

IN THE COURT OF APPEALS OF IOWA

No. 7-577 / 96-1859

**IN RE THE MARRIAGE OF GERALD V. BROWN
AND BARBARA J. BROWN**

**Upon the Petition of
GERALD V. BROWN,**

Petitioner-Appellant,

**And Concerning
BARBARA J. BROWN,**

Respondent-Appellee.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson,
Judge.

Gerald Brown appeals from the denial of his application to modify the parties'
dissolution decree. **AFFIRMED IN PART AND REVERSED IN PART.**

Jerry L. Schnurr III, Fort Dodge, for appellant.

Thomas P. Schlapkohl, Des Moines, for appellee.

Considered by Sackett, P.J., and Streit and Vogel, JJ.

SACKETT, P.J.

Petitioner-appellant Gerald Brown appeals from the denial of his application to modify the parties' dissolution decree. He asserts the trial court erred in failing to eliminate the alimony provisions of the decree, failing to eliminate the requirement that he provide life insurance with respondent-appellee Barbara Brown as beneficiary, and awarding Barbara attorney fees. Both parties request an award of appellate attorney fees. We affirm in part and reverse in part.

Gerald and Barbara were divorced in 1983 after nearly twenty-eight years of marriage. The parties entered into a stipulation concerning alimony and property settlement which was approved by the court. Under its terms, Gerald was to pay monthly alimony of \$400 until Barbara's sixty-fifth birthday, and \$200 monthly thereafter unless Barbara remarried, died, or cohabited with someone as husband and wife, at which time the obligation would cease. The decree also required Gerald to purchase and maintain \$20,000 of life insurance with Barbara as beneficiary for as long as he was obligated to pay alimony. At the time of the divorce, Gerald was earning \$27,700 before taxes as a plant engineer and Barbara was earning \$8900 as a salesperson.

By the time Gerald sought to modify the decree, Barbara was earning approximately \$48,000 annually as a telemarketer. Gerald was earning approximately \$41,000. Gerald had remarried and divorced twice.

Gerald advanced the following changes in circumstances, contending they warrant modification: (1) his divorces resulted in a substantial financial burden; (2) he is earning less than he earned at the time of the dissolution; and (3) Barbara's income had increased substantially since the time of their dissolution.

At the time of the modification hearing in October of 1996, Gerald was sixty-four years of age and Barbara was sixty-three. The district court concluded Barbara was awarded alimony rather than receiving a share of Gerald's retirement income. The court found both parties had increased their income and net worth, and this was not a circumstance beyond the contemplation of the parties or the court at the time of the dissolution.

The court did not consider Gerald's subsequent marriages relevant finding Gerald entered them with knowledge of his obligations to Barbara. The court denied Gerald's application and ordered that he increase his life insurance to \$20,000 in accordance with the terms of the original decree. The court also awarded Barbara \$1500 in attorney fees. Gerald appeals.

This is an equitable proceeding and our review is de novo. Iowa R. App. P. 4; *Marriage of Wessels*, 542 N.W.2d 486, 489 (Iowa 1995). 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. *Mears v. Mears*, 213 N.W.2d 511, 513 (Iowa 1973); *Thayer*, 286 N.W.2d at 223. 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). Such changes must be more or less permanent or continuous, not temporary. *In re Marriage of Carlson*, 338 N.W.2d 136, 141 (Iowa 1983).

Gerald contends the extent of Barbara's increase in income was not contemplated by the parties or the district court at the time of the dissolution and constitutes a change in circumstances which justifies the elimination of the alimony requirement. Spousal support, also called alimony, is provided for under Iowa Code section 598.21(3) which sets forth factors the court needs to consider in determining whether to award spousal support, as well as the amount to be awarded. 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). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. *Mears*, 213 N.W.2d at 514.

Citing a similar set of circumstances in *In re Marriage of Halbach*, 506 N.W.2d 808 (Iowa App. 1993), Gerald argues the increase in Barbara's assets and earnings support his claim for modification. *Id.* at 810.

The trial court disposed of the issue in part (1) by not considering the financial strain put on Gerald by subsequent marriages, and (2) by concluding the alimony was a part of a property settlement in compensation for Gerald's pension. We agree with the trial court the financial strains put on Gerald by subsequent marriages should not be considered. We disagree with the trial court's second conclusion.

Barbara was awarded traditional alimony. *See In re Marriage of Grauer*, 478 N.W.2d 83, 85-86 (Iowa App.1991). Alimony is an allowance to a former spouse in lieu of a legal obligation to support that person. *See In re Marriage of Hitchcock*, 309 N.W.2d 432, 437 (Iowa 1981). An alimony award is modifiable. An alimony award is made after considering, among other things, the ability to pay. *In re Marriage of Murray*, 213 N.W.2d 657, 660 (Iowa 1973). A property settlement is not. While alimony and property settlements are considered together in framing the financial provisions of a dissolution decree, they have differing purposes. *See In re Marriage of Lattig*, 318 N.W.2d 811, 815 (Iowa 1982); *In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976).

At the time of the dissolution, Gerald's annual income was three times that of Barbara's. She had a need for additional income and Gerald had the ability to pay. Barbara has been paid alimony since. Barbara's current income and financial picture are currently superior to Gerald's. She no longer needs financial support from Gerald. These are substantial changes in circumstance. The fact a husband and wife have similar earnings is a consideration in determining the need for alimony. *See In re*

Marriage of Stewart, 356 N.W.2d 611, 613 (Iowa App. 1994). Had the parties and the trial court known of these factors at the time of the dissolution, rehabilitative alimony of a limited length would have been more appropriate. Gerald has met the required burden. We reverse the trial court and modify the decree to terminate Gerald's obligation to pay Barbara alimony.

Gerald also challenges his obligation to maintain life insurance. This requirement was designed to provide support for Barbara after Gerald's death. We have found Barbara is not in need of support from Gerald. We have terminated Gerald's alimony obligation to Barbara. We also terminate any obligation for Gerald to maintain life insurance.

Gerald advances the district court abused its discretion in awarding Barbara attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award, the complaining party must show the trial court abused its discretion. *Id.* Awards of attorney fees must be for fair and reasonable amounts, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *Lattig*, 318 N.W.2d at 817. The trial court did not abuse its discretion in awarding Barbara attorney fees. We affirm on this issue.

Both parties request appellate 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

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). We award no appellate attorney fees. Costs on appeal are taxed to Barbara.

AFFIRMED IN PART AND REVERSED IN PART.