

IN THE COURT OF APPEALS OF IOWA

No. 1-485 / 90-1561

FILED

FEB 25 1992

IN RE THE MARRIAGE OF MARY ANN PEED AND JOSEPH WILLIAM PEED

Upon the Petition of

MARY ANN PEED,

501

Appellant,

And Concerning

JOSEPH WILLIAM PEED,

Appellee.

Appeal from the Iowa District Court for Webster County,
Mark S. Cady, Judge.

Former wife appeals the trial court's refusal to modify
the economic provisions of the parties' dissolution decree.
REVERSED AND REMANDED.

James L. Kramer, Thomas J. Bice, and Arthur H. Johnson
of Johnson, Erb, Latham, Gibb & Carlson, P.C., Fort Dodge,
for appellant.

Steven H. Shindler and William Sidney Smith of Smith,
Schneider, Stiles, Mumford, Schrage, Zurek, Wimer & Hudson,
P.C., Des Moines, for appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.,
but decided en banc by Oxberger, C.J., and Donielson,
Schlegel, Hayden, and Sackett, JJ., with Habhab, J., taking
no part.

OXBERGER, C.J.

The sixteen-year marriage of Joe and Mary Ann Peed was dissolved on August 27, 1987. During the marriage, the parties owned all the stock of a closely-held corporation publishing specialized trade magazines. The publications had little or no editorial content, but contained advertisements for the sale and purchase of used equipment. Joe's father had started the publishing company when Joe was in high school. In 1966 Joe began to work there, and over the years, he purchased the shares of other family members, acquiring twenty-one percent of the stock. Joe continued to manage the business, and toward the end of the marriage, he formed a holding company, HLI, which purchased the remaining stock from the other shareholders. The stock purchases had cost approximately \$1,600,000 and had been financed primarily by corporate debt. The debt was personally guaranteed by Joe. About \$1,300,000 of this debt remained at the time of the dissolution.

The dissolution decree awarded Joe all of the publishing company stock. At that time, Joe valued the stock of HLI at \$570,700, subject to an encumbrance of \$442,500, for a net value of \$128,200. Mary Ann did not obtain an expert valuation of the stock during the 1987 dissolution proceedings.

The decree awarded Mary Ann the family homestead, with all mortgage indebtedness, real estate taxes, insurance, repairs, special tax levies, and improvements to be paid by

Joe. She received an award of lifetime alimony ranging in amount from \$500 to \$1,100 per month. She also received child support for the parties' three children in the amount of \$1,900 per month while all three children are eligible, \$1,300 per month when two children are eligible, and \$700 per month when only one child remains eligible.

In 1988, after the dissolution decree, Joe's publishing company sold its flagship publication, Computer Hot Line, for \$7,834,000. From these proceeds, Joe paid \$1,270,464 in taxes and \$682,078 in broker and attorney fees. Most of the sale proceeds were retained by the corporation, which used them to retire corporate debt, buy an expensive corporate airplane, and absorb operating losses. In addition, Joe's personal compensation from the corporation rose after the sale; he increased his annual salary from \$110,000 to \$150,000, and he began to pay himself six-figure bonuses each year.

After the sale of the Computer Hot Line magazine, Mary Ann filed the present application to modify the 1987 dissolution decree. Mary Ann asserts the retention of the sale proceeds caused the value of Joe's stock to increase substantially beyond the value he attributed to it in 1987. She asked that her child support and alimony awards be increased due to the change in Joe's financial circumstances. She also asked that the division of property be modified on the ground Joe had obtained the initial decree by fraud and misrepresentation of the

corporation's value. After a hearing, the district court denied Mary Ann the relief she sought. She has appealed.

I. Scope of Review. The parties disagree concerning the appropriate standard of review to be applied by this court. Mary Ann contends the action was tried in equity and, therefore, our review should be de novo; Joe asserts our review should be for errors of law. We find no support for Joe's position.

In this equity action for modification of a dissolution decree, 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).

II. Extrinsic Fraud. Mary Ann contends that if Joe anticipated the magazine sale in 1987, then he obtained the 1987 decree by fraudulently misrepresenting the value of the corporation. She argues that such a misrepresentation constitutes extrinsic or collateral fraud and entitles her to a modification of the decree's property division.

The property distribution provisions of a dissolution decree are not subject to modification in the absence of fraud, duress, coercion, mistake, or other grounds that would justify vacation of the decree in any other case. See Knipfer v. Knipfer, 259 Iowa 347, 355, 144 N.W.2d 140,

145 (1966). The grounds which support changing a decree in other contexts are enumerated in Iowa Rule of Civil Procedure 252. See In re Marriage of Waggoner, 438 N.W.2d 850, 851 (Iowa App. 1989). Proceedings brought under rule 252, however, must be commenced within one year of the challenged judgment. See id. In the event the fraud is not discovered within the one-year limitation period, courts of equity may act, independent of the rule, if the fraud alleged is extrinsic or collateral to the matter directly involved in the initial action. Sorenson v. Sorenson, 254 Iowa 817, 825, 119 N.W.2d 129, 134 (1963). The relief sought in the instant case is clearly based on allegations of intrinsic rather than extrinsic fraud. As such, the general rule against modification of property distribution provisions prevents this court from granting Mary Ann the relief she seeks.

III. Change in Circumstances. In the alternative, Mary Ann contends that if Joe did not anticipate the magazine sale in 1987, then the sale constitutes a change of circumstances warranting a modification of the decree's alimony and child support provisions. She argues the district court erred by denying a modification on the ground her financial circumstances had not changed, even though the court acknowledged that Joe's financial circumstances had changed.

Modification of the alimony and child support provisions in a dissolution decree is appropriate only when

there has been a material and substantial change in circumstances since entry of the original decree. Iowa Code § 598.21(8) (1991); Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Mears, 213 N.W.2d at 513; Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). Furthermore, not every change in circumstances constitutes a sufficient basis for modification. Simpkins v. Simpkins, 258 Iowa 87, 90, 147 N.W.2d 621, 623 (1965). Changes must be more or less permanent or continuous, not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983).

Additionally, 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. The provisions in a decree are final as to the circumstances then existing. Mears, 213 N.W.2d at 515. The "then existing" circumstances are those which were known or, through reasonable diligence, should have been known to the court when the original decree was entered. Harwell v. Harwell, 253 Iowa 413, 417, 112 N.W.2d 868, 871 (1962). Any changes in the circumstances that are "natural occurrences and as such could be foreseen by the [c]ourt" will not justify modification. Mears, 213 N.W.2d at 514.

Therefore, the petitioner must show by a preponderance of the evidence that the change in circumstances could not

reasonably have been within the contemplation of the trial court at the time the original decree was entered. Jensen v. Jensen, 253 Iowa 1013, 1019, 114 N.W.2d 920, 921 (1962). A trial court may not modify the provisions of a decree simply on the ground that they were originally inequitable; but rather, relief from an initially inequitable provision may be effected only by appeal. Smith v. Smith, 257 Iowa 584, 591-92, 133 N.W.2d 677, 681 (1965). "Any other procedure would leave the matter open to the most undesirable result of endless litigation and continual uncertainty." Simpkins v. Simpkins, 256 Iowa 989, 992, 129 N.W.2d 725, 725 (1964).

Additionally, in order to warrant modification, "it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice." In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing Vetternack, 334 N.W.2d at 762).

There is no question but that Joe has experienced a tremendous improvement in his overall financial condition since entry of the dissolution decree. The trial court found that this improvement may be short-lived. After entry of the original dissolution decree, Joe was diagnosed

with Parkinson's Disease, a neurological disorder effecting his energy level and mobility and causing tremors. The record however does not support a finding that Joseph's disease has effected his earning capacity. Joseph testified he has good days and bad days. His medication helps him. Although he has hired a person to relieve him to some degree of his day to day pressures within the business, there is no showing his income has suffered in any respect. This court will not speculate what the future may bring for Joseph. At the time of trial his financial picture was excellent. We therefore find there has been a change of circumstances sufficient to modify the alimony and child support obligations. We reverse the trial court and remand for a determination of alimony and child support amounts.

The costs of this appeal are taxed to Joseph.

REVERSED AND REMANDED.

All judges concur except Donielson and Hayden, JJ., who dissent.

DONIELSON, J. (dissenting)

I respectfully dissent; I would affirm the trial court. From my review of the record, I find Mary Ann has failed to establish the continuing nature of the change she describes. She has not demonstrated to my satisfaction that Joseph's serious neurological disorder (Parkinson's Disease), which affects his energy level and mobility, has not jeopardized his future earning capacity.

Moreover, there is no question but that Mary Ann has met with little or no change since entry of the dissolution decree. She lives in the same home, maintains the same comfortable standard of living, and receives substantial alimony and child support payments. The condition of her health remains the same, and she possesses the skills and ability to further supplement, through employment, the support she already receives from Joseph. Neither her needs nor her means have changed significantly.

Finally, this modification action is simply a thinly veiled and covetous attempt to modify the property distribution provisions of the parties' original dissolution decree. Mary Ann chose not to hire an expert to value the marital property during the dissolution proceedings and now, five years later, she is merely attempting to remedy that perceived strategic failure on her part. This court, sitting in equity, should not overlook the self-inflicted nature of Mary Ann's posture.

She should not be allowed to do indirectly that which she is prohibited from doing directly.

Closely-held corporations do not lend themselves to easy valuation.

The valuation of a closely held business is among the more difficult problems facing the attorney . . . in a divorce case. This task is difficult because it is virtually impossible to determine the "true" value of a closely held business in the absence of a negotiated sales contract between a willing buyer and a willing seller. Only after a sales contract has been negotiated can anyone point to an amount and claim that is what the business is really worth.

Even then, this value only represents the result of the sale negotiation. The negotiated price may be based on motives of the parties wholly unrelated to the "true" value of the business. Even where the negotiated price represents a true value, this value was only true in that particular market, at that specific time, and under those unique circumstances. Any inference that the business could be sold at the same price to another buyer at a later date is misplaced. Subsequent events affecting the business, the motives of the buyer, and the circumstances of the seller will affect the later sales price.

Consequently, the true value of any business is elusive. Its value at any particular time is contingent upon many varied and subjective facts and circumstances. This makes valuation a very difficult task in the absence of a real buyer and seller.

* * *

In the divorce context, courts can only expect a reasonable estimate of business value. To ask for more is not only impractical, but also impossible. Yet, nearly every state requires the court to place a value on all items of marital property before making property divisions and monetary awards.

Zipp, Divorce Valuation of Business Interests: A Capitalization of Earnings Approach, 23 Family L. Q. 89, 89-90 (1989).

In 1987, the dissolution court valued the small, closely-held corporation in this case at \$128,200. A year later, a single asset of the corporation was sold for over \$7,000,000. The trial court in this modification action found, and I agree, that the difference in these figures is not the result of fraud or concealment on Joseph's part. Rather, the reason for the difference was the postdissolution emergence of a willing buyer in what can only be described as a very limited market.

I can think of no better example by which to demonstrate the rationale underlying the general rule prohibiting modification of a decree's property distribution provisions. See Knipfer, 259 Iowa at 355, 144 N.W.2d at 145. Yet, the majority's decision today allows former spouses to avoid this rule. It invites them to relitigate the value of closely-held corporations whenever they believe a different value could be proven. Any postdissolution sale of assets which demonstrates the inaccuracy of the dissolution court's estimated value would ostensibly serve as grounds for modification of the decree based upon a substantial change in the financial resources of the seller.

In conclusion, I do not believe Mary Ann has made her case that enforcement of the original decree would visit upon her a positive wrong or injustice. See Vetternack, 334 N.W.2d at 762 (petitioner must show continued enforcement of decree will result in positive wrong or

injustice). Furthermore, in light of Joseph's deteriorating health, I do not believe the trial court, who had the opportunity to see and hear the parties, has failed in its decision to do equity. See Kern, 408 N.W.2d at 389 (trial court's discretion will not be disturbed unless there is a failure to do equity). Finally, I do not believe Mary Ann should be allowed to make an end run around the rule that prohibits modification of the original decree's property distribution provisions, especially where there has been no showing that Joseph acted nefariously.

I would affirm the trial court's decision declining to modify the parties' original decree.

Hayden, J., joins this dissent.