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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-577 / 01-0057
Filed November 16, 2001

IN RE THE MARRIAGE OF S. JEAN PERRY and EDGAR A. PERRY

Upon the Petition of
S. JEAN PERRY,
Appellant,

And Concerning
EDGAR A. PERRY,
Appellee.

Appeal from the Iowa District Court for Hardin County, David R. Danilson, Judge.

The petitioner appeals a district court ruling denying her petition to modify the alimony provisions of the parties' dissolution decree. **REVERSED.**

Clark E. McNeal of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellant.

Larry W. Johnson of Walters & Johnson, Iowa Falls, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

Jean Perry appeals the district court's denial of her petition to modify the alimony provision of the decree dissolving her marriage to Edgar Perry. Because we find Jean demonstrated a substantial change in circumstances, we reverse the district court and modify Jean's alimony award.

Background Facts and Proceedings. Jean and Edgar's forty-two-year marriage was dissolved on July 13, 1998, pursuant to a decree that incorporated and approved a stipulation by the parties. At the time of dissolution the couple had been married forty-two years and both were in their early sixties. The couple had farmed the majority of their married lives, and although both had high school diplomas and one year of college education, neither had any specialized employment skills beyond their farming experience. Jean had worked outside of the home for the last seven years of the marriage, and at the time of the decree was employed as a cook and food server earning less than $6.00 per hour. Edgar had abandoned farming prior to the 1998 crop season and had taken employment as a hog production manager. At the time of the decree he estimated that, excluding capital gains, his gross income was $833.33 per month, or less than $10,000 per year.

The stipulation required Edgar to pay Jean $1.00 per month in alimony, until Jean reached seventy years of age. It further provided:

> [Edgar] shall in April of each year and including April of 2005 provide a copy of his federal and state income tax returns to [Jean] for calendar years ending after 1997. The parties stipulate that in the event [Edgar's] income from all sources under (sic) other than capital gain income shall exceed [Jean's] income by 10% in any year, such circumstances shall constitute a change in

> circumstances sufficient to permit the petitioner to request a modification of alimony in amount and length of time herein.

On June 1, 2000, Jean filed a petition to modify the dissolution decree, alleging Edgar's income exceeded hers by more than ten percent and requesting an increase in alimony. Although Edgar did not deny his current income exceeded Jean's by more than ten percent, he argued modification was not warranted as his income was subject to commission-based fluctuations.

By the time of the modification hearing Jean was employed as a full-time cook earning $8.00 per hour, with a gross annual income of $16,644. While overtime was occasionally available, Jean generally worked a forty-hour week. The difference between Jean's monthly net income and her rather spartan monthly expenses, which included $160 in savings and a $100 tithe to her church, was less than $15. Jean also began receiving Social Security benefits in June 2000, which provided an additional $423 in monthly income. She also had $13,558 in investments and savings. In 1999 Edgar grossed, excluding capital gains income, $29,723, and he estimated his 2000 hog production income at $29,500. Edgar drives a newer pick-up truck, on which he owes a monthly payment of $439, and Jean drives a debt-free, high-mileage car worth approximately $2,000. The parties also share a $24,000 to $25,000 debt to the Internal Revenue Service.[1]

While Jean has rented an apartment since the dissolution Edgar has purchased two properties. The first, purchased for between $60,000 and

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[1] Jean's financial affidavit reported the total I.R.S. debt as $29,381, and her total savings as $18,558. However, prior to the hearing the I.R.S. was able to garnish $5,000 from one of Jean's accounts in partial satisfaction of the debt.

$65,000, now serves as rental property upon which Edgar charges a monthly rent only slightly higher than his monthly loan payment. The second, purchased for $130,000, is his current residence. However, Edgar entered into a barter agreement in regard to the second property, where he agreed to board horses in lieu of making a $1,070 monthly installment payment. Edgar also purchased eleven horses since the dissolution, for $350 each, which he intends to raise, train and sell for profit.

The district court denied Jean's modification request. The court acknowledged the stipulation as to a substantial change was an attempt to accommodate Edgar's low 1998 income while providing Jean a later opportunity to seek more than nominal alimony. Although noting such stipulations are disfavored, it did not specifically rule on the enforceability of the provision. Rather, it found Edgar's 1998, 1999 and 2000 incomes should be averaged, which resulted in an income differential of less than ten percent. The court further found Jean could not independently establish a substantial change in circumstances, as her day-to-day requirements had not changed since the time of the dissolution and as her current income was sufficient to meet her financial needs. Jean appeals.

Scope of Review. Our scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we give them considerable weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 14(f)(7).

Alimony Award. We concur with the modification court's understanding of the original stipulation and decree, in as much as it attempted to signal the transitional nature of Edgar's income, and to leave the door open for an alimony increase. We also agree that, regardless of the intent of the stipulation, it should not bind, nor did it bind, a later court to a predetermined outcome. A decretal court should not incorporate predictors of what a substantial change in circumstances will be, as such a provision can anticipate only a limited number of potential future circumstances. *See, e.g., In re Marriage of Schlenker*, 300 N.W.2d 164, 166 (Iowa 1981) (noting dissolution decree should be based on then-existing circumstances, avoiding the issuance of a piecemeal ruling). Rather, a modification court should make its own determination as to whether a substantial change has occurred, after the subsequent circumstances are brought before it by one of the parties. *See In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998) (setting forth the guiding principles of modification).

In reviewing the record before us, we cannot agree with the modification court's determination that no substantial change has occurred. Initially, we find the trial court miscalculated Edgar's income. His income at the time of dissolution, in July 1998, should not have been incorporated into the analysis. Rather, it is the base line from which future income should be compared. We therefore look only to Edgar's reported 1999 income and his estimates for 2000. Limiting his 2000 income to his hog management commissions establishes a two-year average income of $29,611.50. If we also take into account the value of

the $1,070 per month house payment, his two-year average income increases to $34,681.50.

In either event, Edgar's income has substantially increased since the time of the original decree was filed. Jean's income has also increased, due in part to her receipt of Social Security benefits. Nevertheless, even the narrowest view of Edgar's income demonstrates he makes over thirty-five percent more per year than does Jean, and nearly triple what he made at the time of the dissolution. As we find the monthly house payment waiver to be a valid consideration for income computation, it appears that Edgar in fact makes nearly sixty percent more per year than does Jean, and nearly three and one-half times more than he earned at the time of the dissolution.

Iowa Code section 598.21 directs a court to consider any relevant factor in determining whether a substantial change has occurred, and specifically identifies a change in a party's employment, earning capacity, income or resources, as a relevant factor. Iowa Code § 598.21(8)(a) (1999). The burden is upon Jean to show, by a preponderance of the evidence, that Edgar's increased income and other relevant circumstances are tantamount to a material and substantial change in circumstances. *See In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991). However, reasonable and ordinary changes that may be likely to occur in the relations of the parties do not constitute substantial and material changes. *Id.*

Here, the incorporated stipulation demonstrates the decretal court anticipated a potential increase in Edgar's income at some future date. There is

no showing, however, that at the time of stipulation, the parties knew or understood the likelihood of Edgar's financial success in his newly acquired position. The circumstances relied upon by Jean in seeking her modification were therefore not within the contemplation of the trial court at the time the stipulation and decree were entered. Moreover, the increase in Edgar's income is so significant as to be a material and substantial change.

During the marriage Edgar was a farmer, and such an enterprise, however successful, creates a certain level of stability and security. Jean assisted in the maintenance of the couples' life, both through work on the farm and by holding outside employment. Contemporaneous with the dissolution proceedings, Edgar abandoned his previous life and undertook a new position that was the financial equivalent of forty-hour-per-week, $5-per-hour job. Although we are presented with limited evidence regarding the couple's pre-dissolution finances, from all appearances such income was a significant decrease from Edgar's previous financial contributions. Jean, on the other hand, continued in the same type of positions she had held during the last seven years of the marriage, earning comparable wages. She did so, however, without the additional support previously provided by the marriage and facing new monthly expenses.

Jean engaged in a frugal lifestyle, renting an apartment, driving an old, high-mile vehicle, and taking her meals at work in order to minimize her monthly expenses. It is fair to say that, until she began receipt of Social Security benefits in June 2000, Jean lived paycheck to paycheck. In contrast, Edgar clearly prospered during the two years after the dissolution. He made a success of his

new commission-driven position and was able to purchase rental property, a residence and a new vehicle. Although he bears indebtedness on some items, he still found sufficient funds to invest $3,850 in a horse training operation.

In its ruling the modification court intimated that Jean was not entitled to alimony, in part, because she made a voluntary choice to save for her retirement, make a small donation to her church, and work only one job. We cannot agree. It is inappropriate to expect Jean to work more than forty hours per week or take a second job, simply because the nature of Edgar's work requires a greater than full-time commitment. Nor should Jean be punished because she lives a frugal life style in an attempt to save for her retirement. Jean spent forty-two years contributing to the parties' finances and appears to have ended her marriage in a generally worse position than she enjoyed during the marriage. Under the circumstances, it is fair and equitable to award her something more than nominal alimony, so long as by doing so we do not injure Edgar's financial position. *See In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa Ct. App. 1995) ("the ability of one spouse to pay alimony must be balanced against the needs of the other spouse"). We find $500 per month to be such an equitable amount.

We therefore reverse the district court determination that Jean had not established a substantial change in circumstances. We modify her alimony award to $500 per month, which shall continue until Jean reaches the age of seventy years. In accord with the stipulation of the parties, such alimony shall terminate in the event either party dies prior to Jean's seventieth birthday.

REVERSED.

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