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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-464 / 92-1369

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IN RE THE MARRIAGE OF DALLAS A. HUNT AND NANCY D. HUNT

Upon the Petition of
DALLAS A. HUNT,

Appellee,

And Concerning
NANCY D. HUNT, n/k/a/ NANCY D. LAING,

Appellant.

Appeal from the Iowa District Court for Warren County, George W. Bergeson, Judge.

The former wife appeals the district court's judgment denying her application to modify the alimony provisions of the parties' dissolution decree. **AFFIRMED.**

Victoria E. Lawry of Dunahoo & Lawry, Des Moines, for appellant.

Mark R. Schuling and Thomas J. Levis of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., Des Moines, for appellee.

Heard by Schlegel, P.J., Sackett, J., and Keefe, S.J.* Donielson, J., takes no part.

*Senior judge from the 1st judicial district serving on this court by order of the Iowa Supreme Court.

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SCHLEGEL, P.J.

The former wife appeals the district court's judgment denying her application to modify the alimony provisions of the parties' dissolution decree. She contends the district court erred in: (1) holding that her alleged deteriorating medical condition did not constitute a material and substantial change in circumstances; (2) determining the former husband's alimony obligation should not continue indefinitely; and (3) failing to award her attorney fees, expenses, and costs. Finally, she requests attorney fees and costs on appeal.

Dallas and Nancy Hunt were married on February 15, 1964, and were divorced on August 15, 1984. Pursuant to the decree, Dallas was ordered to pay Nancy $1200 per month alimony beginning August 1, 1984, and continuing to August 1, 1990--at which time alimony was to be reduced to $600 per month until August 1, 1992, when it would be reduced to one dollar per year. In 1990 the parties agreed to modify the decree by stipulating to continued alimony payments in the amount of $1200 per month until August 1, 1991.

The parties stipulated that Nancy was not gainfully employed and was entitled to additional alimony. The district court continued the modification proceeding until August 1, 1991, to permit Nancy the opportunity to file an amended petition for modification in the event she wished to seek further modifications of the decree.

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On July 9, 1991, Nancy filed an amended petition for modification. She alleged that a material and substantial change in circumstances had occurred since the date of the decree. She argued that, although she had secured employment as a secretary, she had developed myofacial syndrome and carpal tunnel syndrome and was incapable of performing repetitive hand and wrist activity. Additionally, Nancy claimed she had been involved in a car accident and had suffered back injuries, rendering her incapable of employment.

Nancy requested that the $1200-per-month alimony payments be extended indefinitely. The district court noted that not one specialist could find anything physically wrong with Nancy and that much of her alleged physical pain was associated with her hatred for her ex-husband. The court further noted that Nancy's doctors had told her to stop her excessive smoking and caffeine consumption, which she failed to do. The district court held that Nancy had not shown a material and substantial change in circumstances and dismissed the petition. Nancy appeals.

Modification of a dissolution decree is only permitted when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on

appeal unless there is a failure to do equity." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

Initially, Nancy contends the district court erred in looking beyond the stipulation and agreement of the parties in 1990 to hold that no substantial change in circumstances had occurred since the entry of the original decree in 1984. Specifically, Nancy argues the district court's "Modification of Decree Dissolution of Marriage," entered on October 3, 1990, adopted the stipulation between the parties regarding the occurrence of a substantial change in circumstances. She contends this provision constitutes the controlling law in the present modification action, arguing the district court's prior finding of a substantial change in circumstances is now binding.

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Having carefully reviewed the October 3, 1990, decree, we disagree with Nancy's argument. Our review of the record reveals the district court did properly consider the 1990 modification order. The 1990 decree states, in relevant part:

> 6. That the parties have reached an agreement pertaining to the issues before the Court and the Court finds that, based on said agreement, there has been a material and substantial change in circumstances since the date of the Decree of Dissolution of Marriage in that the Respondent is not gainfully employed and is entitled to additional alimony, and the agreement of the parties as set forth below appears fair and reasonable and same is hereby approved.
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> 7. That pursuant to said agreement of the parties, the Respondent's alimony obligation to Petitioner shall be increased to $1,200.00 per month, effective August 1, 1990, and continuing each month thereafter until August 1, 1991, at which time said alimony obligation shall be reduced to $1.00 per year, provided that said alimony shall terminate in the event of Respondent's death or remarriage.
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> 8. That pursuant to said agreement of the parties, the Court shall continue these proceedings to August 1, 1991, to enable the Respondent to have the opportunity to file an amended Petition for Modification of Decree of Dissolution of Marriage on or before August 1, 1991, in the event Respondent seeks a further modification of the provisions set forth herein.
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> 9. That all of the foregoing findings of the Court and Decree setting forth the terms and conditions of the parties' agreement are made without prejudice to either party in the event there is an amended Petition for Modification filed by either party on or before August 1, 1991.

The above-cited portion of the 1990 decree reveals the parties agreed to amend the alimony provision of the original decree in October of 1990. The parties

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additionally agreed that the findings of the district court contained in the 1990 decree were made without prejudice to either party in the event an amended petition for modification was filed by either party on or before August 1, 1991. Nancy in fact filed an amended petition for modification on or before August 1, 1991. As a result, the district court's findings contained in the 1990 decree were not binding on the district court when the court entered its finding of fact, conclusions of law, and order regarding the amended petition for modification.

Nancy cannot, by agreement, make the findings of the 1990 order nonbinding if an amended petition for modification is filed and then file an amended petition and assert that those same findings are binding. The 1990 modification of decree dissolution of marriage represented consent findings. These findings, by agreement, were not binding on the district court as a result of the filing of the amended petition for modification by Nancy.

Next, Nancy contends her alleged deteriorating medical condition has rendered her medically incapable of gainful employment. She argues her medical condition constitutes a material and substantial change in circumstances warranting a modification of the alimony provision of the parties' dissolution decree. Having reviewed the medical evidence contained in the record, we agree with the district court's determination that Nancy has failed to prove by a preponderance of the evidence that she is incapable of

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becoming gainfully employed. Accordingly, we affirm the district court's conclusion that no material and substantial change in circumstances has been shown by Nancy.

Nancy also asserts the district court erred in failing to award her trial attorney fees, expenses and costs. Iowa trial courts have considerable discretion in awarding attorney fees and costs in dissolution actions. 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. Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and must be based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982). The district court did not abuse its broad discretion in denying Nancy's request for trial attorney fees, expenses, and costs.

In addition, Nancy requests attorney fees and costs on 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

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(Iowa App. 1981). The parties shall pay their own attorney fees, and the costs of this appeal shall be paid by Nancy.

AFFIRMED.