

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 26 1984

CLERK SUPREME COURT

IN RE MARRIAGE OF WILLIAM A. RYDER AND GARLEEN G. RYDER

Upon the Petition of)

468

WILLIAM A. RYDER,)

Filed June 26, 1984

Petitioner-Appellant,)

And Concerning)

GARLEEN G. RYDER,)

4-139

83-714

Respondent-Appellee.)

Appeal from the Iowa District Court for Muscatine County - Linda K. Neuman, Judge.

Petitioner appeals from a modification of the parties' dissolution decree increasing respondent's alimony award from \$1 per year to \$300 per month. REVERSED AND REMANDED.

Duane J. Goedken of Muscatine, Iowa, for petitioner-appellant.

Douglas E. Johnston of Muscatine, Iowa, for respondent-appellee.

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

Petitioner appeals from a modification of the parties' dissolution decree increasing respondent's alimony award from \$1 per year to \$300 per month.

The parties' marriage was dissolved in 1980. Both parties were employed at that time. The trial court noted that Garleen had a history of heart trouble which could jeopardize her future employment. The court awarded Garleen token alimony in case her health deteriorated and prevented her from working.

After the dissolution became final William underwent two prostate surgeries and lost ninety percent of his kidney functions. On his doctors' advice he retired in December of 1982 at the age of fifty-nine. He receives a monthly pension of \$1,246.30. The dissolution decree had projected William's pension to be \$426.70 per month and awarded Garleen forty-five percent of that amount as part of the property division.

In August of 1982 Garleen was laid off from her job due to her employer's economic slump. Garleen testified that she believed her health problems contributed to her being laid off.

Garleen filed an application for modification of the dissolution decree requesting an increase in the alimony award. She relied on her loss of employment and the increase in William's pension as changed circumstances justifying the modification.

Our review is de novo. Iowa R. App. P. 4. While we are not bound by the fact findings of the trial court, we give them weight, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

The party seeking modification of alimony provisions must prove by a preponderance of the evidence that there has been a material and substantial change in circumstances since the date of the original decree, and that such changed circumstances must not have been within the contemplation of the trial court at the time of the prior proceeding. In re Marriage of Full, 255 N.W.2d 153,

159 (Iowa 1977); In re Marriage of Jensen, 251 N.W.2d 252, 253-54 (Iowa 1977). Modification is not desirable unless enforcement of the decree will be attended by positive wrong or injustice as a consequence of changed conditions. Where a change of financial condition of one or both parties is relied upon as the basis for modification, the change must be substantial. In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973) (quoting Spaulding v. Spaulding, 204 N.W.2d 634, 635 (Iowa 1973)). Furthermore, the change in circumstances must be permanent or continuous rather than temporary. Mears v. Mears, 213 N.W.2d 511, 515 (Iowa 1973).

The supreme court reviewed decisions in which loss of employment or reduction in income has been asserted as a change of circumstances sufficient to justify modification in In re Marriage of Vetterneck, 334 N.W.2d 761, 762-63 (Iowa 1983). The court concluded:

A review of these holdings indicates three trends: (1) a growing reluctance to modify decrees; (2) current inability to pay has become less a consideration and long range capacity to earn money has become more of a consideration; and (3) any voluntariness in diminished earning capacity has become increasingly an impediment to modification.

Id. at 763. Garleen has not made any showing that her unemployment is a permanent condition. She was laid off for economic reasons and is subject to being recalled to work when the economy improves. Although her health is definitely a factor an employer would consider, we conclude that she has not shown by a preponderance of the evidence that her health makes her unemployable.

Garleen also asserts the increase in William's pension benefits as a change in circumstances. We disagree. At the time of the dissolution William was earning approximately \$24,000 per year. At the time of the modification hearing his gross income was \$1,913.34 per month or \$22,960.08 per year. Obviously there has not been a substantial improvement in William's economic position.

471

Since we conclude there has been no substantial change in circumstances since the dissolution, we reverse and remand this case to the district court to reinstate the provisions of the dissolution decree.

REVERSED AND REMANDED.