FILED
OCT 21 1980
CLERK OF COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KATHRYN A. FEEKIN AND RICHARD W. FEEKIN

Upon the Petition of)

KATHRYN A. FEEKIN,) Filed October 16, 1980

Petitioner-Appellant,)

And Concerning)

RICHARD W. FEEKIN,) 0-259
2-64079

Respondent-Appellee.)

Appeal from Pottawattamie District Court - Leroy H. Johnson, Judge.

Petitioner wife appeals from dismissal of contempt action and from modification of dissolution decree, alleging 1) that the record requires a finding of contempt; 2) that respondent's change in circumstances was voluntary and not so substantial as to justify modification of decree; and 3) that the trial court erred in decreeing that petitioner cannot levy or execute against respondent to collect her judgment for past support payments. AFFIRMED IN PART; REVERSED IN PART.

Lyle A. Rodenburg, Council Bluffs, for petitioner-appellant.

Richard W. Feekin, Council Bluffs, pro se.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

OXBERGER, C. J.

Petitioner, Kathryn Feekin, appeals from trial court's dismissal of her application to cite respondent husband for contempt and from modification of economic provisions of the parties' dissolution decree. She contends 1) that the record requires a finding of contempt and that therefore she was entitled to attorney fees and costs in the trial court; 2) that the respondent's change in circumstances was voluntary and not so substantial as to justify modification of the original decree; and 3) that the trial court erred in decreeing that petitioner may not levy or execute against the husband or any of his property in order to satisfy her judgment for his arrearage in support payments. We affirm the decision of the trial court with respect to petitioner's contempt application; with respect to modification of the original decree and petitioner's third contention, however, we reverse the ruling of the trial court.

Our review of the contempt charge is not de novo, but we are not bound by the trial court's findings. Critelli v. Tidrick, 244 Iowa 462, 56 N.W.2d 159 (1953). The trial court's decision will not be easily reversed, but the evidence to sustain a contempt charge must be clear, satisfactory and convincing.

Our review of this appeal as to modification is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While weight is given to the findings of the trial court, we will not abdicate our function as triers de novo on appeal. Id.; In re Locke, 246 N.W.2d 246, 249 (Iowa 1976).

The parties' marriage was dissolved on March 23, 1978, and the decree provided that respondent husband was to pay combined alimony and child support of $250 per week. Additionally, he was to be responsible for any necessary and reasonable medical and dental expenses for the couples' three children up to the sum of $3000 per child per year. He was ordered to make certain mortgage payments and petitioner was awarded a lump sum alimony payment of $18,000 payable at the rate of $125 per month.

On January 24, 1979, petitioner filed an application for order to show cause, alleging that respondent should be held in contempt for failure to make support and other payments as ordered by the decree. Respondent then filed an application to

modify the economic provisions of the decree, alleging as change of circumstances a decline in his financial condition.

The trial court concluded that respondent was financially unable to make the payments ordered by the decree and dismissed petitioner's application to cite him for contempt. The court reduced his combined support and alimony obligation from $250 to $200 per week and terminated until further order his obligation to make mortgage payments and installment lump sum alimony payments. The court relieved respondent of further responsibility for medical and dental expenses for the children and declined petitioner's request for attorney fees and costs. Although petitioner contended that respondent was $8,715.56 behind in payments ordered by the original decree, the trial court concluded that the amount in arrearage was actually $6533.15 and further held that so long as respondent met his $200 per week obligation for combined alimony and support, petitioner could not levy or execute against him or any of his property in order to satisfy her judgment for the arrearage.

I. Petitioner first alleges error from the dismissal of her application for order to show cause. She maintains that the record requires a finding of contempt, but we do not agree.

Section 598.23, The Code 1979, provides that:

> If any party against whom any temporary order or financial decree has been entered shall willfully disobey the same, or secrete his property, he may be cited and punished by the court for contempt and be committed to the county jail for a period of time not to exceed thirty days for each offense.

The language of this provision has consistently been interpreted to require a showing that the disobedience was willing. See In re Marriage of Florke, 270 N.W.2d 643, 646 (1978); Nystrom v. District Court, 244 Iowa 735, 738, 58 N.W.2d 40, 42 (1953) (construing section 598.15, The Code 1950). See also Porter v. Maxwell, 208 Iowa 1224, 1225, 226 N.W. 917, 918 (1929). Proof of willful disobedience must be clear and satisfactory. Johnstone v. Johnstone, 226 Iowa 503, 508, 284 N.W. 379, 382 (1939). We find such proof lacking in the instant case.

The record reveals that respondent, who was in the construction business, operated a corporation of which he owned 70 percent, the remaining 30 percent being owned by the couples' three minor children. Respondent also owned a one-third interest

in another corporation, from which he testified that he received no income. Respondent made support payments from the account of the first corporation, and he testified that his failure to pay was the result of financial difficulties that put his corporation on the verge of bankruptcy. We agree with the trial court that respondent's then-existing financial position was sufficient to allay a finding of contempt, therefore, we affirm that portion of the lower court's ruling. Because we do not find respondent in contempt, we lack authority under section 598.24, The Code 1979, to grant petitioner's request for attorney fees and costs incurred in the contempt proceedings.

II. We do not find the respondent met his burden to enable modification of the support provisions in the original decree. Shortly before the hearing on petitioner's application for order to show cause, respondent sold assets of the corporation but denied making a profit on the transaction. The respondent, although now technically employed by another at $300 per week, is essentially a self-employed person even though incorporated. There are indications he will continue to pursue the same occupation in the same status. Furthermore, his present temporary situation was entirely under his control and voluntarily instigated. See Ellis v. Ellis, 262 N.W.2d 265 (Iowa 1978).

The record reveals several transfers of land since the divorce decree between respondent or his corporation as seller and persons known to be closely associated with the respondent as purchasers. Respondent testified he made no profit on most of these transactions and used the proceeds to pay bills of the corporation. What the record does not reveal is an accurate account of respondent's financial situation. As he is alleging a reversal in his economic worth sufficient to justify modification, this lack of evidence does not support his claim. The support needs of the family remain the same, and, without proof of substantial change of circumstance, respondent's obligation to meet those needs should not be diminished. Therefore, we reverse the trial court's rulings and orders which modified support or economic provisions of the original decree.

III. We recognize that the trial court's decree was probably intended to prevent the petitioner from involving respondent in excessive litigation, and we further acknowledge that the trial court considered respondent's financial situation made unlikely the existence of an adequate remedy for the petitioner. However, by decreeing that she may not levy or execute against respondent to collect her judgment, the trial

court has in effect divested her of rights accrued under the original decree, since her right to back payments is essentially meaningless unless she can enforce it. It is well recognized that the power to modify an original decree does not authorize the court to divest the parties of rights already accrued under the provisions of that decree. In re Marriage of Welsher, 274 N.W.2d 369, 372 (Iowa 1979); In the Matter of Evans, 267 N.W.2d 48, 51-52 (Iowa 1978); Gilliam v. Gilliam, 258 N.W.2d 155, 156-57 (Iowa 1977); Wren v. Wren, 256 Iowa 484, 489, 127 N.W.2d 643, 646 (1964). Therefore, while we recognize that respondent's financial status makes recovery against him very unlikely, we reverse this part of the trial court's decision and hold that petitioner may use the legal means available to her to attempt to enforce her judgment for payments due under the decree.

AFFIRMED IN PART; REVERSED IN PART.

All judges concur, except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent from the majority's holding that respondent's change in circumstances was voluntary and not so substantial as to justify modification of the original decree. Under the circumstances, I think the modification made by the trial court was warranted.

In my estimation, respondent's change in circumstances was sufficiently substantial to justify modification of his original obligations under the decree. The financial provisions of the original decree were based on respondent's former position as the president and 70 per cent owner of a solvent corporation, the remaining 30 per cent of which was owned by the couple's three minor children. At the time of the decree, respondent's corporation had received contracts to work on several lucrative construction projects. The corporation at that time apparently had substantial assets.

In contrast, respondent now makes $300 per week straight salary. Although the majority suggests that the respondent is now essentially a self-employed person and that he holds the same business status as he had at the time of the original decree, the facts simply do not bear this out. The only similarity between respondent's situation at the time of the decree and his current situation is the fact that he is still working in the construction business; otherwise, his circumstances have changed considerably. Respondent is no longer incorporated; he holds a position as a salaried employee in a corporation in which he owns no interest and from which he receives no income except his $300 weekly salary. Under the original decree, he was required to pay $250 per week in combined alimony and support alone. Additionally, he was to be responsible for any necessary and reasonable medical and dental expenses for the three children up to the sum of $3000 per child per year. He was ordered to make installment payments of $125 per month on a lump sum alimony award of $18,000 and to make mortgage payments totalling $297 per month. It is inconceivable to me that respondent could meet this obligation on his current salary of $300 per week, and I concur in the trial court's judgment that it is unreasonable to impose such obligations where sufficient assets do not exist.

Furthermore, respondent's decision to sell his corporation and all its assets does not appear to me to have been voluntary. Because his corporation fell into severe financial difficulties, he lacked sufficient funds to finish jobs he had already begun and he lost large amounts of money on those contracts. Because he had large business

debts, he was unable to get financial backing from lending institutions. He sold his business because he wanted to salvage what he could out of it, fearing that bankruptcy was his only alternative. Realistically, respondent had no choice but to sell out.

I am therefore convinced that the trial court's modification of respondent's obligations under the decree was justified and fair to both parties. I would affirm.