

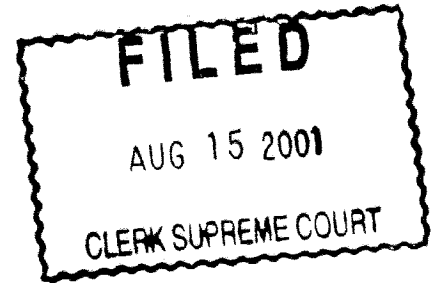
IN THE COURT OF APPEALS OF IOWA

No.1-389 / 00-1885  
Filed August 15, 2001

IN RE THE MARRIAGE OF GALE ALICE SAUER  
AND PHILLIP WAYNE SAUER

Upon the Petition of  
GALE ALICE SAUER,  
Petitioner-Appellant,

And Concerning  
PHILLIP WAYNE SAUER,  
Respondent-Appellee.



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Appeal from the Iowa District Court for Wapello County, James P. Reilly,  
Judge.

Gale Sauer appeals from a district court ruling denying her petition to  
modify the parties' dissolution decree and granting Phillip Sauer's petition to  
reduce alimony. **AFFIRMED IN PART AND REVERSED IN PART.**

Karen A. Taylor of Taylor, Ristau & Lett, Des Moines, for appellant.

R. Kurt Swaim of Swaim Law Office, Bloomfield, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

**MILLER, J.**

The Petitioner, Gale Alice Sauer appeals from the district court ruling denying her petition to modify the parties' dissolution decree and granting Respondent, Phillip Wayne Sauer's petition to reduce alimony. Gale contends the district court erred in (1) determining her requested modification should be denied, and (2) lowering the amount of alimony she receives. We affirm in part and reverse in part.

**I. BACKGROUND FACTS AND PROCEEDINGS**

Trial on Gale's petition for dissolution of her twenty-five year marriage to Phillip was held March 20, 1997. At the time of the dissolution trial Gale was age forty-five and Phillip was forty-four. Phillip was then employed as a railroad engineer with the Soo Line where he had worked for the last eight years. He had worked for the railroads in some capacity since he was nineteen, and was in good health. Phillip made approximately \$50,000 per year working for the railroad.

Gale did not work outside the home until the mid 1980's. She then began working part-time at K-Mart. Her last job was with Highland Place, working with handicapped people. In the spring of 1996 she was forced to quit working due to her debilitating rheumatoid arthritis. Gale testified she also suffered from panic attacks and thyroid problems and was taking several medications for her medical problems. Gale was living with her mother at the time of the dissolution trial. She had received some cash from the sale of the parties' household goods at the time of their separation but only had a small amount left at the time of trial.

From the time Gale quit her last job in 1996 to the time of the dissolution trial her only income was temporary alimony ordered by the trial court. She introduced a physician's statement at that trial. It indicated she was totally disabled for any occupation. She had applied for Social Security Disability benefits, been denied, and the denial was on appeal.

Following the dissolution trial Phillip filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). In ruling on it the trial court ordered that Gale was to notify Phillip "within ten days of receiving any disability benefits from any source and, should she receive a lump sum benefit, a determination should be made at that time concerning distribution of that award."

The dissolution decree was entered on January 21, 1998, based on the court's earlier entered findings, conclusions and direction for decree. As part of the decree Phillip was to make car payments on Gale's vehicle and furnish her with health insurance for twenty-nine months, or else be personally liable for all of her medical expenses incurred during that time period. The decree also ordered Phillip to pay Gale alimony in the amount of \$700 per month until she "remarries, becomes employed or receives Social Security Disability benefits." The court retained jurisdiction to modify or adjust the alimony award in the event Gale were to start receiving Social Security benefits, remarry or become employed.

In June 1999 Phillip filed bankruptcy. The bankruptcy proceeding discharged certain debts of his. They included not only the debt on Gale's car for which he was responsible under the decree, but also some \$40,000 in medical bills she had incurred and for which he was responsible because he had not

provided medical insurance for her. As a result of Phillip's bankruptcy Gale's car was repossessed in early 2000. Phillip's bankruptcy also resulted in medical service providers looking to Gale for payment of the \$40,000 in medical bills. She then found it necessary to file bankruptcy, resulting in discharge of her debts in late August 2000.

Gale filed an application for rule to show cause and an application to modify the decree on March 29, 2000. She alleged in each that the bankruptcy was "contrary to the Decree and contrary to the rights of the Petitioner." The application to modify also asserted there had been a material and substantial change in circumstances based on Phillip's filing bankruptcy and sought to have Gale's alimony increased. Gale requested her alimony be increased approximately \$300 per month for five years in order to allow her to obtain a vehicle to replace the car that was repossessed due to Phillip's bankruptcy.

Phillip resisted both the application for rule to show cause and the application to modify the decree stating that the debts were legally discharged in bankruptcy. The court dismissed the contempt action for this reason. Phillip was subsequently allowed to amend his answer to Gale's application to modify to include counterclaims asking that (1) his alimony obligation be reduced or terminated because Gale was receiving monthly Social Security Disability benefits and had received a lump sum award and his circumstances and terms of employment had become more unfavorable, and (2) a determination be made concerning distribution of the lump sum award. Phillip alleged he had only been notified of the fact Gale was receiving Social Security benefits when she responded to his discovery requests in the modification action, despite the earlier

court order requiring her to give him notice within ten days if she received any such payments.

Hearing was held on the matter October 5, 2000, the court issued its ruling October 18, 2000, and the modification of the decree was entered on November 1, 2000. The court determined Gale had received a net lump sum from Social Security of \$2289 and had received net monthly payments from July 1999 to November 1999 of \$119 and from December 1999 to October 2000 in the amount of \$123.<sup>1</sup> Therefore she had received a total net sum of \$4237 in Social Security Disability payments. Based on these facts the court granted Phillip's request to reduce his alimony obligation and decreased his monthly payments from \$700 to \$577 beginning November 2000, a decrease in the full amount of net Social Security Disability payment Gale receives each month. The court also granted Phillip a \$4237 credit against the back alimony he owed to Gale. This was the full amount of the lump sum and monthly payments she had received. The court determined Phillip's obligation to pay the balance due on Gale's car constituted a property settlement, not an alimony support obligation, and was properly discharged in bankruptcy. Thus, Gale's request for additional alimony in order to replace the repossessed car was denied.

## **II. SCOPE AND STANDARDS OF REVIEW**

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the

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<sup>1</sup> The \$123 is the net amount Gayle receives from a \$168.50 per month benefit after \$45.50 is withheld for "Medicare," apparently in the form or nature of an insurance premium.

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). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

### III. MERITS

Gale appeals from the district court's ruling contending the court erred in (1) denying her request to increase Phillip's monthly alimony payments to her, and (2) granting Phillip's request to decrease his alimony obligation, including granting him credit against his alimony delinquency for the \$4237 Social Security Disability benefits Gale had received as of the time of the modification hearing. We discuss Gale's second contention first.

Modification of a dissolution decree is governed by the provisions set forth in Iowa Code section 589.21(8). "Modification of the alimony provisions of a decree is justified only if there has been some material and substantial change in circumstances of the parties, financially or otherwise, making it equitable that other terms be imposed." *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991). The burden rests on the party seeking the modification to establish such a change by a preponderance of the evidence. *Id.* "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." *Id.* (citing *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. *Id.* Modification of an alimony award may be appropriate if the consequences of a bankruptcy are shown to satisfy principles for modification

and the modification does not violate the policies underlying section 524 of the Federal bankruptcy code. *In re Marriage of Trickey*, 589 N.W.2d 753, 757-58 (Iowa Ct. App. 1998).

As set forth above, the district court found that Phillip's alimony obligation should be modified and reduced prospectively because of the monthly Social Security benefits received by Gale. The court also found Phillip was entitled to receive credit of \$4237 against the back alimony he owed. The trial court had expressly retained jurisdiction to adjust or modify alimony in the event Gale started receiving Social Security Disability benefits. We agree with the trial court that Gale's receipt of such benefits is a change in circumstances. This change, standing alone would likely require a reduction in Phillip's alimony obligation. However, the initiation of benefits for Gale is not the only change in the parties' financial circumstances. Phillip's discharge of debts through bankruptcy, including the debts he was assigned in the divorce decree, also resulted in changed financial circumstances.

Phillip was able to discharge in bankruptcy some \$40,000 in debt for Gale's medical expenses. The relief from this debt, regardless of the source of the debt, clearly increased his ability to pay the monthly alimony he was ordered to pay. Furthermore, the discharge of the debt he owed on Gale's car, resulting in the car being repossessed and Gale losing it, not only increased his ability to pay alimony but also increased her need for alimony.

We agree with the trial court that Phillip's obligation to pay the remaining balance on Gale's car was part of the property settlement, not an alimony support obligation, and thus was fully and properly dischargeable in bankruptcy.

*See In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994); *Ziegenhorn v. Iowa District Court*, 510 N.W.2d 894, 897-99 (Iowa Ct. App. 1993). However, the fact the car debt was properly discharged in bankruptcy does not change the fact the elimination of the debt increased his ability to pay alimony or the fact the discharge caused Gale to lose the car and thus increased her need for alimony.

The trial court reduced Phillip's alimony obligation both by reducing future monthly payments from \$700 to \$577 and by granting credit against his alimony delinquency for the full amount of disability benefits Gale had received as a lump sum and monthly benefits after dissolution of the parties' marriage and up to the time of the modification hearing and ruling. In doing so it considered and relied on one of the changes in the parties' financial circumstances, Gale's receipt of Social Security Disability benefits. It did not take into account other equally material and substantial changes in their financial circumstances, those resulting from Phillip's discharge of debts.

We conclude the trial court should have taken these additional changes into consideration also. After taking them into consideration we conclude that Gale's decreased need for alimony resulting from her receipt of disability benefits is offset by the combination of Phillip's increased ability to pay resulting from his discharge of debts and Gale's increased need resulting from the loss of her car. We conclude Phillip's alimony obligation should not have been reduced because of Gale's receipt of disability benefits. For the same reason, the offsetting nature of the several changes in the parties' financial circumstances, we further

conclude that Gale's request for an increase in alimony should be denied and the trial court was correct in so ruling.

Phillip alleges on appeal, as he did in his counterclaim, that his employment circumstances had become more unfavorable since the date of the entry of the decree. He asserts this is another material and substantial change in circumstance supporting a decrease in his alimony obligation. His argument is based on the fact the railroad closed his "home terminal" in Ottumwa, near where he resided, and moved it to Clinton which is 205 miles from where he lives. There is no evidence in the record Phillip's salary was affected by this change. The evidence shows only that he would have greater expenses due to the increased amount of distance he would have to commute to work. There does not appear to be any reason, other than a personal preference, why Phillip could not move closer to his newly assigned home terminal and eliminate this extra expense. Thus, Phillip's increased traveling expense alone is not a sufficient reason to decrease his alimony obligation.

#### **IV. SUMMARY AND DISPOSITION**

We affirm the trial court's denial of Gale's request for an increase in alimony. We reverse the trial court's reduction of Phillip's alimony obligation, including the grant of credit against his alimony delinquency for disability benefits received by Gale. Court costs are taxed one-half to each party.

**AFFIRMED IN PART AND REVERSED IN PART.**