FILED
AUG 25 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-056 / 93-522

IN RE THE MARRIAGE OF LAWRENCE D. CHAPMAN AND PATRICIA E. CHAPMAN

Upon the Petition of
LAWRENCE D. CHAPMAN,

Appellant,

And Concerning
PATRICIA E. CHAPMAN,

Appellee.

Appeal from the Iowa District Court for Shelby County, Leo F. Connolly, Judge.

Petitioner appeals a judgment of the district court denying his petition for modification of the parties' dissolution decree. **AFFIRMED.**

Robert Kohorst and William T. Early of the Kohorst Law Firm, Harlan, for appellant.

Susan Larson Christensen, Harlan, for appellee.

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

HUITINK, J.

Lawrence (Larry) and Patricia Elaine (Elaine) Chapman were married in 1978 and divorced in 1990. The parties entered into a stipulation which was incorporated by the district court in the dissolution decree. Larry was ordered to pay alimony of $1,180 per month for a period of sixty months or until Elaine remarries or dies, whichever occurs first.

The district court divided the parties' property to award Larry his business, Chapman Electric Metering Company. Elaine was awarded her vehicle and household goods. Larry was made responsible for all of the parties' debts, except the debt on Elaine's vehicle. The court ordered the parties to sell their house in Jefferson, Iowa. The proceeds from the sale were to be applied to certain debts, and any excess was to be divided between the parties.

On June 8, 1992, Larry filed a petition for modification of the dissolution decree seeking a reduction of his alimony obligation. He claimed his income had been reduced. He also claimed the house in Jefferson was worth less than the parties had assumed it was worth. Additionally, he stated he had been forced to make certain unforeseen payments to the Internal Revenue Service.

The district court found there had not been a substantial change in circumstances. The court found it was foreseeable that the real estate market could turn in

either direction after the dissolution decree was entered. The court determined the tax levy was within the contemplation of the court at the time of the original decree because the IRS audit was in process at that time. Furthermore, the court noted that although his expenses had increased, Larry's gross income had not changed substantially since the time of the decree. The court determined these increased expenses were not necessary and that Larry had voluntarily reduced his income. Larry has appealed.

Pursuant to Iowa Code section 598.21(8) (1991), a court of competent jurisdiction may subsequently modify a decree of dissolution where there has been a substantial change in circumstances. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991). The supreme court has set forth the following principles concerning the modification of dissolution decrees: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree

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was entered. In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983).

A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of the changed conditions. In re Marriage of Dawson, 467 N.W.2d 271, 274 (Iowa 1991). Moreover, the burden is on the party seeking modification to prove a substantial change in circumstances by a preponderance of the evidence. Feustel, 467 N.W.2d at 263.

We determine Larry has not met his burden to show a substantial change in circumstances. The gross income of Chapman Electric was approximately $356,000 in 1990, the year of the dissolution. In 1992 the company's gross income had increased to $366,000. We agree with the district court that in this case, Larry's increased expenses were unnecessary. We concur in the district court's conclusion Larry voluntarily reduced his income. Generally, when a person's inability to pay alimony is self-inflicted or voluntary, it will not constitute a ground for reduction of future payments. Ellis v. Ellis, 262 N.W.2d 265, 268 (Iowa 1978).

The parties were involved in an IRS audit at the time of the dissolution decree. The parties' certified public accountant filed an affidavit which stated that at the time of the dissolution, the IRS had completed its tax audit and determined the taxes owing. We determine the tax levy was within the contemplation of the district court at the time

the dissolution decree was filed. Thus, Larry has failed to show a substantial change in circumstances due to the IRS tax levy.

The parties' house in Jefferson had been appraised in 1988 for $51,500. The appraisal contained a comment, "Buyers for this type of property are somewhat limited because of rural location." At the time of the modification hearing, the parties had received offers of $18,000 to $20,000. Because of the low offers the parties had not yet sold the house. We agree with the district court the parties' inability to sell the house is not a permanent or continuous change which was not contemplated by the district court at the time the decree was entered.

Furthermore, Larry has made no showing his alimony obligation was based on the valuation of the house. Alimony is generally based on the earning capacity of each party. In re Marriage of Oler, 451 N.W.2d 9, 13 (Iowa App. 1989). There is no showing Larry's earning capacity has been affected by the reduced value of the house.

Upon our de novo review, we conclude there has been no substantial change in circumstances sufficient to warrant a modification of the parties' dissolution decree. We affirm the decision of the district court.

Elaine seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Hunt, 476 N.W.2d 99, 103

(Iowa App. 1991). We order Larry to pay $1,000 towards Elaine's appellate attorney fees. Costs of this appeal are assessed to Larry Chapman.

AFFIRMED.