

IN THE COURT OF APPEALS OF IOWA

No. 0-662 / 90-576

FILED

AUG 27 1991

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DIANE J. BIRCHARD AND DAN C. BIRCHARD

Upon the Petition of

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DIANE J. BIRCHARD,

Appellee,

And Concerning

DAN C. BIRCHARD,

Appellant.

Appeal from the Iowa District Court for Jasper County,
Jerrold Jordan, Judge.

The husband appeals from a district court order refusing to modify the parties' 1982 dissolution decree. He contends the wife's alimony award should be eliminated due to her cohabitation with a male. **AFFIRMED AS MODIFIED.**

Dennis F. Chalupa of the Brierly Law Office, Newton,
for appellant.

Robert Koop Johnson of Whitfield, Musgrave & Eddy,
Des Moines, for appellee.

Considered by Oxberger, C.J., and Donielson and
Schlegel, JJ.

DONIELSON, J.

Diane and Dan Birchard were married in December 1960. They had four children during their marriage. Three of these children are now adults, and the youngest will soon be attending college.

A decree of dissolution was entered for the parties on January 14, 1982. The district court based its support awards on the expectation that Diane's gross income would be approximately \$9,000 and Dan's gross income would be \$23,250. Diane was awarded \$200 per month in alimony until she either died or remarried.

Diane began living with a man named Lou Foster in 1985. Diane and Lou commingle their respective incomes and expenses. Lou generally works as an entertainer in Door County, Wisconsin, for four months during the summer. When Lou is not on the road working as an entertainer, he lives with Diane in Newton, Iowa, and gives music lessons out of her home.

Dan filed an application for modification on May 12, 1989, seeking to eliminate his alimony obligation. He claimed that there had been a material change in circumstances due to Diane's cohabitation with Lou.

The district court denied the application for modification. The court found that Lou did not significantly contribute to the net economic result of Diane's household. Dan was ordered to pay \$1,500 of Diane's attorney fees. Dan appealed.

I. In this equity action our review is de novo. Iowa R. App. P. 4. We give weight to the 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).

II. We first consider the question of alimony. The doctrine of alimony is based upon the common law obligation of a husband to support his wife. In re Marriage of Woodward, 229 N.W.2d 274, 278 (Iowa 1975). Alimony is not an absolute right; its award depends upon the unique circumstances of each particular case. In re Marriage of Cooper, 451 N.W.2d 507, 508 (Iowa App. 1989).

Modification of the alimony provisions of a dissolution decree is justified only if there has been some material change in the circumstances of the parties, financial or otherwise, making it equitable that other or different terms be imposed. In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977). Such a change in circumstances must not have been within the contemplation of the trial court when the original decree was entered and must be more or less continuous or permanent, not temporary. In re Marriage of Skiles, 419 N.W.2d 586, 588 (Iowa App. 1987).

Cohabitation cannot be a ground for automatic denial or limitation of alimony payments when remarriage itself is not. In re Marriage of Orgren, 375 N.W.2d 710, 713 (Iowa App. 1985). However, the wife's financial status may be altered by the addition of another person with whom to

share household expenses. Id. The dispositive issue in a modification of alimony suit is whether the recipient spouse needs continued alimony. In re Marriage of Schober, 379 N.W.2d 46, 47 (Iowa App. 1985).

Diane is now employed full-time as a State employee working in soil conservation. Her gross income from that job was \$17,826 in 1989. Diane also earned \$734 in 1989 selling seed corn, for a total gross income of \$18,560. In examining the evidence concerning Lou's various part-time jobs, we calculate that his total gross income is approximately \$21,213 per year.

Dan is now employed as a traveling salesman for Walker Manufacturing Company in Racine, Wisconsin. His gross income from his employment in 1989 was \$31,841. Dan also receives rental income of \$400 per month, which increases his total gross income to \$36,641.

We find there has been a material change in circumstances since the time of the original decree due to Diane's continued cohabitation with Lou Foster and the changes in the parties' incomes. After examining all of the factors in this case, including the length of the parties' marriage, we conclude that Diane is not entitled to lifetime alimony. We find that Diane should have been awarded alimony for ten years from the date of the original decree, January 14, 1982. Therefore, we modify the dissolution decree to order Dan to pay alimony of \$200 per month until January 14, 1992.

III. The original decree did not specify who could claim the parties' minor son as a dependent for income tax purposes. At the modification hearing both parties asked to be awarded the right to claim the child as a dependent. The district court awarded Diane the right to claim the son as a dependent on her income tax returns. On appeal, Dan asks for the dependency exemption.

The allocation of the right to claim income tax exemptions has a direct effect on the financial resources available for the support of children and may be considered in connection with the award of support payments. In re Marriage of Habben, 260 N.W.2d 401, 403 (Iowa 1977). Generally, the custodial parent is allowed to claim the exemption because the custodial parent is treated as having furnished over half of the child's support. In re Marriage of Kerber, 433 N.W.2d 53, 54 (Iowa App. 1988).

We agree with the district court's allocation to Diane of the right to claim the minor son as a dependent for income tax purposes.

IV. Dan also challenges the award to Diane of \$1,500 for her attorney fees in district court.

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 that the trial court abused its discretion. Id. An award of attorney fees must be based

on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We do not believe the district court abused its discretion here.

V. Finally, Diane seeks 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. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 order that each party should be responsible for his or her own attorney fees for this appeal.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. I would affirm the trial court.