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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PHYLLIS HOPE HALL,)
Appellee,) Filed January 25, 1979
vs.)
JOHN VERNON HALL,) 721
Appellant.) 2-61303

Appeal from Polk District Court - Harry Perkins, Judge.

Appeal by husband from the trial court's denial of his application to modify the provisions of a dissolution decree. - Affirmed.

John D. Hudson and James W. Carney, of Carney, Hudson & Williams, Des Moines, for Appellant.

Melio Tonini, Des Moines, for Appellee.

Submitted to Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant John Vernon Hall appeals an adverse judgment of the trial court denying his application to modify a divorce decree. John had requested that his alimony payment of $450 per month to his former wife, Phyllis, be terminated and that certain provisions relating to insurance and retirement benefits be altered. The trial court found Phyllis had established her own retirement plan and that as a result she should have no interest in John's profit sharing plan . However, the request to modify the alimony and insurance requirements was denied.

Our review is de novo. Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976); rule 4, Rules of Appellate Procedure. However, we give weight to the trial court's findings of fact, but are not bound by them. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974); rule 14(f)(7), R. App. P. The burden is on the party seeking modification, in this case John, to prove a substantial change in circumstances since the date of the original decree making it equitable and just that different terms be fixed. A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice as a result of changed conditions. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978).

The provisions for support in the original decree are final as to the circumstances then existing. Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973); Holland v. Holland, 260 Iowa 248, 249, 149 N.W.2d 124, 125 (1967). The circumstances which have changed must be those which were not then within the contemplation of the trial court at the time of the original decree. Page, supra; Mears, supra. Finally, the changed circumstances relied upon must be material and substantial, not trivial and more or less permanent or continuous, not temporary. The focus is on what the decretal court actually knew, not on what the parties knew or should have known. Mears, supra.

At the time of the original decree in 1969, the parties had been married approximately 28 years. At the modification hearing John testified his 1969 income was $35,159.77; Phyllis stated her's was $7,851.50. Their 1976 incomes had increased to approximately $39,000 and $9961 respectively. John's income was made up in part of a salary of $25,000 and a bonus of $14,000. In 1970, John remarried and at

that time his new wife was earning approximately $10,000 per year. However, she is now unable to be employed for physical reasons. Finally, the evidence at the modification hearing indicates Phyllis is the beneficiary of 75% of the estate of a recently deceased aunt from which she expects to receive about $58,000.

On appeal, John argues that Phyllis's proportionately greater increase in salary, her inheritance of approximately $58,000 and the fact that his present wife is unable to be employed for physical reasons justifies a termination of his alimony responsibilities or at the very least a reduction of those responsibilities. John cites Wasser v. Wasser, 249 Iowa 1100, 90 N.W.2d 431 (1958), in support of his argument that an unconsidered inheritance constitutes a material change in circumstances.

Initially we note that an increase in Phyllis's income does not in and of itself constitute a material change in circumstance especially where John's earning power has also increased, albeit by a smaller percentage. See e.g. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Secondly, the remarriage of the husband, coupled with the obligations assumed thereby does not alone constitute such a change in circumstances as to justify a reduction of alimony, although it is a factor which may be taken into consideration by the court. Smith v. Smith, 254 Iowa 1120, 1122, 120 N.W.2d 448, 450 (1963); Handsaker v. Handsaker, 223 Iowa 462, 470, 272 N.W. 609, 613 (1937).

We find the trial court was correct in denying John's request to terminate the alimony and insurance provisions of the dissolution decree. There has not been a material and substantial change in circumstances since the original decree to justify such a modification. At the time of the hearing, Phyllis's share of her deceased aunt's estate was still an expectancy. Trial court's denial of defendant's request to modify is affirmed. It similarly possessed no authority to exonerate the former payments which had accrued and remained unpaid. See Gilliam v. Gilliam, 258 N.W.2d 155 (Iowa 1977).

AFFIRMED.

All judges concur, except Oxberger, C. J., and Donielson, J., who dissent.

OXBERGER, C. J. (dissenting)

I would grant John's application and lower his monthly alimony obligation to $225. From the time of the divorce until the modification hearing, Phyllis' income increased nearly 35.6%. John's increased only 9.8%. In the interim, Phyllis has also inherited $58,000 in liquid assets which could yield her additional income of $386 per month. It is undisputed that Phyllis has a vested right in this inheritance and not a mere expectancy since the only obstacle to her receipt of the assets is the final settlement of the estate. John's second wife, who was earning $10,000 per year at the time of their marriage, has become physically unable to work. Based on the foregoing, I would find a sufficient change of circumstances to justify modification. I would reduce John's alimony payments to $225 subject to the condition that he makes full payment in 60 days of the amount of alimony which is in arrears. Also, if at any future time John's monthly payment of $225 became more than 30 days late, the sum of $450 would be automatically reinstated.

DONIELSON, J., joins in this dissent.