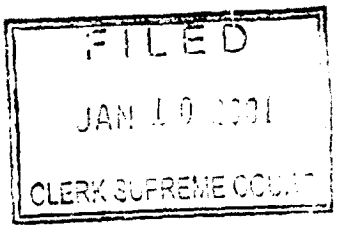
IN THE COURT OF APPEALS OF IOWA

No. 0-490 / 99-1583
Filed January 10, 2001

IN RE THE MARRIAGE OF BEVERLY P. DUBERSTEIN AND DANNY LEE DUBERSTEIN

Upon the Petition of
BEVERLY P. DUBERSTEIN,
Petitioner-Appellee/Cross-Appellant,

And Concerning
DANNY LEE DUBERSTEIN,
Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Polk County, Darrell J. Goodhue, Judge.

The respondent appeals, and petitioner cross-appeals, from the district court order granting petitioner's action to modify various economic provisions of the parties' dissolution decree. **AFFIRMED IN PART AND REVERSED IN PART.**

Becky S. Knutson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellant.

Michael M. Sellers of Sellers Law Office, West Des Moines, for appellee.

Heard by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

HUITINK, P.J.

I. Background Facts and Proceedings.

Beverly and Danny Duberstein's marriage was dissolved on January 4, 1995. At the time of the decree Danny was employed as a physician earning a net monthly income of $22,000. Although Beverly was qualified as a schoolteacher, she was unemployed. The court determined Danny's future earning capacity was uncertain because he suffered from a disabling heart condition. The court also determined Beverly's prospects for employment as a teacher were remote but that she was capable of earning a subsistence income.

Under the terms of the original decree Danny was ordered to pay child support for the parties' two children and all their college expenses limited to the costs of tuition, room, and board at an Iowa regents college. Additionally, Beverly was awarded property valued at $1.25 million, including a fifty-percent share in an apartment house Danny owned with his brother. She was also awarded declining rehabilitative alimony of $3000 per month for twenty-four months, $2000 per month for the next twenty-four months, and $1000 per month for an additional seventy-two months. Danny was awarded property valued at $1.1 million. The district court's alimony award was premised in part on the following findings:

> In making this award of alimony, the Court has considered the contributions of the Petitioner to the education of the Respondent and his earning capacity. The Court has also considered Petitioner's income earning capacity, the income potential of the property awarded to Petitioner and the substantial debt assigned to Respondent. The Court has also taken into account the disproportionate amount of property awarded to Petitioner.

On appeal we rejected Beverly's claim for more alimony, stating:

> Here, the district court decided it would be better to award Beverly a greater amount of the parties' assets rather than award her a greater amount of alimony. The court stated it took this approach because Dan had health problems due to two heart attacks and diabetes, and it was difficult to project his future earning capacity. We agree with the district court that under the facts of this case, the award of alimony is adequate when considering the amount of property awarded to Beverly.

In re Marriage of Duberstein, No. 95-0468 (Iowa App. July 26, 1996).

The decree also valued the parties' home and provided for its sale, subject to equal payment of specified expenses and division of the sale proceeds. Similar provisions were made for the sale of the parties' horse.

In April 1998 Beverly filed a petition to modify the decree. Beverly claimed Danny had remarried and that his new family planned to permanently reside in the marital home despite the court's order that the property be sold. Beverly also alleged that litigation with Danny's brother over their jointly owned apartment complex had diminished the value of this asset and otherwise caused the dissipation of her original property award. She requested a return of the apartments to Danny and that she receive an alternative monetary award. She also sought increased alimony.

At trial, the disputed issues included Beverly's demands for increased alimony, disposition of the homestead, disposition of the parties' horse and payment of related expenses, termination of Danny's obligation to pay child support for the parties' daughter, Sara, and Danny's obligation to pay college expenses. In its modification decree, the district court, citing Danny's unexpected receipt of $15,000 per month disability income, awarded Beverly

permanent alimony of $1500 per month in lieu of its original alimony award. Because the marital home had not been sold, the court revalued it at $250,000 and awarded it to Danny. The court ordered Danny to pay Beverly $26,750 in return for her share of the home's equity. The court ordered the parties' horse be sold and the proceeds divided equally following payment of expenses. Any deficiency was assigned to Danny. The court also denied Danny's request to terminate his obligation to pay the children's college expenses. Both parties filed posttrial motions to amend the modification decree. As a result, the district court increased Beverly's share of the homestead equity to $28,750. The court also determined that Danny's child support obligation for Sarah should end in January 2000. Both parties' requests for an award of attorney fees were denied.

On appeal, Danny contends the district court erred in: (1) increasing his alimony obligation; (2) determining the value of the parties' home and division of its equity; (3) requiring him to continue paying all of the children's college expenses; (4) assessing him the costs for maintenance of the parties' horse; (5) failing to order Beverly to repay loan proceeds on their lake home; (6) failing to award him attorney fees. On cross-appeal, Beverly contends the district court erred in (1) failing to award her higher monthly alimony; (2) calculating her share of home equity; (3) failing to award her trial attorney fees. Danny requests an award of appellate attorney fees.

II. Standard of Review.

In this equity action, our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Smiley*, 518 N.W.2d 376, 378 (Iowa 1994). We give

weight to the fact findings of the trial court, especially considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value; we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Economic Issues.

Property division and alimony should be considered together in reviewing their individual sufficiency. *See In re Marriage of Tzortzoudakis*, 507 N.W.2d 183, 186 (Iowa App. 1993). Modification of the alimony provisions of a dissolution decree is justified only if there has been some material and substantial change in the circumstances of the parties, financially or otherwise, making it equitable that other terms be imposed. *Thayer v. Thayer*, 286 N.W.2d 222, 223 (Iowa App. 1979). Circumstances that have changed, to justify modification of alimony, must be those that were not within contemplation of the trial court when the original decree was entered. *In re Marriage of Full*, 255 N.W.2d 153, 159 (Iowa 1977). However, property settlements, once set, absent fraud, duress, coercion, mistake, or other similar grounds that would support modification of an ordinary judgment, are not subject to modification. *In re Marriage of Johnson*, 299 N.W.2d 466, 468 (Iowa 1980).

A. Alimony.

Beverly's claim for increased alimony is premised on the unanticipated stability in Danny's postdecree income, dissipation of income producing assets she was originally awarded, and unfulfilled expectations of self-sufficiency. She specifically cites Danny's receipt of a nontaxable $15,000 monthly disability

benefit. She renews her claim that the district court's disproportionate property division justifying a lesser alimony award is premised on a $100,000 mathematical error.

The district court, for the most part, resolved the resulting factual issues in Beverly's favor.

The court found:

> 3. Since the dissolution decree was entered, Dan has had bypass surgery and has at least temporarily been determined to be disabled. He receives approximately $15,000 per month in tax-free disability income. The existence of such a policy was evidently not considered in the original dissolution proceeding. In addition, Dan's assets received in the dissolution have increased in value. Beverly is still unemployed and has dissipated a substantial portion of the approximate one million dollars worth of assets she received out of the dissolution. To her credit part of these sums have been spent on the education of the children of the parties. For the most part the children have elected to attend private colleges or out-of-state public institutions.

We disagree with the district court's conclusion that these findings justify modification of Beverly's alimony. As noted earlier, Danny was earning $22,000 net monthly income plus unspecified investment income at the time the original decree was entered. His current income includes $15,000 disability benefits plus unspecified investment income. The court originally sought to protect Beverly from the risk of Danny's declining income by awarding her a larger share of their assets. We fail to see how a $7000 decline in Danny's income defeats this express objective; nor do we find it equitable for Beverly to receive both a disproportionate property division and an increased alimony award. We decline to revisit Beverly's claims of a mathematical error in the original property division

because she has had more than adequate opportunity to resolve that issue on appeal from the original decree. We reverse on this issue.

B. Homestead.

The 1995 decree made the following disposition of the parties' homestead:

> The family home shall be immediately listed for sale at $350,000.
>
> The Petitioner and children shall have the exclusive right to occupancy of the family home until June 1, 1995, unless sooner sold. In the event the house has not been sold by June 1, 1995, the Respondent shall have the right to the occupancy of the home.
>
> The parties shall pay equally the mortgage payments of $3,258 per month, gas and electric bills, and shall maintain the homeowners insurance in full force and effect, until June 1, 1995. If the home is not sold by that date then Respondent shall assume full responsibility for the mortgage payment and other utility expenses. The parties shall pay equally for any necessary repairs and maintenance that may be required by the real estate company for purposes of sale. Upon the sale of the home, the parties shall equally divide the net proceeds.

As noted earlier, the parties' home was not sold as originally contemplated. The record also indicates that Beverly failed to pay or otherwise comply with the court's order concerning specified expenses.

At the time of the modification trial Danny had renovated the parties' home and resided there with his wife and children. He introduced evidence indicating he paid $15,103.23 of expenses assigned to Beverly under the decree. Danny also claimed credit for $53,031 of repairs and maintenance from June 1, 1995, through March 31, 1999, and $43,470.94 for Beverly's damage to their family home.

The district court made the following findings concerning the homestead:

> Dan has remarried and as of this date he, his new wife and her family are living in the former homestead of the parties. It has not been sold, although listed for an extensive period with real

> estate brokers. Dan ended up paying all of the mortgage payments and the utility bills for the first five months of 1995 for a total expenditure of $9,500. There was a list of repairs submitted on Respondent's Ex. CC which were requested by the real estate agents. Dan has provided a list of items which he has paid in the way of repair and maintenance of the homestead. Nevertheless, the list in CC cannot be correlated to Dan's expenditures with any degree of accuracy. Based on the evidence submitted, the improvements required on CC, and therefore by the decree, are found to have a value or cost of $8,000. These are the only costs Dan is entitled to under the decree and any and all of the additional claims against Beverly are denied. It is noted that Dan has been occupying the house. The homestead is found to have a value of $250,000. The value given is primarily based on the Faber offer. (See Ex. GG.) To the extent the home may have a greater value because of subsequent repairs and improvements that value should be attributed to Dan. The mortgage balance at the time of the dissolution was $180,000. Dan has made all of the payments reducing the mortgage balance since the dissolution was granted. Beverly was obligated to pay one-half of the first five mortgage payments. Although the evidence is not clear, the Court will assume that those five payments reduced the mortgage by a total of $5,000, leaving a net mortgage of $175,000 when Dan became solely liable for the monthly mortgage payments.

These findings are well within the range of the evidence, and we decline to disturb them on appeal. *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973). We conclude the district court's calculations fairly accommodate the current value of the property, Danny's occupancy, and credit for mortgage and maintenance expenses he paid. We cannot say the district court's division of this asset was inequitable and accordingly affirm on this issue.

C. College Expenses.

Danny's request for relief on this issue is premised on the decline in his income and recent amendments to the statute controlling postsecondary education support payments. *See* Iowa Code § 598.21(5A) *et seq.* We find it sufficient to note that a decline from $22,000 to $15,000 net monthly income is

not a substantial change in circumstances justifying modification of Danny's obligation to pay all of the children's college expenses. Moreover, the statutory changes Danny cites do not apply to decrees entered before its July 1997 effective date. *See In re Marriage of Sojka*, 611 N.W.2d 503, 504-05 (Iowa 2000).

We affirm on this issue.

D. Horse Expenses.

As noted earlier, the original decree provided for the sale of the parties' horse and equal division of related expenses. The record also indicates the horse has not been sold and the expenses of its keeping may exceed its value.

Beverly has effectively been in exclusive possession of the horse and has incurred at least $4409 in postdecree expenses for its care. Danny has paid all of these expenses. Under these circumstances, equity requires the horse be sold as originally ordered and the proceeds be applied to the costs of sale and reimbursement to Danny for one-half of the expenses he paid to date. If, after the sale, there are any remaining deficiencies, Beverly shall be responsible for paying them. To the extent the district court concluded otherwise, it was in error and any contrary provisions of the modification decree are reversed.

E. Loan Proceeds.

Our review of the record indicates the district court failed to address this issue and Danny failed to file a 179(b) motion alerting the court to this failure. Accordingly, Danny has waived any error concerning Beverly's retention of loan proceeds, and we decline to address it on appeal. *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa App. 1994).

IV. Attorney Fees.

Both parties claim that the district court should have awarded them trial attorney fees, and Danny also requests appellate attorney fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay the fees, and the fees must be fair and reasonable. *Id.* Under the circumstances present in this case, we affirm the decision of the district court that each party should pay his or her own attorney fees.

An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. *Id.* Given the circumstances present in this action, we find equity does not warrant an award of appellate attorney fees to Danny.

We have carefully considered all the remaining issues raised and find that they have either have been waived or have no merit. The district court's decision is affirmed in part and reversed in part.

AFFIRMED IN PART AND REVERSED IN PART.

Mahan, J., concurs; Vaitheswaran, J., concurs in part and dissents in part.

VAITHESWARAN, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. The majority reverses the district court's award of increased alimony, reasoning "we fail to see how a $7000 decline in Danny's income defeats this express objective; nor do we find it equitable for Beverly to receive both a disproportionate property division and an increased alimony award." The district court's award of increased alimony was based in part on the fact Dan's future income at the time the decree was entered was uncertain but had become certain by the time the modification application was filed. For this reason, I would affirm the alimony award. I concur in the balance of the majority's opinion.