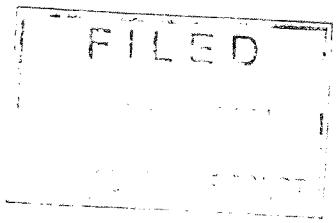
IN THE COURT OF APPEALS OF IOWA

No. 1-688 / 01-0106
Filed December 28, 2001

IN RE THE MARRIAGE OF BRAD McCALL AND LORI ANN McCALL



Upon the Petition of
BRAD McCALL,
Petitioner-Appellant,

And Concerning
LORI ANN McCALL,
Respondent-Appellee.

Appeal from the Iowa District Court for Jasper County, Eliza J. Ovram, Judge.

The petitioner appeals a district court order dismissing his application to modify the alimony provisions of the parties' dissolution decree and awarding respondent attorney fees and costs. **AFFIRMED.**

Brad McCall, Newton, pro se appellant.

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

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MILLER, J.

Brad McCall appeals a district court order dismissing his application to modify the spousal support provisions of the parties' dissolution decree and awarding Lori McCall attorney fees and costs. He contends the court erred in: 1) failing to find a material change in circumstances justifying a reduction in his spousal support obligation; and 2) awarding Lori attorney fees and costs. Lori requests an award of appellate attorney fees. We affirm.

In this equity action our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on issues properly presented. *In re Marriage of Maher*, 596 N.W.2d 561, 564 (Iowa 1999). We give weight to the district court's factual findings, but are not bound by them. Iowa R. App. P. 14(f)(7). The party seeking modification must prove by a preponderance of the evidence that there has been a substantial change in the circumstances of the parties since entry of the decree or any subsequent intervening proceeding that considered the situation of the parties upon petition for the same relief. *Maher*, 596 N.W.2d at 564-65. Not every change in circumstances is sufficient; it must appear that continued enforcement of the decree would, as a result of the changed circumstances, result in positive wrong or injustice; the change in circumstances must be permanent or continuous rather than temporary; and the change in circumstances must not have been within the contemplation of the district court when the decree was entered. *Id.* at 565. The district court has reasonable discretion in determining whether modification is warranted and we will not disturb that discretion unless there is a failure to do equity. *Id.*

The parties' marriage was dissolved by a November 25, 1996 decree. The parties agreed to all terms of the decree. The decree placed physical care of the parties' seventeen-year-old son, Benjamin, with Lori; ordered Brad to pay $300 per month child support; ordered Brad to be responsible for college expenses for Benjamin and the parties' nineteen-year-old daughter, Lisa, but allowed him to use funds that had been accumulated in the children's names to assist with such expenses; allowed Brad to claim the children as dependents for income tax purposes; and ordered Brad to pay $2800 per month spousal support, increasing to $2900 per month when he had college education support obligation for only one child and $3000 per month when he no longer had such an obligation for either child.

The parties were married in 1973 when Brad was nineteen and Lori was seventeen. Lori then finished high school, but acquired no further education. She quit working outside the home when pregnant with Lisa and was a homemaker until after dissolution of the parties' marriage. Since then she has obtained part-time employment with the Newton Community School District as an elementary school teacher's aide. She works about thirty-one hours per week during the school year, at $7.20 per hour, resulting in gross annual income of about $8000. A vocational specialist testified that Lori has the skills, experience and capacity to earn some $16,000 to $22,000 per year. Lori likes her present job, does not wish to work full-time, and has not sought full-time employment as a teacher's aide or in any other job.

Brad completed college and law school and practices law. His income from his law practice was about $84,500 in 1996, the year the parties' marriage

was dissolved, and was about $141,500 in 1999, the last year before he filed his petition for modification in June 2000. His income from his law practice was about $263,500 in 1997 and $132,500 in 1998. When his modification action was tried in late 2000 he anticipated that his law practice income for 2000 would be about $102,000 to $105,000.

Brad argues that Lori's increased earnings and earning capacity constitute a material change in circumstances. Although Lori now has a job in which she works somewhat more than one-half time, both her present income and her increase in income since the dissolution are substantially less than Brad's increase in income since the dissolution. Nothing in the record indicates Lori's earning capacity has substantially changed since the parties' marriage was dissolved, and even her earning capacity is not larger than Brad's increase in income since the dissolution.

Brad also argues that failure of his earnings to maintain a level that was expected when the decree was entered constitutes a material change in circumstances. He testified at the modification hearing that at the time the dissolution decree was entered there were a number of cases in his practice that held the promise of substantial future income, the parties relied on this expected future income in setting spousal support, and the parties' expectations proved correct resulting in his substantially higher income for the years 1997 through 1999. He also testified that contrary to his expectations his current income has returned to a level comparable to what it was before the decree. He argues this constitutes a substantial and permanent change in circumstances justifying modification. For several somewhat related reasons we disagree.

Brad in fact received the substantially increased income that he testified the parties expected him to receive from the cases pending at the time of the dissolution. Although the parties may have anticipated the increased earnings which resulted from those cases, no evidence shows that either of them anticipated Brad acquiring more such cases in the foreseeable future. There is no evidence that in approving the parties' agreement concerning spousal support the trial court believed that Brad's income would for some time increase substantially over what it was at the time of the dissolution. Brad's income at the time of the modification proceeding is in fact some $18,000 to $20,000 per year higher than it was at the time of the dissolution. We conclude the changes in Brad's income shown by the record do not justify or require modification.

We agree with the trial court that there has not been a material and substantial change in circumstances which was not within the contemplation of the trial court when the decree was entered. We therefore also conclude Brad has not proven that changed circumstances cause continued enforcement of the decree to result in positive wrong or injustice. We affirm the trial court's denial of modification.

Brad argues Lori was not entitled to trial attorney fees because he was entitled to the modification he sought and therefore Lori would not be the "prevailing party" entitled to attorney fees under Iowa Code section 598.36. For reasons stated above we have affirmed the trial court's denial of modification. We conclude Lori was the "prevailing party" in the modification proceeding. We affirm the trial court's award of trial attorney fees.

Lori seeks an award of appellate attorney fees. We have discretion to award appellate attorney fees under Iowa Code section 598.36. *Maher*, 596 N.W.2d at 568. 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 trial court's decision on appeal. *Id.* After considering the relevant factors, we award Lori $1000 appellate attorney fees.

AFFIRMED.

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