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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KENNETH RAY KLEIN AND NORMA JEAN KLEIN

Upon the Petition of)
KENNETH RAY KLEIN) Filed April 15, 1977
Appellant,)
And Concerning)
NORMA JEAN KLEIN,) 87 / 2-58253
Appellee.)

Appeal from Polk District Court - Gibson C. Holliday, Judge.

An appeal for a modification of alimony provisions of a dissolution decree - Affirmed.

Harlan M. Hockett, of Des Moines, for appellant.

Everett H. Albers, of Des Moines, for appellee.

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

PER CURIAM

The sole issue presented for review is whether the trial court erred in reducing alimony to $200 per month. We affirm.

The trial court was called upon to assess whether Kenneth's asserted reduction in income was a substantial change of circumstances supporting a modification of alimony. Such a case is necessarily dependent upon observation and assessment of the parties' credibility, their attitude and demeanor as well as the financial information filed. Therefore, we give considerable weight to the findings of the trial court, although we are not bound by them. Rule 344(f)(7), Rules of Civil Procedure, Bitner v. Bitner, 176 N.W.2d 162 (Iowa 1970).

Kenneth at the time of dissolution had a demonstrated capacity to earn $24,000. He left this employment immediately after the decree because of a "personality conflict" with his superior. He has shown no change in his earning capacity. Kenneth may not voluntarily reduce his income by disengaging himself from the $24,000 employment, enter his own business venture with the voluntary assumption of heavy indebtedness and thereby defeat or avoid his alimony obligation to Norma. The trial court on the record before it reduced the alimony by 50%. Such action was fully within the range of its discretion.

Affirmed.

All judges concur, except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent. The record does not reflect any serious dispute that the appellant now has $2377 per year to live on in Minneapolis, after paying $4800 per year alimony and child support from his 1974 taxable income of $7177.

The appellee has her salary of $7786 plus $4800 child support and alimony for a total of $12,676. One of the dependent children contributes $1600 to her own expenses so this provides the wife and daughter with income of $14,276 per year.

In the meantime, the husband has remarried and assists in the support of three children by this new marriage with his wife working at a modest income.

In 1972, when the dissolution occurred, a stipulation was filed where the husband received approximately $5000 and the wife received approximately $25,000. He at that time agreed to $400 per month alimony and $100 per month child support for four children for a total of $800 per month. He was fired from his job earning him $24,000 a year two weeks after the dissolution.

Although the majority indicates the appellant: "... *left this employment immediately after the decree because of a 'personality conflict' with his superior.*" The record reflects, the personality conflict was with the president of the grocery chain concerning the divorce and he *"was terminated"*. The trial court found he *"was terminated"*. To me, this means fired.

> "Q. And did you have a conflict with the manager of Dahl's out there? A. With the president of Dahl's.
> Q. Having to do with the divorce and whether or not you ought to be maintained there? A. Yes, it was a personality conflict between he and I.
> Q. As a consequence, were you terminated?
> A. That's right."

The appellant then went to Minnesota and sold real estate earning approximately $15,500 in 1972, $10,000 in 1973, and during mid-year, he purchased a picture framing business which resulted in income for 1973 of $4896. His tax return in 1974 showed an income of $7177, and he still managed to pay $4800 in child support and alimony.

The record produces not a scintilla of evidence that indicated that he voluntarily reduced his income as the majority suggests. Nor is there the slightest bit of evidence anyplace in the record to indicate that he did not do everything that he could do to earn a substantial living after having been fired. He sold real estate with some modest success and eventually purchased this picture framing business, but during this entire time, managed to pay the $4800 per year alimony and child support. This is hardly indicative of any attempt to avoid his alimony obligation.

The trial court reduced the alimony and child support from the original $400 to $200, and he still has $100 per month for each of two children still remaining at home. This provided him with no relief from what he was paying.

The net amount remaining with appellant of $2377 is not enough and certainly does not fit within the criteria of Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968). White v. White, 251 Iowa 440, 442, 101 N.W.2d 18 (1960) still seems to be appropriate where it states:

> "We must be mindful not only of the needs of the children but of the divorced father. He should support his children, as best he can. But it will not do to burden him to the extent that all incentive is to be destroyed. ... Some balance must be found between the needs of the

> children and the father's ability to pay. These matters are tried in equity, and equity, in general terms, means fairness."

The criteria to justify a modification is set forth in McDonald v. McDonald, 183 N.W.2d 186, 188 (Iowa 1971) to find a *"positive wrong or injustice as a result of the changed conditions"* as it relates to the appellant's ability to pay. A recitation of the figures set forth in this dissent should be more than ample to show the injustice or positive wrong.

I would reduce alimony more than the trial court which provided *no* relief for the appellant.