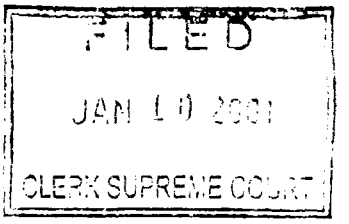
IN THE COURT OF APPEALS OF IOWA

No. 0-629 / 99-2043
Filed January 10, 2001

**IN RE MARRIAGE OF MACK MAULDIN
AND ANNE H. MAULDIN**

**Upon the Petition of
MACK MAULDIN,
Petitioner-Appellee/Cross-Appellant,**

**And Concerning
ANNE H. MAULDIN,
Respondent-Appellant/Cross-Appellee.**



Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Respondent appeals from the district court's denial of her application for modification of the parties' dissolution decree. **AFFIRMED.**

Steven H. Lytle of Nyemaster, Goode, Voigts, West, Hansell & O'Brien, Des Moines, for appellant.

Joseph Bertogli, Des Moines, for appellee.

Heard by Zimmer, P.J., and Hecht and Vaitheswaran, JJ.

ZIMMER, P.J.

Anne Mauldin appeals from a district court ruling denying her application for modification of the decree which dissolved her marriage to Mack Mauldin. She contends the trial court erred by denying her an award of alimony. Mack cross-appeals, contending the court erred by overruling his motion to dismiss and by finding that Anne could pursue her application for modification even though no alimony was awarded in the parties' original decree. We affirm.

I. Background Facts and Proceedings. Mack and Anne married in 1952. After a thirty-year marriage, the couple divorced in 1982. One of the issues litigated at their dissolution trial before Judge J.P. Denato was whether or not Mack would be required to pay alimony to Anne. The court found that Mack's net monthly income was $2,700 and Anne's net monthly income was $2,500. In the dissolution decree, Judge Denato did not award alimony. However, he specifically reserved jurisdiction for the court to consider a later application for alimony. Fifteen years later, Anne filed an application to modify, requesting alimony based on an alleged substantial change in circumstances. Mack filed a pretrial motion to dismiss, challenging the jurisdiction of the trial court to enter an alimony award. The district court denied his motion after concluding that Judge Denato specifically reserved the right to each party to seek alimony if there was a substantial change in circumstances. Mack's application to pursue an interlocutory appeal was denied by our supreme court.

Trial took place in October 1999. The trial court denied Anne's request for alimony and rejected Mack's request for an award of trial attorney fees. This appeal followed.

On appeal, Anne contends the district court erred by denying her an award of alimony. On cross-appeal, Mack asserts the trial court erred by overruling his pre-trial motion to dismiss Anne's application to modify. He also appeals from the trial court's decision not to award him trial attorney fees. Mack also seeks appellate attorney fees.

II. Mack's Motion to Dismiss. Mack contends the trial court improperly overruled his motion to dismiss when it found that Anne could pursue her application to modify even when no alimony was awarded in the original decree. Our supreme court has ruled that

> if the decree in a divorce action is silent upon the question of alimony . . . , or if the decree provides that no alimony is allowed . . . , the decree cannot be thereafter modified so as to allow . . . alimony, although there may be a change in the circumstances of the parties . . . .

In re Marriage of Carlson, 338 N.W.2d 136, 139 (Iowa 1983) (quoting *Duvall v. Duvall,* 215 Iowa 24, 27, 244 N.W. 718, 719 (1932)). In this case, the decree is not silent on the issue of alimony. After concluding that Anne Mauldin would not receive alimony at the time of the decree based on then-existing circumstances, the trial court reserved jurisdiction for future consideration of the alimony issue.

We recognize that Iowa appellate courts have uniformly discouraged trial courts from reserving issues in dissolutions. *See, e.g., In re Marriage of Graziano,* 573 N.W.2d 598, 599 n.1 (Iowa 1998); *In re Marriage of Wersinger,* 577 N.W.2d 866, 867 (Iowa App. 1998); *In re Marriage of Keith,* 513 N.W.2d 769, 771 (Iowa App. 1994); *In re Marriage of Smith,* 501 N.W.2d 558, 560 (Iowa App. 1993). However, whether Judge Denato was right or wrong in his decision to reserve the issue of alimony for future consideration, we conclude his decision is

the law of this case. Neither party appealed from the clause reserving jurisdiction when the original decree was entered. "The res judicata consequences of a final unappealed judgment are not altered by the fact that the judgment may have rested on incorrect legal principles." *Petition of Bisenius,* 573 N.W.2d 258, 260 (Iowa 1998) (citing *Gail v. Western Convenience Stores,* 434 N.W.2d 862, 863 (Iowa 1989)). Under the circumstances presented here, we conclude the trial court's decision to hear Anne's application to modify on its merits was correct. We affirm the denial of Mack's motion to dismiss.

III. Scope of Review. We review de novo proceedings to modify the alimony provision of a dissolution decree. *In re Marriage of Sjulin,* 431 N.W.2d 773, 776 (Iowa 1988); *Wernli v. Wernli,* 216 N.W. 2d 322, 323 (Iowa 1974). We give weight to the findings of the trial court but are not bound by them. *Sjulin,* 431 N.W.2d at 776. Our duty is to examine the entire record and adjudicate rights anew on those questions properly presented. *Id.* The burden is on the party seeking modification of a dissolution decree to prove a substantial change in circumstances from the time the decree was entered. *Id.* Even if a substantial change is shown, we will not modify the decree unless its enforcement will be attended by a positive wrong or injustice as a result of changed conditions. *Id.*

IV. Alimony. The trial court concluded Anne failed to demonstrate a sufficient change in circumstances to justify requiring Mack to begin paying alimony seventeen years after the parties' marriage was dissolved. After conducting a de novo review of the record, we agree.

At the time the original decree was entered, Mack had been retired from the United States Air Force for six years. He was receiving a retirement pension

plus a veterans administration disability pension. He was also employed by Drake University. His net monthly income was approximately $2,700. At the time of the decree, Anne was self-employed as the owner and operator of a wholesale art supply business. Her net monthly income was approximately $2,500.

Following the divorce, Anne continued to operate her business. The business initially expanded and during its best years, Anne was able to draw a salary approaching $50,000 per year. The business began to decline in 1989 and closed in 1994. Anne was able to liquidate the business equipment and sell the two commercial properties occupied by the business. Anne was also diagnosed with breast cancer in 1992. Treatment for the cancer proved successful and at the time of trial in this modification proceeding, she described her health as good. Meanwhile, Mack continued his employment with Drake University until 1984. At that time, he moved to West Virginia. Mack remarried in 1985.

At the time of the modification trial, Anne was sixty-six years old and a resident of Ames, Iowa. The trial court found she has a net worth in excess of $300,000. Of this amount, $143,000 is in the form of liquid assets. Most of Anne's investments came from an inheritance she received from her mother. Anne's net after-tax cash-flow is $2,127.93 per month. Of this amount, $1,644.93 consists of net ordinary income and $525 is attributable to the principal portion of a real estate contract. She seeks $750 per month in alimony.

Mack was seventy-two years of age at the time of trial. He has suffered from a number of physical and mental ailments since the decree was entered in

1982. His net worth at the time of trial was approximately $75,000. He has a net monthly income of approximately $3,800. His net income has increased somewhat since 1982 as a result of COLA provisions applied to his military pension and social security.

Anne claims monthly living expenses in excess of $3,100, while Mack claims monthly living expenses in excess of $3,400. The trial court found both parties included in their monthly expenses items which the court did not consider necessities. For example, Anne's expenses included gifts of $300 per month, household (carpet cleaning, linens, cook wear, appliances, etc.) expenses of $300 per month, and travel expenses of $175 per month. These 'extras' are about the same as the amount of alimony she currently seeks.

The trial court gave careful consideration to the factors it was required to consider in determining whether alimony is appropriate in this case. As the trial court pointed out, Anne has a net worth in excess of $300,000, significant liquid assets, and a monthly net after-tax cash-flow in excess of $2,100. She also has monthly expenses which could be reduced without seriously affecting her standard of living. Although Mack's monthly income has gone up since the 1982 decree, the increase hardly accounts for inflation. We agree with the trial court's conclusion that the circumstances here do not require that an alimony obligation be established eighteen years after the parties' marriage was dissolved.

V. Attorney Fees. Mack appeals from the trial court's decision to deny him an award of attorney fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels,* 542 N.W.2d 486, 491 (Iowa

1995). The controlling factor in awards of attorney fees is the ability to pay the fees. *In re Marriage of Muelhaupt,* 439 N.W.2d 656, 663 (Iowa 1989). We decline to disturb the trial court's decision not to award trial attorney fees.

Mack also requests an award of attorney fees for this appeal. In considering such a request, we look to 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 trial court's decision on appeal. *In re Marriage of Wood,* 567 N.W.2d 680, 684 (Iowa App. 1997). We award no attorney fees on appeal.

AFFIRMED.