

FILED

JUN 26 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DEAN A. NIERLING AND PATRICIA C. NIERLING

450

Upon the Petition of)

DEAN A. NIERLING,)

Filed June 26, 1984

Petitioner-Appellant,)

And Concerning)

PATRICIA C. NIERLING,)

4-168

83-1404

Respondent-Appellant.)

Appeal from the Iowa District Court for Howard County - Roger F. Peterson, Judge.

Petitioner appeals from the trial court's denial of his petition for modification of the parties' 1977 dissolution decree to eliminate his future alimony obligation following the respondent's remarriage. **AFFIRMED.**

Richard L. Donohue, West Union, Iowa, for petitioner-appellant.

Donald H. Gloe of Miller, Pearson, Gloe, Burns, Beatty & Cowie, Decorah, Iowa, for respondent-appellee.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

Petitioner, Dean Nierling, appeals from the trial court's denial of his petition for modification of the parties' 1977 dissolution decree to eliminate his future alimony obligation following the respondent's remarriage. He asserts that, contrary to the trial court's ruling, he has shown a substantial change in circumstances since the entry of the decree which warrants a modification of the decree so as to eliminate the future payment of alimony. We affirm.

Dean petitioned in 1981 for a modification of the 1977 dissolution decree seeking a reduction in his child support and alimony obligations under the decree. Respondent, Patricia Nierling Sill, was awarded custody under the 1977 decree of the parties' four minor children and \$600 per child per month child support until the youngest child reached the age of eighteen or graduated from high school, whichever is later. Two of the parties' children—Jayson, age 15, and Kathryn, age 13—remained minors at the time of the modification hearing in 1983. The dissolution decree also provided that Dean was to pay Patricia \$1,500 alimony per month as permanent alimony and that such payments were to continue until Patricia's death or remarriage. Upon her remarriage the monthly amount of alimony was to be reduced to \$500 per month. All these provisions were stipulated to and incorporated into the parties' dissolution decree by consent.

Dean based his request for elimination of his future alimony obligation upon the employment of Patricia since the dissolution, the reduction in his income since the dissolution, and the fact that both parties have remarried. The trial court held that Dean had failed to show a substantial change in circumstances since the entry of the decree and denied the request. Dean asserts on appeal that although each circumstance by itself may not constitute sufficient grounds to eliminate his alimony obligation, all of these circumstances together warrants modification of the decree.

As noted by Dean in his brief, the only issue pursued by the parties on appeal is whether or not he established a substantial change of circumstances at the modification hearing justifying a termination of his future alimony obligation to Patricia. It appears that Patricia is presently receiving \$500 per month alimony and \$600 per month child support pursuant to the parties' 1977 dissolution decree. Dean concedes in his brief that he is no longer requesting a reduction or elimination of child support.

Our review is de novo. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977); Iowa R. App. P. 4.

I. 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 Jensen, 251 N.W.2d 252, 254 (Iowa 1977); Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973). 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). Circumstances that have changed, to justify modification of alimony, must be those that were not within the contemplation of the trial court when the original decree was entered. In re Marriage of Full, 255 N.W.2d at 159. Moreover, the change in circumstances must be continuous, not temporary. Spaulding v. Spaulding, 204 N.W.2d at 635.

In accord with request made by the parties in this case, their stipulation as to child custody, property settlement, and support was made a part of their original decree by reference. The stipulation was merged in and constituted an operable part of the decree, see Bowman v. Bennett, 250 N.W.2d 47, 50 (Iowa 1977), and, consequently, was superseded by the decree. Id. The parties' rights and obligations are those imposed by the decree, not the stipulation, and enforceable as such. Id. Thus, the provisions of the stipulation, to the extent it was incorporated in the parties' dissolution decree, may be modified in the same

manner as a dissolution decree entered by a court based upon evidence received at trial. Iowa Code § 598.21(8) (1981). See Knipfer v. Knipfer, 259 Iowa 347, 350, 144 N.W.2d 140, 142 (1966); Pederson v. Pederson, 235 Iowa 708, 712, 17 N.W.2d 520, 522 (1945).

II. Neither party asserts on appeal that the \$6,000 per year is intended to be anything other than alimony. See In re Marriage of Woodward, 229 N.W.2d 274, 277-78 (Iowa 1975) (employment of the term "alimony" is not conclusive). Both parties and the court were clearly aware that Patricia would need substantial support due to the award of custody of the parties' four minor children to her. However, the decree provided for a separate award of child support and awarded Patricia a substantial share of the parties' accumulated property. We believe it is clear that the amount awarded as "alimony" in the decree is, in fact, alimony and may be modified accordingly.

III. We first discuss the merits of each of the circumstances that Dean alleges has changed since the entry of the parties' dissolution decree and then determine whether all the circumstances combined are sufficient to show a substantial change in circumstances.

A. Dean initially contends that Patricia's employment constitutes a substantial change in circumstances. At the time of the dissolution decree, Patricia had not been employed full-time outside the home for a substantial period of time. Dean asserts that it was not contemplated that Patricia would ever become employable because of a serious drug dependency. Patricia is now employed full-time outside the home as a secretary in her present husband's family business earning a net weekly wage of \$162. Her gross salary for the year 1982 was \$10,147.

We do not believe the evidence shows that the court did not contemplate that Patricia would return to the job market. She had been employed as a teacher prior to her marriage to Dean and had two years of college education. Her drug

dependency at the time of the original decree could not have been as debilitating as Dean alleges because Patricia was awarded custody of the parties' four minor children. Moreover, Patricia testified at the modification hearing to increased expenses in providing for the parties' minor children. Her income at the time of the modification hearing was not such that she is affluent. We believe that Patricia's eventual employment was anticipated by the court and that her employment and present income of approximately \$10,000 per year are not grounds for granting a modification. See Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974); Holesinger v. Holesinger, 252 Iowa 374, 379, 107 N.W.2d 247, 251 (1961). Particularly in light of the reduction in alimony upon her remarriage by \$12,000 per year.

B. Dean next asserts that the reduction in his own income constitutes a substantial change in circumstances. Dean is a physician and he was a partner in a lucrative private medical practice in Cresco, Iowa, at the time of the dissolution. His gross income was \$71,535 in 1976, \$86,000 in 1977, approximately \$106,000 in 1980 and 1981, and \$90,780 in 1982. Dean sold his share in the private practice in July, 1981, and he now is employed as an emergency room physician at the University of Missouri with a gross income of \$60,000. Thus, his income has changed from \$71,535 in 1976, the last year the parties resided together, to \$90,780 in 1982, with a reduction to \$60,000 per year expected in the future.¹

Assuming a reduction in Dean's income in the future to \$60,000 per year, we do not believe his change in income constitutes a substantial change in circumstances justifying modification of his future alimony obligation. As we noted above, his alimony obligation has been reduced by \$12,000 per year during

¹ It should be noted that when Dean filed this modification application in 1981, his income was \$106,000. However, we consider the change as of the date of the hearing in 1983.

the same period of time. The net effect of this reduction on the income presently available to him is negligible when compared with his annual income of \$71,535 in 1976, the last year of income shown prior to the parties' dissolution decree.

Moreover, his reduction in income was voluntary. Dean chose to sell his private medical practice in order to enter the field of emergency medicine. A person with an obligation to support another is not relieved of that obligation by voluntarily reducing his income or assets. In re Marriage of Cerven, 335 N.W.2d 143, 146 (Iowa 1983); Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978).

Dean testified that he sold his share in his private medical practice because he "got fed up with the practice." He further testified that he did not believe he could continue to do a good job under the circumstances and had consulted a psychiatrist prior to making his decision to leave private practice. However, there was nothing in the record beyond his statement that he was "fed up with the practice" to show he was unable to continue his practice. The court in Ellis v. Ellis, 262 N.W.2d at 267, stated as follows:

Although the record indicates his health problems are not as serious as he makes them out to be, we do not think they are imaginary. However, he is not free to plan his future without regard to his obligation to his first wife. He cannot arbitrarily freeze her out of his future. Similar obligations in and apart from family life compel many persons to maintain employment which may be difficult, undesirable and even physically or mentally painful.

We believe those same comments are also appropriate in this case. We understand the pressures of "professional life" may be difficult; however, we do not believe a finding of a substantial change of circumstances can be based upon a voluntary reduction of income as a result of employment pressures without a showing of need arising from those pressures.

C. Dean further asserts that the remarriage of both of the parties constitutes a substantial change in circumstances justifying a termination of his alimony obligation to Patricia. Dean remarried shortly after the dissolution

decree in 1977 and his present wife was employed as a registered nurse prior to the marriage. They have one child and his wife is presently attending school at the University of Missouri. Patricia was remarried in 1978 and has moved to Florida. Patricia and her husband are both employed in his family's business.

It has been generally stated that the remarriage of the husband, coupled with the obligations assumed thereby, does not alone constitute such a change in the circumstances of the parties as to justify modification of a dissolution decree. Smith v. Smith, 254 Iowa 1120, 1122, 120 N.W.2d 448, 450 (1963). However, it is a circumstance to be taken into consideration in determining whether there has been a substantial change in circumstances justifying modification of the decree. Holesinger v. Holesinger, 252 Iowa at 380, 107 N.W.2d at 251. See Iowa Code § 598.21(8) (1981). In this case, there is nothing to indicate that, as a result of Dean's remarriage, he is suffering unusual financial constraints. The fact that his net worth is only approximately one-half what it was before the parties' 1977 dissolution is not surprising in light of the parties' property settlement and his assumption of additional obligations. While we consider his remarriage as an additional circumstance in determining whether there has been a substantial change in circumstances, we do not attach great weight to that circumstance in this case.

D. Finally, Dean asserts that Patricia's remarriage constitutes a showing of a substantial change in circumstances justifying termination of his future alimony obligation to her. We agree with Dean that Patricia's remarriage is significant. The remarriage of a woman whose previous marriage has been terminated in a dissolution of marriage proceeding does not of itself terminate her right to alimony, but it does make out a prima facie case which requires the court to end it, in the absence of some extraordinary circumstances justifying its continuance. In re Marriage of Woodward, 229 N.W.2d at 280.

Dean made out a prima facie case for termination of the \$500 monthly payments. Patricia urges as extraordinary circumstances justifying the continuance of alimony the fact that the trial court clearly contemplated Patricia's remarriage and provided for a reduction, rather than a termination of alimony. See Simpkins v. Simpkins, 256 Iowa 989, 991-92, 129 N.W.2d 723, 724 (1964) (decree specifically provided for termination of alimony upon remarriage). Patricia also argues that the fact that her remarriage was highly unlikely to restore her to her accustomed standard of living obtained in the parties' marriage is an extraordinary circumstance justifying continuance of alimony. We, however, do not decide the issue on the basis of whether she is entitled to the same standard of living within her remarriage as within her original marriage as a circumstance justifying continuation of alimony. It is clear that both the parties and the trial court contemplated continuation of alimony after Patricia's remarriage. Moreover, although we have determined the \$500 monthly payments are "alimony," examination of the parties' dissolution decree makes clear that the parties and the court intended Patricia to use the alimony income to support herself during the period of time that she is responsible for raising the parties' minor children. See In re Marriage of Beeh, 214 N.W.2d 170, 174 (Iowa 1974) (alimony awarded so mother could provide children full-time care); Peters v. Peters, 214 N.W.2d 151, 157 (Iowa 1974) (court intended mother to have alimony during period in which parents were obligated to support children). We find on the basis of the provision in the original decree and the intent of the court in awarding permanent alimony that there are extraordinary circumstances in this case justifying the continuance of alimony to Patricia despite her remarriage.

Thus, considering the remarriage of both parties and the alleged changes in each of the parties' financial condition, Dean has failed to establish by a preponderance of the evidence that there has been any material and substantial change, not within the contemplation of the trial court when it entered the

original decree, to warrant termination of the \$500 per month alimony award to Patricia. We do not reach the issue of whether the amount and duration of the alimony award is inequitable. We do not have the power to modify a dissolution decree merely because it is inequitable. Smith v. Smith, 254 Iowa at 1121, 120 N.W.2d at 449; Iowa Code § 598.21(8) (1981). That is a matter for appeal in the original action.

Our decision does not affect Dean's right to apply for modification of the parties' dissolution decree in the future based upon a showing of a substantial change in circumstances. Accordingly, the trial court's decision must be affirmed.

AFFIRMED.