

IN THE COURT OF APPEALS OF IOWA

No. 1-69 / 90-940

FILED

AUG 27 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF JOAN EILEEN STAEBELL AND
VINCENT GERALD STAEBELL

450

Upon the Petition of
JOAN EILEEN STAEBELL,

Appellee,

And Concerning
VINCENT GERALD STAEBELL,

Appellant.

Appeal from the Iowa District Court for Black Hawk
County, John Bauercamper, Judge.

The husband has appealed a dissolution decree,
contending his alimony obligation is excessive. **AFFIRMED**
AS MODIFIED.

L. Don Snow of Reed-Merner and Mershon, Snow & Knock,
Cedar Falls, for appellant.

Ronald J. Pepples, Parkersburg, for appellee.

Considered by Oxberger, C.J., and Donielson and Hayden,
JJ.

HAYDEN, J.

Joan and Vincent Staebell were married in 1966. They have three children. Two of the children are adults. At the time of the decree the youngest child was eighteen years old and about to graduate from high school. She planned to attend Loras College in the fall. Vincent expressed a willingness to pay this child's college expenses, and the dissolution decree so provided.

Vincent is fifty years old and has been employed at John Deere since 1960. At the time of trial, he was eligible for retirement. In 1989 his gross earnings were \$4495 per month, or \$53,940 per year which included \$8728 of overtime pay. He does not expect as much overtime in the future. Vincent also owns and operates a car wash business.

Joan, forty-nine years old at the time of trial, has had little employment experience. Before the marriage she worked as a medical receptionist. She has been primarily a homemaker during the marriage, having only occasional part-time employment. She has no posthigh school training.

The dissolution decree awarded Joan the parties' house valued between \$41,000 to \$55,000. Joan was required to assume a first mortgage of approximately \$25,800. She was also awarded household goods and a late model car subject to a sizable debt.

The decree awarded Vincent the car wash business, valued at \$100,000, but subject to debts of approximately

\$74,000. Vincent was also awarded his John Deere pension plan, valued at \$31,100, along with a retirement annuity worth \$1400 and a pickup truck. He was required to assume other debts slightly exceeding \$20,000, including a second mortgage on the house which apparently was incurred to pay a down payment on the car wash.

The decree required Vincent to pay Joan alimony of \$1200 per month until either party dies to be reduced by fifty percent if Joan remarries. The trial court also ordered Vincent to maintain life insurance on his life with Joan as beneficiary in the amount of \$40,000, decreasing to \$20,000 if she remarries.

Vincent appeals the dissolution decree contending his alimony obligation is excessive. Joan requests attorney fees on appeal.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering

those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983).

In the present case, the trial court considered the necessary factors in making its determination of alimony. Specifically, the trial court found, due to the length of the marriage, the age of the parties, and Joan's lack of employment skills and inability at her present age to obtain additional training to increase her earning capacity, an award of permanent alimony was necessary. We agree with the trial court's finding. Additionally, we consider property division and alimony together in evaluating their individual sufficiency. In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d at 608. Because Vincent received a majority of the parties' assets, the trial court's award of \$1200 per month was not excessive.

Vincent also contends his alimony obligation is excessive because he is required to pay his daughter's college expenses in addition to the monthly alimony. The record reflects Vincent expressed his desire to finance his daughter's college education. In ordering Vincent to pay this expense, we conclude the trial court was simply honoring Vincent's request.

However, awarding permanent alimony with no provision in the decree for a reduction in the amount at retirement could prevent Vincent from modifying the award upon his retirement. 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). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Id.; Mears v. Mears, 213 N.W.2d 511, 513 (Iowa 1973). 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). The knowledge of the trial court at the time the award is made is the basis for determining whether there has been a change of circumstances. Full, 255 N.W.2d at 159; Leo v. Leo, 213 N.W.2d 495, 496 (Iowa 1973).

At the time of trial, Vincent was eligible for retirement. The record reflects testimony regarding his retirement. Under the circumstances, Vincent will be unable to modify the decree when he retires, because his retirement will be considered a circumstance within the contemplation of the trial court when the original decree was entered. As such, we modify the decree and order it shall be subject to judicial review and possible modification upon Vincent's retirement by application of either party. In addition, the alimony of \$1200 per month shall terminate upon Joan's remarriage, cohabitation with

another man, or upon the death of either party, whichever occurs first. Vincent shall maintain \$40,000 of life insurance upon his life designating Joan as the beneficiary so long as he is required to pay her alimony.

Finally, Joan requests attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Relying on these principles, we order Vincent to pay \$500 of Joan's attorney fees for this appeal. Costs on appeal are taxed to Vincent.

AFFIRMED AS MODIFIED.

Donielson, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would affirm the trial court.