

IN THE COURT OF APPEALS OF IOWA

No. 3-543 / 93-0051

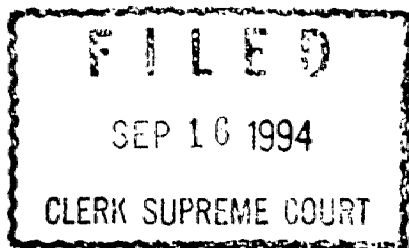
IN RE THE MARRIAGE OF ALLAN DEN BESTEN AND
SANDRA J. DEN BESTEN

Upon the Petition of
ALLAN DEN BESTEN,

Appellant,

And Concerning
SANDRA J. DEN BESTEN,

Appellee.



Appeal from the Iowa District Court for Scott County,
David J. Sohr, Judge.

Allan Den Besten appeals from the district court's
modification of the alimony provision in the parties'
dissolution decree. **AFFIRMED IN PART, AFFIRMED BY
OPERATION OF LAW IN PART, AND REVERSED IN PART.**

Linda A. Whittaker and Patrick J. Madden of Stanley,
Lande & Hunter, P.C., Muscatine, for appellant.

Dennis D. Jasper of Stafne, Lewis, Jasper, Alexander &
Preacher, Bettendorf, for appellee.

Considered en banc.

PER CURIAM

This is an appeal from a decision by the district court which modified the parties' decree for dissolution of marriage by increasing alimony and ordering that alimony would not automatically terminate upon remarriage by Sandra. The trial court also awarded attorney fees to Sandra.

The court is equally divided over the issue whether the trial court erred by modifying the amount of alimony. Accordingly, we affirm on this issue by operation of law. Iowa Code § 602.5106(1) (1993).

For affirmance: Habhab, Cady, and Huitink, JJ.

For reversal: Donielson, C.J., and Hayden and Sackett, JJ.

We reverse that portion of the trial court's ruling which changed the original decree by providing alimony would not automatically stop if Sandra remarried. The issue was not raised by the parties in the pleadings or at trial, and it was not essential for the trial court to address the issue to render its decision. See Henry Walker Park Ass'n v. Mathews, 249 Iowa 1246, 1257, 91 N.W.2d 703, 710 (1958). Furthermore, the issue may be the proper subject of a direct appeal, but is not properly raised in a modification proceeding.

The trial court correctly awarded Sandra attorney fees at trial, and we award \$2000 to Sandra for appellate attorney fees. Costs are assessed to Allan.

**AFFIRMED IN PART, AFFIRMED BY OPERATION OF LAW IN PART,
AND REVERSED IN PART.**