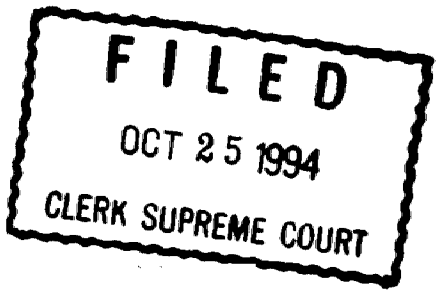
IN THE COURT OF APPEALS OF IOWA

No. 4-246 / 93-1012



IN RE THE MARRIAGE OF WILLIAM E. MASTERSON AND JANET J. MASTERSON

Upon the Petition of
WILLIAM E. MASTERSON,

Appellant,

And Concerning
JANET J. MASTERSON,

Appellee.

Appeal from the Iowa District Court for Mahaska County, Phillip R. Collett, Judge.

Petitioner appeals judgment of district court denying application to modify dissolution decree.

AFFIRMED.

Richard A. Bartolomei and Denise S. Lange of Bartolomei & Lange, P.C., Des Moines, for appellant.

Greg A. Life of the Life Law Office, Oskaloosa, for appellee.

Heard by Donielson, C.J., Huitink, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

DONIELSON, C.J.

This case involves a former husband's second attempt to modify a dissolution decree. We find he has failed to meet his burden of proof and affirm the trial court's denial of the request to eliminate his alimony obligation.

William and Janet Masterson were married in 1954 and divorced in 1984 after 29 years of marriage. They were both 47 years of age when the dissolution decree was entered. William was a successful farmer at the time of the dissolution and owned 208 acres of farmland. Aside from two years early in the marriage when Janet worked for an ASCS office, she was not employed during the course of the marriage.

Pursuant to the dissolution decree, William was awarded all of the parties' real estate, stock, machinery, equipment, livestock and grain on hand and was ordered to pay all of the parties' liabilities. The total value of the assets awarded William exceeded $900,000 and the parties' total liabilities were $514,700. The trial court, after setting aside the value of inherited property to William, determined the parties had a net equity of $305,919 and awarded Janet one-half of it or $152,959. Of that amount, she received $20,000 in cash and assets at the time of the dissolution, and the remainder was to be paid in 15 equal annual installments of $8,864 with interest at the rate of 10%. William was ordered to pay Janet alimony

in the amount of $500 per month until her remarriage or the death of either party.

Following entry of the dissolution decree Janet obtained employment with the Mahaska County Engineering Department in 1987. In 1988 William sought to have the dissolution decree modified. The trial court concluded neither the changes in William's health, the decline in land values nor Janet's assumption of employment warranted a change in the alimony obligation. This decision was affirmed on appeal. In re Marriage of Masterson, 453 N.W.2d 650 (Iowa App. 1990).[1]

Subsequent to the first modification action William experienced financial difficulties. His lender had contemplated foreclosure against his property and had encouraged him to find a new bank. William entered into a workout agreement with his lender in which he sold all but nineteen acres of his farmland in order to reduce his debt.

William filed a second modification action on October 15, 1992. He alleged his net worth fell from $228,954 in 1988 to $20,512 in 1992 and he had incurred a loss of $89,529 in 1992. He argued he no longer had the earning capacity to pay Janet alimony and her financial condition had improved so much an award of alimony was no longer equitable or necessary.

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1. In 1992, William recovered $40,000 in a legal malpractice action related to the appeal and failed compromise of the alimony provisions of the decree.

At the time of the second modification hearing Janet was earning approximately $1,054 per month. She was debt-free and owned a $57,000 home, a $12,000 vehicle, a $21,573 IRA, a $5-6,000 savings account and an investment account worth approximately $79,000. Janet testified she acquired most of her assets from the investment of her share of the dissolution property award. Janet's total monthly income from earnings, investment income interest and alimony payments was $1,852 a month.

In addition to income derived from farming, William receives $6,000 a year in director's fees as well as commissions from real estate sales. At the time of the modification hearing William had earned only $2,324 in real estate commissions through June of 1993. However, he had additional properties listed for sale and, in the past, had received as much as $12,000 in yearly commissions. William had remarried prior to the first modification action and his new wife had substantial income.

Following the June 3, 1993, modification hearing, the district court found William had failed to establish there had been a material and substantial change of circumstances which warranted modification of the decree. The district court determined William's present farm operation losses were not a departure from the losses he incurred in the years preceding entry of the dissolution decree and the first modification action. The court also concluded any

decrease in William's net worth would have little effect on his ability to pay alimony.

William has appealed and pursuant to an order signed by Justice Ternus on April 22, 1994, Janet's request for attorney fees is submitted with this appeal. Our review in this equity action is de novo. Iowa R. App. P. 4.

I. Modification.

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 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. Id. at 223. "The circumstances which have changed must be those which were not within the contemplation of the trial court when the original decree was entered or at time of a subsequent intervening proceeding which considered modification of the alimony provisions of the original decree." In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous and not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983).

At the time of the modification hearing William had reduced his debt to Mahaska State Bank from $425,000 in

1990 to $190,000. His two major remaining notes included a $76,806 debt secured by machinery and equipment and a $96,000 obligation secured by his home and remaining 19 acres. William's annual principal and interest payments are approximately $14,000 on the machinery loan and $13,000 on the home loan. In a December 19, 1992, net worth statement William valued the machinery and equipment at $138,216 and his home and remaining 19 acres at $150,000.[2]

Though William no longer owns 208 acres of farmland he is still involved in a substantial farm operation. In April 1993 he and his son established a limited liability company known as Masterson Farms, L.C. ("Masterson Farms"). Its articles of organization indicate William and his son had previously farmed as a partnership and all assets from the dissolved partnership were transferred to the limited liability company.

Masterson Farms has $27,000 in capital and a $100,000 line of credit. At the time of the modification hearing it had a net worth of $17,500 and had used $36,000 of its credit line. The company was capitalized with vehicles acquired, in part, with proceeds from the sale of equipment or machinery owned by William. William has leased all of his equipment and machinery to Masterson Farms in exchange

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2. In addition to his home, land, and machinery, testimony from William's banker indicated William continued to own stock in the Mahaska Investment Company. While his financial affidavit did not list the number of shares owned or their value, the 10,100 shares he owned at the time of the dissolution of the marriage had a value of $120,000.

for an annual rental payment of $17,000. William intended to use $14,000 of the rental payment to service the note on the machinery.

Masterson Farms rents approximately 800 acres of farmland. William has a one-half interest in the limited liability company and income from Masterson Farms is to be divided equally between him and his son. William introduced no evidence or projections as to the amount of profit it was anticipated Masterson Farms would make. His own testimony indicated he had no idea what the company's earnings would be in 1993. Prior to the establishment of the limited liability company, William's son had paid him a monthly consulting fee equal to the amount of his alimony obligation. William testified he no longer receives a consulting fee since he is part of the limited liability company and his earnings will depend on its profitability.

While there was considerable evidence regarding William's diminished net worth and his sale of real estate to facilitate a workout with his bank, the record also reflects he is still a participant in a large, albeit reorganized, farm operation. William was required to prove he no longer had the earning capacity to meet the $500 a month alimony obligation, yet he provided the trial court with no evidence regarding the projected earnings of Masterson Farms.

In both his brief and reply brief William describes his available sources of income as: 1) $6,000 in annual

director's fees; 2) $3,000 remaining from the machinery lease after payment of his machinery note; and 3) $5,000 in estimated real estate commissions. Using only these figures William argues he will earn only $14,000 a year from which he must pay $6,000 in alimony and approximately $16,000 toward the annual property payment awarded Janet. Noticeably absent from his calculations are any estimates of the profits he will have from the limited liability company's farming of over 800 acres of land. This potentially significant source of income cannot be overlooked. Absent complete evidence regarding William's earning capacity, the trial court could not have concluded by a preponderance of the evidence modification was warranted and we affirm the trial court's decision.

II. **Attorney Fees.**

Janet seeks an award of appellate attorney fees. An award of attorney fees is not a matter of right but rests within the court's discretion. 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). While we recognize Janet has now been compelled to defend two modification actions, we believe she is financially able to pay her own attorney fees and equity does not require William be ordered to do so.

AFFIRMED.