FILED
MAY 31 1988
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JOHN HOWARD RADFORD AND TERESA LYNN RADFORD

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Upon the Petition of)

JOHN HOWARD RADFORD,)

Petitioner-Appellant/ Cross-Appellee,) *Filed May 31, 1988*

And Concerning)

TERESA LYNN RADFORD,) 8-248 / 87-1489

Respondent-Appellee/ Cross-Appellant.)

Appeal from the Iowa District Court for Woodbury County (No. Eq. 10201), Dewie J. Gaul, Judge.

Petitioner appeals from the district court's decision not to modify dissolution decree regarding child support and alimony awards. Respondent cross-appeals for attorney fees. **AFFIRMED.**

R. Scott Rhinehart of Richard Rhinehart & Associates, Sioux City, for petitioner-appellant/cross-appellee.

Edward J. Keane of Margolin, Gildemeister, Willia, Mugan & Keane, Sioux City, for respondent-appellee/cross-appellant.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

PER CURIAM

The parties' marriage was dissolved in 1986. The dissolution decree placed the parties' two children in the respondent's physical care and directed the petitioner to pay child support of $400 per month per child. The decree also required the petitioner to pay respondent rehabilitative alimony of $150 per month for a period of thirty-six months; the duration of this alimony award was designed to match the period of time the respondent was expected to spend in an educational course of study and is subject to a condition hereafter noted. The petitioner by this action seeks a modification of that decree. The district court declined to modify. Petitioner appeals. We affirm.

The petitioner seeks a reduction in his child support and alimony obligations. Our review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

The petitioner first contends his child support obligation should be reduced because his annual income has dropped due to a loss of overtime in his job. The applicable law states that "[a]ny change in circumstances relied on for a modification of a decree must not have been within the contemplation of the court when the original decree was entered." In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983).

It is clear that the loss of overtime upon which the petitioner seeks to rely was within the contemplation of both parties at the time of the original decree. The petitioner's affidavit of financial status of April 21, 1986, and his factual affidavit of April 22, 1986, state that he was basing his financial affidavit on a forty-hour week because his overtime was going to be eliminated. On redirect examination, the petitioner admitted he knew the overtime was going to be eliminated, but attempted to salvage his testimony by stating that

the overtime was being eliminated for a different reason than originally anticipated. We find that the reason for the elimination of overtime is not relevant.

The trial court compared the petitioner's financial affidavit filed August 24, 1987, with the previously-discussed financial affidavit and factual affidavit filed in April of 1986. The affidavit filed at the time of trial on the petition to modify showed gross monthly earnings of $2,407.20 and net earnings per month of $1,471.63. These figures compare with 1986 figures of $2,416.27 gross income per month and $1,281.14 net income per month. As the trial court stated:

> Thus it is clear that the Petitioner's net earnings now are higher than he listed on his April 1986 affidavit. This is because on the affidavit he listed no overtime, whereas he is still getting some overtime although less than formerly. But the forthcoming decline in overtime earnings was known to Petitioner, Jack, well before the Decree of July 9, 1986, and cannot be said to have not been foreseen by the parties and the Court which entered that Decree.

The petitioner has failed to show any change in circumstances which was not contemplated by the parties or the court at the time of the original decree. Therefore, we affirm the trial court's decision not to modify petitioner's child support obligations.

The petitioner next contends his alimony obligation should be eliminated because the respondent is holding a full-time job rather than attending school. He asserts that the respondent worked thirty hours a week at a salon from August 15, 1986, to December 15, 1986. However, respondent also testified she took two night classes during the same period.

The stipulation made a part of the decree of July 9, 1986, provides: "This alimony obligation shall terminate in any month(s) after which the Respondent obtains full-time employment instead of continuing her schooling (excludes summer vacation) . . . ."

The trial court reasoned, and we agree, that it cannot be said that the respondent "obtain[ed] full-time employment instead of continuing her schooling"

when the record is clear that she did continue her schooling during the period in question. The trial court went on to say:

> Webster's Third New International Dictionary defined the preposition "instead of" thusly: "As a substitute for or alternative to." The court believes that when one is continuing her schooling it cannot be said that something has been substituted for continuing her schooling.

Finding no error in the court's reasoning, we affirm the trial court's decision not to modify the petitioner's alimony obligations.

The respondent has filed a notice of cross-appeal contending the district court erred by denying her request for attorney's fees. Iowa Code section 598.36 (1987) states that "[i]n a proceeding for the modification of an order or decree under this chapter, the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court." Id. (emphasis added).

The trial court noted that the "prevailing party" in a modification proceeding may be awarded attorney fees, but when some change is made in a decree by a modification proceeding but some changes requested are also denied, neither party is the sole prevailing party and the court may decline to award attorney fees in connection with such modification. At any rate, the award of attorney fees in a modification proceeding is discretionary with the court. Id. Accordingly, we affirm the trial court's ruling on this matter.

On appeal we award attorney fees in the amount of $750 to the respondent.

AFFIRMED.