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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CAROL F. FORNEY AND LARRY D. FORNEY

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UPON THE PETITION OF CAROL F. FORNEY,	)	
Petitioner-Appellee/Cross-Appellant,	)	6-244
AND CONCERNING LARRY D. FORNEY,	)	85-1363
Respondent-Appellant/Cross-Appellee.	)	

Appeal from the Iowa District Court for Woodbury County (Eq. 8714), Dewie J. Gaul, Judge.

Respondent-husband appeals from the trial court's denial of his petition for modification of the parties' original dissolution decree. **AFFIRMED AS MODIFIED.**

Daryl L. Hecht of Crary, Huff, Clem, Roby & Inkster, P.C., for respondent-appellant/cross-appellee.

Thomas A. Vakulskas and Robert J. Rehan, of Vakulskas Law Firm, P.C., for petitioner-appellee/cross-appellant.

Considered by Oxberger, C.J., Snell, and Sackett, JJ.

OXBERGER, C.J.

This is an appeal from the trial court's refusal to modify an alimony award. Appellant Larry Forney contends that the trial court erred in failing to find that the decrease in his farm profit during the 1984 crop year constituted a substantial change in circumstances warranting modification of the original dissolution decree. Appellee Carol Forney has cross-appealed, urging: (1) that the trial court erred in holding that the appellant was not required to pay her attorney's fees; and (2) that the trial court should have found the appellant in contempt for his refusal to pay her alimony. We affirm as modified.

The parties' marriage was dissolved in April of 1984. Pursuant to the decree, Larry was ordered to pay Carol monthly alimony of $1250 until her death or remarriage. In February of 1985, Larry filed a petition for modification, alleging that a substantial decrease in his farm profit caused by declining commodity, land and equipment values and inclement weather rendered him unable to pay the alimony; in March of 1985, he ceased making the payments. In September of 1985, the trial court denied the petition, finding that the alleged change in circumstances was not of sufficient permanency.

Our standard of review is de novo. Iowa. R. App. P. 4. We are not bound by the findings of the trial court, but we do give them weight, especially concerning the credibility of witnesses. Iowa R. App. P. 14(f)(17).

The following well-established principles govern our review of a petition for modification:

> The burden is on the party seeking modification to prove a substantial change in circumstances from the time the decree was entered making it equitable and just that different terms be fixed. A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of changed conditions.

Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). Moreover, the change in circumstances must be continuous, and not merely temporary. Thayer v. Thayer, 286 N.W.2d 222 (Iowa Ct. App. 1979); see also In re Marriage of Vetternack, 334 N.W.2d 761, 763 (Iowa 1983).

The courts of this state have recognized that a substantial change in a divorced spouse's ability to pay alimony or support may provide the basis for the modification of a decree. See Bixby v. Bixby, 253 Iowa 1172, 1177 115 N.W.2d 852, 855 (1962)(slight reduction of alimony justified because of current decrease in earnings); Gesmacher v. Gesmacher, 247 Iowa 836, 840, 76 N.W.2d 790, 792 (1956)("If there has been a substantial lowering of earning power, a modification of the decree should be made."); Prady v. Prandy, 241 Iowa 1050, 1054, 44 N.W.2d 379, 381 (1950)("Our concern is the payment of support money within the father's ability to do so."); Corl v. Corl, 217 Iowa 812, 814, 253 N.W.2d 125, 126 (1934)("[T]his record shows that the defendant is not able to make the payments the original decree required.") See also Taylor v. Taylor, 648 S.W.2d 505, 506-07 (Ark. Ct. App. 1983); Berkowitz v. Berkowitz, 239 Ga. 1, 2, 236 S.E.2d 7, 8 (1977).

We have carefully reviewed the record, and conclude that the application of the above principles requires that the alimony award in the instant case be modified. The original decree was entered in April of 1984. In 1983, Larry had a net profit of $62,413. In 1984, he suffered a net loss of $74,426. The loan officer at the bank testified that even if Larry had an excellent crop in 1985, it was doubtful that he would generate enough income to satisfy the principal and interest obligations on his operating loans.

In addition, since the entry of the original decree the value of Larry's farm land has fallen from $331,250 to $231,875. This represents a decline of nearly thirty percent. Moreover, soybean and corn prices have dropped by thirty-three percent and twenty-six percent respectively.

Furthermore, in 1985, the bank financing Larry's operating expenses threatened to "sell him out." With an FHA guarantee, however, the bank extended Larry's operating note over seven years and loaned him an additional $52,000. This sum is sufficient to cover Larry's operating expenses only. In order to make the additional loan, the bank took an all-inclusive security interest in Larry's assets. The record discloses that during the period between the entry of the original decree and the hearing on Larry's petition for modification, his debt rose from $421,433.71 to $587,130.75.

Carol argues that Larry contributed to his financial deterioration, and that as a result, the alimony should not be modified. She stresses that Larry is farming fewer acres because he is no longer co-farming with his neighbor. Carol also urges that in 1984 Larry spent approximately $8000 on home improvements. In addition, Carol asserts that Larry's financial crisis is merely temporary because it was caused by inclement weather. We do not think that these factors played a significant role in the deterioration of Larry's earnings; the source of Larry's financial detriment has been the decline in commodity, land, and equipment values.

We think that Larry's present financial crisis constitutes a substantial change in circumstances since the entry of the original decree. Accordingly, we have determined that the alimony payments should be reduced to $600 per month payable under the terms originally imposed by the trial court.

We agree with the trial court's conclusion that Larry should not be found in contempt for his failure to pay alimony in 1985. We think that the record adequately supports his assertion that he was unable to pay during the period in question. See Lamb v. Eads, 246 N.W.2d 830, 832 (Iowa 1984). We think, however, that based upon the respective finances of the parties, Larry should be directed to pay $1000 of the attorneys fees incurred by Carol in connection with this appeal. See In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa Ct. App. 1982).

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