FILED
APR 20 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DAVID E. BOLSTER AND BETTY L. BOLSTER

Upon the Petition of	)	15
DAVID E. BOLSTER,	)	Filed April 20, 1988
Petitioner-Appellant,	)	
And Concerning	)	
BETTY L. BOLSTER,	)	8-98 87-1018
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Black Hawk County (Equity 31664), George L. Stigler, Judge.

Petitioner appeals the trial court's ruling on both parties' applications for modification of a marriage dissolution decree. **AFFIRMED AS MODIFIED.**

D Quinn Martin of Martin, Nutting, Miller, Keith & Pedersen, Waterloo, for appellant.

David L. Riley of Lindeman & Yagla, Waterloo, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

PER CURIAM

David and Betty Bolster were married in 1960. The marriage was dissolved in October of 1983, after nearly twenty-four years. At the time of the dissolution trial, David was earning $53,430 per year, with a net annual income after taxes of $38,016.26. Although Betty taught for approximately the first nine years of the marriage, from the time of the birth of the parties' child Lisa, she was not employed outside the home. She worked as a homemaker and was unemployed at the time of the entry of the original decree of dissolution.

By the original decree, Betty was awarded custody of the child, and was permitted to live in the family home "until . . . the minor child of the parties is no longer residing in the said real estate and attending school, either high school or college or its equivalent." When the child ceased to reside in the home, it was ordered to be sold, and after the payment of a lump sum amount from the proceeds to Betty, the balance was to be divided equally between David and Betty. The decree further ordered David to pay child support of $400 per month, and $400 per month as alimony to Betty.

The decretal court provided that it would retain jurisdiction of David's John Deere retirement plan "until such time as the petitioner retires from his employment at that organization at which time the parties may apply to the Court for such further hearings in connection with that plan as may be deemed necessary."

In 1985, David filed an application to modify the decree, claiming that there had been material and substantial changes in circumstances which were not within the contemplation of the court at the time of entry of the decree of dissolution, in that Betty had obtained employment, and that David had remarried, with his new wife having lost her job, all of which increased the

17

financial burden upon him. Prior to the hearing on that application, his wife obtained employment with a $22,000 per year income, and that ground for modification was withdrawn. Nevertheless, the court, because of the evidence showing that Betty had obtained employment providing her with a net income of $564 per month, reduced the alimony payable to her from $400 per month to $250 per month.

In January 1987, Betty filed her application for modification of the decree of dissolution, requesting: (1) that the alimony payable by David be increased, (2) that there be a determination her rights in David's pension from John Deere, and (3) the post-high school education costs of the minor child. David resisted this application and counterclaimed for a modification seeking: (1) elimination of any alimony obligation; (2) termination of child support when the child attains age eighteen; and (3) both parties to pay equal amounts of the child's college education costs, if she attends college, up to a total of the amount which was provided for by the original decree.

Upon hearing, the district court found that Betty had proved changes of circumstances, and modified the alimony payable to her. The court provided that the child support payable by David should remain at $400 per month, and provided:

> When Lisa [the child] becomes 18, marries, dies or becomes self-supporting, said support shall end subject to section 598.1(2), Code. In that event the spousal support award set out in paragraph 2 following shall be increased by the amount of $150.00 per month.
>
> 2. Petitioner David E. Bolster is ordered to pay as spousal support to respondent Betty L. Bolster the amount of $600.00 per month payable in two installments of $300.00 per month on the 1st and 15th of each month with the first such payment to commence on the 1st of July, 1987. * * *

The court also concluded that David had proved material changes in circumstances.

Betty's application for modification of the decree was brought about by reason of the sale of the house in which she lived with the parties' minor child, at a time prior to the time called for in the decree of dissolution. David's retirement resulted in a reduction in his income. He asked Betty to agree to an early sale of the house, because he would not be able to carry the financial burden of the house with his reduced income. Betty agreed, but asked for an increase in alimony. Following the sale of the house, David refused to increase the alimony.

As noted before, in her application for modification, Betty seeks an increase in the support paid to her, a determination of her rights to David's pension, the post-high school education costs of the minor child, and other equitable relief. David, by way of counterclaim for modification, seeks to eliminate any obligation to pay alimony to Betty, now or in the future, and to provide that child support be terminated when the minor child attains age eighteen prior to graduation, and each of the parties be made responsible for equal contribution to the minor child's college education.

Our review of this equitable action is de novo. Iowa R. App. P. 4. The power of the court to modify child support exists only when there has been material and substantial change in circumstances since the date of the original decree, or of any subsequent intervening proceedings which considered the situation and the rights of the parties upon application for the same relief. (Emphasis added.) Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973). Where a change of financial condition of one or both parties is relied upon as a basis for modification of child support provisions of a divorce or dissolution of marriage decree it must be substantial. Id.

An award entered in a final decree is not to be regarded as a variable sum, to be adjusted either upward or downward with each fluctuating change in the conditions of the respective parties. Such a decree is entered at the time, with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. At the time such an award is made in a final decree, the court should take into consideration all of the facts and circumstances surrounding the parties at the time, and also the reasonable prospects regarding their future condition, and make such an award as will fairly and reasonably be right and proper under all of the circumstances. When this is done, such decree is conclusive and should not be disturbed, unless it is made to appear that the enforcement of the decree will be attended by positive wrong or injustice under changed conditions. In re Marriage of Mueller, 400 N.W.2d 86, 88 (Iowa App. 1986); Mears, 213 N.W.2d at 515.

In other words, the provisions for support payments in a divorce decree are final as to circumstances then existing. Mears, 213 N.W.2d at 515; Holland v. Holland, 260 Iowa 248, 249, 149 N.W.2d 124, 125 (Iowa 1967). It follows that a divorce or dissolution of marriage decree will not be modified as regards child support unless it is proven by a preponderance of the evidence that its enforcement will be attended by positive wrong or injustice as a result of material and substantial changes in the circumstances since the date of the original decree or of any subsequent intervening proceedings which considered modification of the child support provisions of the original decree. Mears, 213 N.W.2d at 515.

The changed circumstances relied upon must be material and substantial, not trivial, more or less permanent or continuous, not temporary, and must be such as were not within the knowledge or contemplation of the court when

the decree was entered. Sandler v. Sandler, 258 Iowa 84, 86, 137 N.W.2d 591, 592 (Iowa 1965).

Betty seeks a determination of her rights to a portion of David's John Deere pension, in view of the decretal court's retention of jurisdiction to make such determination. We hold that a determination of any division of such pension benefits is a matter of property division, and is not properly subject to modification. Financial provisions made in a decree of dissolution, that are a part of property division, are not subject to modification in the absence of fraud, duress, coercion, mistake or other grounds as would justify the setting aside or changing a decree in any other case. In re Marriage of Kehrli, 378 N.W.2d 735, 736 (Iowa App. 1985).

In determining whether there has been a change in circumstances sufficient to warrant modification of alimony and child support, consideration may be given to the parties' changed financial circumstances. See In re Marriage of Stafford, 386 N.W.2d 118, 122 (Iowa App. 1986). Upon our de novo review, we find that Betty has shown a change in circumstances sufficient to require a modification of the decree, in that because of the premature sale of the house, she has been required to assume the payment of the cost of housing for herself and the parties' minor daughter. While David has, as a result of his retirement, suffered a net loss of available income of nearly $315 per month, he is far more able to accommodate to that loss of income than is Betty able to cope with an additional burden of $350 or more per month on her earnings. We agree that both parties proved a change in circumstances. The circumstances have changed both from the time of the original decree and since the modification order that changed the alimony provisions. Having determined that a material

change in circumstances has been shown, it becomes necessary for us to determine whether those changes require further modification of the decree of dissolution.

The trial court ordered David to pay alimony in the amount of $600 per month, starting July 1, 1987. It also continued the child support at $400 per month. It appears that the court intended that such child support should continue under the provisions of Iowa Code section 598.1(2), to the end that it should continue so long as the minor child of the parties is, in good faith, a full time student in a college, university, or area school, or has been accepted for admission to such an institution.

Under the decision of the modification court, David's present obligation to support Betty and their minor child totals $1,000 per month. Upon the termination of child support, it reduces to $750 per month. Considering David's income, we believe this is inequitable. We also believe it is unrealistic to consider David's desire that all alimony, now and in the future, be ended. While we do not make a determination of Betty's rights to David's retirement pension, we do consider the availability of the pension benefits as bearing upon David's ability to pay support. We also consider the income of his new wife as bearing upon his overall financial condition. In re Marriage of Mueller, 400 N.W.2d at 88. Considering the income of both David and his wife, there are available funds made up of pension benefits in the amount of $28,156.32 per year, plus David's wife's earnings of $22,000 per year, or a total of $50,156.32 per year for the payment of the obligations of David's present household. While his present wife has no obligation to support Lisa or Betty, it is proper to consider the available funds, in arriving at David's financial condition and ability to pay such support. Id. We modify the court's order by requiring David to pay child support at the present rate of $400 per month until Lisa becomes eighteen years of age or graduates from

high school, whichever is later, or marries, dies, or becomes self-supporting. Such support shall continue until age twenty-two if Lisa shall continue her education so as to meet the requirements of section 598 1(2) of the Code of Iowa (1987) We further order that alimony at the rate of $400 per month shall be paid to Betty until she dies, marries or cohabits with a male to whom she is not related by blood or marriage Upon the termination of the child support to Lisa, the amount payable as alimony shall increase to $500 per month. All support payments shall cease upon David's death

AFFIRMED AS MODIFIED

Oxberger, C J , and Schlegel, J , concur, Hayden, J , dissents.

HAYDEN, J (dissenting)

I respectfully dissent 23

In the original decree of dissolution the house was ordered to be sold when the minor daughter, Lisa, no longer resided in it and was attending school. It is clear the trial court contemplated the house would be sold. David lost his health and was forced to take early retirement The house was sold and the proceeds were divided between respondent and petitioner in accordance with the trial court's decree of dissolution I fail to find a sale of the house at this time constitutes a material change of circumstances so as to justify a modification

I would reverse the trial court and deny both parties' modification efforts, and reinstate the 1985 modification decree