IN THE COURT OF APPEALS OF IOWA

No. 6-410 / 95-1609

IN RE THE MARRIAGE OF NORMA ARLENE SCHMATT AND GARY LEE SCHMATT

Upon the Petition of
NORMA ARLENE SCHMATT,

Appellee,

And Concerning
GARY LEE SCHMATT,

Appellant.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, Larry J. Conmey, Judge.

Respondent appeals the district court's denial of his application to modify the parties' dissolution decree. **AFFIRMED.**

David P. McManus of Glasson, Sole, McManus & Combs, P.C., Cedar Rapids, for appellant.

Benjamin W. Blackstock and Jon Tack of Blackstock Law Offices, Cedar Rapids, for appellee.

Considered by Habhab, C.J., and Huitink and Streit, JJ.

HABHAB, C. J.

Gary Schmatt appeals the decision of the district court denying his application to modify the alimony provision of the parties' dissolution decree. We affirm.

Norma and Gary Schmatt were married in 1962. A decree of dissolution was entered on November 5, 1991, which incorporated the parties stipulation. The relevant portion of the decree provided:

> 8. Alimony. Gary shall pay the sum of $250 per month in alimony to Norma until she reaches the age of 62. Such alimony shall be payable on the first Monday following the date of the Decree and each month thereafter and shall terminate on the remarriage of Norma or the death of either Norma or Gary.

At the time the dissolution decree was filed, Norma was involved in a relationship with Mervin Perry and Gary was involved in a relationship with Mervin's wife, Janette. Norma and Mervin began cohabiting in January 1992. They have purchased a home together. In November 1992, Gary married Janette.

On September 1, 1994, Gary filed an application to modify the dissolution decree. He asked to have his alimony obligation terminated due to Norma's cohabitation. At the modification hearing, Gary testified he had discussed with his attorney whether the stipulation should provide that alimony would cease on cohabitation. Norma testified there had been discussion and negotiations between the parties concerning whether or not alimony would continue if she cohabited. She testified cohabitation had specifically been omitted from the stipulation as a condition

which would terminate alimony. She also testified she paid her own expenses and was not supported by Mervin.

The district court denied the application for modification. The court found the issue of cohabitation had been discussed prior to the stipulation being signed. The court determined the parties had agreed not to include a provision terminating alimony on Norma's cohabitation. In addition, the court concluded Gary failed to show Norma no longer needed alimony. The court found the parties' financial situations had not changed since the time of the dissolution decree.[1] Gary was ordered to pay $2500 for Norma's attorney fees. He has appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

A dissolution decree may be modified only where there has been a substantial and material change in circumstances occurring after the entry of the decree. *In re Marriage of Hess*, 522 N.W.2d 861, 863 (Iowa App. 1994). The change in circumstances must not have been within the contemplation of the trial court when

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[1] At the time the decree was entered, Norma had annual income of $16,054, and Gary had annual income of $34,853. In 1994, Norma had annual income of $18,161. Gary and Janette together have annual income of about $48,000.

the original decree was entered. *In re Marriage of Cooper*, 524 N.W.2d 204, 206 (Iowa App. 1994).

II. Gary claims his alimony obligation should be eliminated or reduced. He believes Mervin is supporting Norma and claims she no longer needs alimony. He contends the parties made no agreement that alimony would continue even if Norma cohabited. He states although he knew Norma was seeing Mervin at the time of the stipulation, he had no knowledge she would engage in cohabitation.

As we stated in *In re Marriage of Ruter*, No. 95-2168 (Iowa App. Mar. 28, 1997):

> The resolution of the issues raised in this appeal requires an interpretation of the decree dissolving the Ruter's marriage. The applicable rules of interpretation are not disputed. Once a stipulation is merged in a decree, "it is interpreted and enforced as a final judgment of the court, not as a separate contract between the parties." *Prochelo v. Prochelo*, 346 N.W.2d 527, 530 (Iowa 1984). The determining factor guiding our inquiry is the intent of the court as gathered from the decree and other proper evidence. *In re Marriage of Knott*, 331 N.W.2d 135, 137 (Iowa 1977) (citing *Bowman v. Benett*, 250 N.W.2d 47, 50 (Iowa 1977)). Extrinsic evidence may be considered "not to show the language means something different than what is said in the instrument [decree], but to show what is meant by what is said." *Peters v. Peters*, 214 N.W.2d 151, 157 (Iowa 1974). We are required to give effect to "that which is both expressed and implied." *Bowman v. Bennet*, 250 N.W.2d at 50. We also seek to give effect to the language of the entire decree in accordance with its commonly accepted and ordinary meaning. *Gendler Stove Products Co. v. Lamb*, 129 N.W.2d 628, 650 (Iowa 1970).

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. *In re Marriage of*

Full, 255 N.W.2d 153, 159 (Iowa 1977); *Leo v. Leo*, 213 N.W.2d 495, 496 (Iowa 1973).

Cohabitation is not grounds for automatic denial or limitation of alimony payments. *See In re Marriage of Schober*, 379 N.W.2d 46, 47 (Iowa App. 1985); *In re Marriage of Orgren*, 375 N.W.2d 710, 713 (Iowa App. 1985). The dispositive issue is whether the recipient spouse needs continued alimony, not the spouse's present living arrangement. *Schober*, 379 N.W.2d at 47. However, the issue of cohabitation is clearly a "relevant factor" within the meaning of Iowa Code section 598.21(3)(1), and may well affect Norma's need for support. *Orgren*, 375 N.W.2d at 713.

As the district court noted, the original decree listed only remarriage of Norma or the death of either party or Norma's attaining the age of 62 as events automatically terminating the alimony obligation. Therefore, Gary bears the burden of establishing there has been a material and substantial change in circumstances since the decree. *See Mears v. Mears*, 213 N.W.2d 511, 513 (Iowa 1973). He has failed in this respect.

Upon de novo review of the record, we find Norma's relationship with Mervin has not substantially altered her financial needs. We find the present circumstances had been contemplated at the time the dissolution decree was entered. We affirm the trial court on this issue.

III. Gary contends the district court improperly refused to consider certain evidence. Gary sought to raise an issue concerning Mervin's credibility by showing

a disparity between Mervin's affidavit of financial status in his divorce from Janette and his affidavit of financial status in the present case. The district court stated it would not consider Mervin's affidavit from the divorce. We concur in the district court's determination that Mervin's affidavit of financial status from his divorce need not be considered.

IV. Gary failed to seek attorney fees in his petition before the district court. At trial, he sought to amend his petition to ask for attorney fees. The district court refused to allow him to amend his petition. Even if Gary had been permitted to amend, we find he would not be entitled to attorney fees.

V. Gary contends the district court abused its discretion by awarding attorney fees to Norma. Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Hunt,* 476 N.W.2d 99, 103 (Iowa App. 1991). We find no abuse of discretion in the award of attorney fees to Norma.

VI. Both parties seek attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *Id.* We determine Gary should pay $1000 for Norma's appellate attorney fees.

We affirm the decision of the district court denying Gary's request for modification of the parties' dissolution decree. Costs of this appeal are assessed to Gary.

AFFIRMED.