

IN THE COURT OF APPEALS OF IOWA

No. 3-325 / 92-1837

FILED

APR 26 1994

CLERK SUPREME COURT

IN RE THE MARRIAGE OF EUGENE R. FITZGERALD
AND PATRICIA A. FITZGERALD

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Upon the Petition of
EUGENE R. FITZGERALD,

Petitioner-Appellant,

And Concerning
PATRICIA A. FITZGERALD,

Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County,
Arthur E. Gamble, Judge.

The former husband appeals a ruling of the district
court denying his application to modify the parties'
dissolution decree. **AFFIRMED.**

Eric Borseth of Borseth & Genest Law Office, Pleasant
Hill, for appellant.

Dennis F. Chalupa of Brierly Law Office, Newton, for
appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

HABHAB, J.

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The former husband, Eugene Fitzgerald, appeals a ruling of the district court denying his application to modify the parties' dissolution decree. We affirm.

The district court dissolved the marriage of Eugene and Patricia Fitzgerald on December 11, 1973, after approximately twelve years of marriage. Patricia received physical custody of the parties' five children. The district court ordered Eugene to pay child support in the amount of \$20.00 per week per child.¹ In addition, the district court ordered Eugene to pay spousal support in the amount of \$25.00 per week until Patricia's death or remarriage. At the time of the dissolution, Patricia was a homemaker and Eugene was employed as an insurance agent earning approximately \$18,000 per year.

In 1983, Eugene remarried. He has a daughter from this marriage, Mary, who suffers from a congenital heart defect. Eugene stated he and his wife pay about \$2500 a year in uninsured medical expenses for Mary. Eugene's wife has a small farm, cow-calf operation and a basket business. Eugene is currently employed as a wholesale salesman. His gross yearly earnings are approximately \$24,000.

1. The dissolution decree states, "said payments shall continue each Friday thereafter until at such time as each child shall reach the age of 18 years, marries or otherwise becomes self-supporting." The parties' youngest child turned eighteen in March of 1988.

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After the dissolution of the parties' marriage, Patricia returned to college and obtained her bachelor's degree in 1978. In order to complete her education, Patricia had to sell the house she was awarded in the dissolution and borrow money from her brother. She worked full-time, went to school full-time and took care of the five children. In 1988, she obtained her master's degree.

Eugene's child support and alimony payments during this time were sporadic and he admits to currently owing over \$59,000 in back support, not including interest. Patricia was forced to go on ADC during a portion of this time period. Eugene also failed to provide health insurance as required in the dissolution decree. Patricia was forced to take out a family policy at an additional cost of \$100 a month.

Patricia currently teaches fifth grade earning an approximate gross income of \$33,000 per year. She has no significant assets other than an old car and a small retirement fund valued at \$10,000 at the time of trial. She is \$24,600 in debt.

In 1992, Eugene filed an application to modify the dissolution decree. Following a hearing, the district court denied the application for modification. It found Eugene had not shown a substantial change in circumstances justifying the reduction of spousal support to Patricia. The district court ordered Eugene to pay \$600 towards Patricia's attorney fees. Eugene appeals.

Eugene argues he should not have to continue to pay spousal support to Patricia because her income increased significantly since the time of the dissolution decree.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Modification of the alimony provisions 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. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Mears v. Mears, 213 N.W.2d 511, 513 (Iowa 1973); Thayer, 286 N.W.2d at 223. Circumstances that have changed, to justify modification of alimony, must be those that were not within contemplation of the trial court when the original decree was entered. 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).

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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, 213 N.W.2d at 514.

We note that at the time of the dissolution decree, Patricia was not employed. However, she had completed two years of college and had taught kindergarten for a year and one-half before the parties' children were born. Twenty years have passed since the original decree was entered. We agree with the district court that at the time of the original decree, it was in the contemplation of the trial court Patricia would find employment in a field she had previously been employed; i.e. teaching. Eugene has failed to show her increase in salary is a material and substantial change in circumstances.

In his brief, Eugene specifically states he is not arguing his remarriage, his financial obligations towards his child, Mary, his periods of illness or unemployment since the original decree are change in circumstances. He states these factors are only applicable to whether the continued enforcement of the dissolution decree would result in a positive wrong or injustice.

Eugene has incurred numerous debts due to his drinking and inability to maintain steady employment. Eugene also

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has made bad investments which have contributed to his financial problems. Eugene testified that in about a year he expects to be making commission on sales. Considering the parties' financial situations, we find the continued enforcement of the \$25.00 per week alimony payment would not result in a positive wrong or injustice. We affirm the district court on this issue.

Eugene also argues the district court erred in awarding Patricia trial attorney fees. 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. Id. 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). We find the district court did not abuse its discretion in awarding Patricia \$600 in trial attorney fees.

Costs of this appeal are assessed to Eugene.

AFFIRMED.