

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JACALYN ANN ANDERSON
AND DAVID W. ANDERSON

FILED

JAN 29 1986

CLERK SUPREME COURT

24

Upon the Petition of	)	
JACALYN ANN ANDERSON,	)	
Petitioner-Appellee,	)	Filed January 29, 1986
And Concerning	)	
DAVID W. ANDERSON,	)	<u>5-546</u>
Respondent-Appellant.	)	<u>85-288</u>

Appeal from the Iowa District Court for Buena Vista County - Richard Cooper, Judge.

Respondent husband appeals from the denial of his application to modify the decree dissolving the parties' marriage. **AFFIRMED.**

Laurel L. Boerner of Boerner & Jacobson, Ida Grove, for respondent-appellant.

Dan Connell of Connell & Duffy, Storm Lake, for petitioner-appellee.

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

Respondent husband appeals from the denial of his application to modify the decree dissolving the parties' marriage. Respondent husband asserts (1) that the trial court should not have awarded petitioner wife any attorney fees and that the trial court's attorney fee award to petitioner wife included some items which were not incurred in this modification proceeding and (2) that there was sufficient evidence that there has been a substantial change in circumstances since the decree which warrants a reduction in his alimony obligation.

The marriage of petitioner Jacalyn Ann Anderson and respondent David W. Anderson was dissolved in September 1983. The dissolution decree incorporated the parties' stipulation that David was to pay Jacalyn alimony of \$480 per month commencing on October 1, 1983 through September 30, 1988. This amount was to be increased in a given year if David's income, as reported in his federal income tax return, had increased in the previous year. The parties evidently did not anticipate a decrease in income so as to necessitate a decrease in alimony. In fact, the stipulation stated, "under no circumstances shall alimony be less than \$480 per month and under no circumstances shall the monthly alimony exceed the sum of \$900 per month." The \$480 base amount was apparently calculated using David's 1982 income of \$15,518. The decree was entered on September 29, 1983.

In April of 1984, David applied for a modification of the dissolution decree; he asked that his alimony obligation be reduced because his income had decreased significantly since the decree. Jacalyn resisted the application. Trial was scheduled for December 21, 1984. On December 20, 1984, Jacalyn sought to amend her pleadings to include a request for attorney fees. Jacalyn's attorney filed an itemized statement of his \$633.75 in fees and expenses in the modification action.

No trial was held. The parties stipulated that the modification action would be submitted on the basis of their current affidavits of financial status and the income tax returns they had filed. Both parties filed their 1983 income tax returns; Jacalyn's indicated her income, as a secretary, was \$2,269.24 and David's indicated his income as a veterinarian, was \$6,970.09.

The district court denied David's application for modification; it stated:

[T]he mere submission of a present affidavit of financial status by the respondent along with a copy of his late-filed 1983 federal tax return is insufficient to show a substantial change in circumstances as required by Section 598.21(8), the Code. Without sworn testimony, or other evidence concerning the respondent's financial status at the time of the decree, the Court is unable to make any meaningful comparison between his status then and now.

The district court awarded Jacalyn \$633.75 in attorney fees; it specifically found the itemized fees and expenses reasonable. David has appealed from the district court's ruling.

I.

The initial issue involves David's assertion that the trial court abused its discretion by awarding Jacalyn attorney fees when she was not granted leave by the trial court to amend her pleadings.

Iowa Civil Procedure Rule 88 provides:

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Judicial interpretation of rule 88 indicates that although allowances of amendments are the rule and denial the exception, an amendment is not permissible where it will change the issue or where allowance would constitute an

abuse of discretion. See M-Z Enterprises, Inc. v. Hawkeye-Security Insurance Company, 318 N.W.2d 408, 411 (Iowa 1982); Akerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976); Atlantic Veneer Corporation v. Sears, 232 N.W.2d 499, 503 (Iowa 1975).

The day before the trial began, Jacalyn filed an amendment seeking attorney fees in resistance to David's application to modify. Nevertheless, David did not object to this amendment nor did he file a motion to strike her amendment at trial. The trial court entertained Jacalyn's amendment and awarded her \$633.75 in attorney fees. Consistent with our holdings that a decision to allow an amendment will be interfered with on appeal only upon a clear showing that the court abused its discretion, Kellar v. Peoples Natural Gas Co., 352 N.W.2d 688, 692 (Iowa Ct. App. 1984); Kardux Transfer, Inc. v. McGrew, 350 N.W.2d 223, 225 (Iowa Ct. App. 1984), we cannot find such a showing was made by David. Therefore, we hold that the trial court's award of \$633.75 in attorney fees to Jacalyn was reasonable under Iowa Code § 598.36 (1983).

II.

David claims the decrease in his income which occurred six months after the original decree constitutes a substantial change in circumstances. The party seeking to modify the original decree bears the burden of proving a substantial change of circumstances. Iowa Code § 598.21(8) (1985); see also In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976); Dworak v. Dworak, 195 N.W.2d 740, 742 (Iowa 1972).

Temporary changes of circumstances contemplated by the trial court when the original decree was entered are not sufficient to establish a substantial change of circumstances. See Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973); Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa Ct. App. 1979).

Because David sought the change so soon after the original decree and because he is a professional, a veterinarian, his decreased income appears to be fairly characterized as temporary in nature. Based on the appellate record before us, we are not convinced David's reduced income represents a permanent situation. The modification petition was ruled on almost one year ago. Since that time David has probably filed an income tax return for 1984, in addition to his 1983 return. This financial information, although it was not available at the original modification hearing, is available now and will yield a clearer trend in David's financial situation. Should David's income continue to remain at the 1983 level, then relief from alimony payments may be in order. Thus, we affirm the trial court and find no substantial change of circumstances present at this time.

AFFIRMED.