July 1, 1991, when it was ordered payable at \$1 per year. From this decision Shirley appeals.

At the time of the dissolution Glenn was fifty-five and Shirley was fifty-three. Glenn was, and had for some time been, employed at Rockwell International, Collins Division. Shirley had assumed the primary responsibility for the home and care of the parties' four children, who

were by then adults. Shirley had had minimal employment outside the home. Neither party was in good health. Glenn had a heart condition, and Shirley had severe arthritis. Shirley suffers a congenital anomaly. She is missing three fingers from her right hand. This limits her employability. Considering the parties' ages, health, and relative economic circumstances, as well as Shirley's lack of vocational training, the judge ordered Glenn to pay alimony of \$75 per week until his retirement. At his retirement, the alimony was to be reduced to \$50 per week.

In June 1985 Glenn had a second heart attack. He had bypass surgery in February 1986. On January 2, 1986, Glenn filed an application for modification. He asked to have his alimony award reduced. The judge denied this request, finding although Glenn had left his employment because of poor health, the leave of absence was within the contemplation of the trial court when the original decree was entered. The court went on to find retirement had been provided for in the original decree, in that at retirement the original decree reduced alimony to \$50 per week. At the hearing, the probate file from Shirley's mother's estate was made a part of the record. The file had been opened in June 1985. The court found Shirley would receive a substantial amount of money from the estate. The court denied modification.

Glenn retired from his job after the 1986 modification trial, but before the judge's decision was entered. When he retired, he began paying \$50 a week alimony.

On March 22, 1989, Glenn again sought to modify the alimony provision in the decree. The case was tried. At the time of trial, Glenn's monthly income was \$1,916.44. Shirley's income was \$725 per month, plus the \$200 per month alimony. Shirley's income included \$267 per month wages. Shirley had a home and investments of about \$70,000 from the inheritance from her mother.

Glenn testified at trial he anticipated his retirement income would be reduced from \$1,348 to \$748 per month. A social security benefit will increase his income to approximately \$1,500 per month, if this reduction is made. The reduction in Glenn's income is the result of his election to take his retirement benefits at an accelerated rate when he retired, rather than a level payment every month until death. He received payments which were considerably higher for the first five years of his retirement, then his benefits are reduced substantially, at which time he could draw social security. Shirley ultimately will draw social security benefits on Glenn's account of one-half of Glenn's benefits, or approximately \$400 per month. Shirley will not receive social security benefits for three years.

Glenn has remarried. His wife was forty-seven years old at the time of this modification trial, and is not employed. Prior to her marriage to Glenn, she had been employed as a secretary earning approximately \$18,000 per year.

The trial court modified the decree to decrease alimony to \$50 a month to July 1, 1991, when it reduced to \$1 per year. Shirley appeals contending the trial court should not have modified the dissolution decree to substantially decrease and then partially eliminate her alimony.

Our review is de novo. We give weight to the trial court's findings, but are not bound by them. Iowa R. App. P. 4; In re Marriage of Orgren, 375 N.W.2d 710, 712 (Iowa App. 1985).

A marriage dissolution decree can be modified only when there has been a material and substantial change in circumstances since the date of a prior modification concerning the same issue. In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976). Circumstances that have changed, to justify modification of alimony, must be those that were not within contemplation of the trial court when the decree to be modified was entered. See In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983). 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. Full, 255 N.W.2d at 159; 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 v. Mears, 213 N.W.2d 511, 514 (Iowa 1973). Modification of the alimony provision of a dissolution decree is justified only if there has been some material and substantial change in the circumstances of the parties, financially or otherwise, making it equitable that other terms be imposed. In re Marriage of Skiles, 419 N.W.2d 586, 588 (Iowa App. 1987); Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden of showing the change is that of the party seeking modification, in this case Glenn. See In re Marriage of Jensen, 251 N.W.2d 252, 254 (Iowa 1978); Mears, 213 N.W.2d at 513. The question is, did Glenn prove there had been a substantial change of circumstances since he attempted to modify the decree in 1986? At that time, Shirley had already obtained a substantial portion of the inheritance from her mother. The total amount of the inheritance was known. Glenn had already had the heart attack and bypass surgery, which resulted in his early retirement. Although Glenn had not retired at the time of the hearing in the first modification action, the health circumstances which led to his decision to retire occurred prior to the modification

hearing. Glenn's retirement came after the hearing but before the court ruled on Glenn's first application for modification. The court specifically found in ruling on the first modification, Glenn might have to retire early. The original decree recognized Glenn's heart condition.

This was a long-term traditional marriage. Glenn was the major wage earner. Shirley had little or no employment outside the home. The parties were in their fifties when the decree was entered. Glenn was employed by Rockwell Collins and had made substantial contributions to a company pension plan, as well as FICA contribution. Shirley had minimal or no contributions to a pension plan and FICA in her own right. The income Glenn receives from social security and pension is in large part the result of accumulations from the marital years. The dissolution court considered evidence of the health problems, anticipated retirement, and reduced alimony based on retirement.

The first modification court received into evidence Shirley's mother's probate file. The file had been open for a year, and the trial court was advised as to the extent of Shirley's inheritance and considered it. Glenn's poor health deteriorated as he aged. It is common knowledge that certain health problems come with the aging process. In re Marriage of Skiles, 419 N.W.2d at 589. Medical problems associated with the aging process are in

the contemplation and knowledge of the trial court when a decree is entered. Id. They are reasonable and ordinary changes that are likely to occur. Mears, 213 N.W.2d at 514. Glenn has failed to meet his burden.

Shirley next contends the trial court should not have taxed \$500 of Glenn's attorney fees against her. In view of our holding, we agree.

We award no attorney fees on appeal. Appellate costs are taxed to Glenn.

REVERSED.