

IN THE COURT OF APPEALS OF IOWA

No. 0-445 / 89-1654

IN RE THE MARRIAGE OF JEFFERY E. PROUTY AND
DEBORAH J. PROUTY

FILED

JAN 20 1991

CLERK SUPREME COURT

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Upon the Petition of

JEFFERY E. PROUTY,

Appellee,

And Concerning

DEBORAH J. PROUTY,

Appellant.

Appeal from the Iowa District Court for Boone County,
Timothy J. Finn, Judge.

Deborah appeals a district court order refusing to
modify her dissolution decree to increase child support and
increase the amount and duration of alimony. **AFFIRMED.**

Jack H. Blanshan of Dakin & Blanshan, Boone, for
appellant.

Ben T. Doran of Doran, Courter, Quinn & Doran, Boone,
for appellee.

Considered by Donielson, P.J., and Habhab, J., and
Perkins, S.J.,* but decided en banc by Oxberger, C.J., and
Donielson, Schlegel, Hayden, Sackett and Habhab, JJ.

*Senior Judge from the Polk County District Court serving
on this court by order of the Iowa Supreme Court.

PER CURIAM

The parties were married in 1972. They have two children: Tina was born in 1975 and Travis in 1978. The parties' marriage was dissolved by decree in 1987. The decree placed the children in joint legal custody and in Deborah's primary physical care. The decree ordered Jeffery to pay child support of \$300 per month per child. The decree also ordered Jeffery to pay Deborah rehabilitative alimony of \$400 per month for two years.

In February 1989 Deborah filed an application to modify the decree to increase the child support and to increase the amount and duration of alimony. Following trial the district court overruled the application. The court found that there had not been a substantial change in circumstances regarding the children's expenses and Jeffery's income. The court also found that evidence concerning the length of time required for Deborah to complete her college degree could have been presented to the judge at the time of the dissolution trial.

Deborah appeals. She contends that the district court erred by failing to modify the decree to increase the amount of child support. She claims that there have been the following substantial changes in circumstances: 1) Jeffery's income is substantially greater than at the time of the dissolution; 2) the expenses for raising the children have substantially increased; and 3) Jeffery's current wife earns a net monthly income of \$1,255. Deborah

also argues that the decree should be modified to increase the amount and duration of alimony. She claims that the fact that her graduation date has been extended one year is a substantial change of circumstances justifying a modification of the decree. Finally, Deborah requests an award of attorney fees for the modification action and for this appeal. We affirm.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Deborah first argues that the trial court erred in failing to modify the decree to increase child support by finding no substantial change in circumstances. Modification of a dissolution decree is only allowed 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 in the contemplation of the trial court when the original decree was entered.

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

Deborah points out that Jeffery's income has increased since the time of the trial. Deborah notes that Jeffery's hourly wage with the Civil Service has increased from \$13.61 per hour to \$17.67 per hour. Deborah maintains that Jeffery's income has thus increased by 30%. Deborah also points out that Jeffery is a member of the Iowa National Guard and has a net monthly income of \$460 from the Guard. Deborah additionally asserts that Jeffery's new wife, Patty, earns a gross monthly income of \$1,749 per month, or \$1,225 net. Deborah also states that Jeffery has purchased a new home and a new car. In contrast, Deborah argues that she relies on college grant money, summer jobs, child support payments, and loans to meet her expenses. She contends that her 1989 income would total only \$13,653,

leaving a shortfall of \$9,379. Deborah argues that she had to borrow over \$8,000 just to maintain her household. Deborah's main contention, however, is that because she did not graduate in May 1989 as expected from Iowa State University, she has increased expenses that the court did not contemplate at the time of trial, and that as a result she needs increased support from Jeffery in order to maintain her household. The dissolution decree provides that Jeffery is to pay support in the amount of \$300 per month per child, and \$400 per month in alimony, which pursuant to the decree ended in June 1989.

While we greatly sympathize with Deborah concerning the skyrocketing costs of raising growing children, we unfortunately do not find that she has shown a substantial change in circumstances of the parties pursuant to facts which were not in contemplation of the trial court at the time of the original decree. The record reveals that Jeffery's net income rose from \$27,120 to \$33,886. Jeffery has now married the woman with whom he was living at the time of trial.¹ While we agree with Deborah that Jeffery's new wife's income may be considered in reviewing Jeffery's overall financial picture, Page v. Page, 219 N.W.2d 556, 557-58 (Iowa 1974), such a remarriage is not unusual, and such a fact alone does not of itself qualify as a ground for modification. The trial court certainly contemplated that Jeffery would have increases in his income as an

1. A child has been born of this marriage.

employee with the Civil Service, and we do not find that Jeffery's increase in income is so substantial that a modification is justified.

Deborah's main argument centers on the fact that it will take her longer to graduate from Iowa State University than had been determined at the time of trial. When the original decree was entered in the fall of 1987, Deborah anticipated it would take her two years to complete her degree. Several months after the decree had been entered, Deborah learned not all of her credits would transfer from her previous educational institution. Deborah subsequently indicated that she would graduate in May 1990. Thus, it appears that this information could have been obtained by Deborah prior to trial, or should have been discovered. We cannot find evidence of a material change of circumstances based on Deborah's failure to graduate at the time originally determined in the decree. See Jensen v. Jensen, 253 Iowa 1013, 1020, 114 N.W.2d 920, 924 (1973).

We likewise fail to find a substantial change in circumstances justifying an increase and extension of alimony payments. As we noted earlier, the trial court most certainly envisioned that Jeffery would have increases in salary. The trial court undoubtedly also contemplated that Jeffery would remarry, since he was living with a woman at the time of the trial. The trial court ruled that Deborah would take approximately two years to graduate from Iowa State. It was not beyond the contemplation of the

trial court that Deborah might take longer than two years to complete her degree. While Deborah's monthly expenses have undoubtedly increased, due to both the extra year of schooling and her growing children, none of these facts are sufficient to find a substantial change of circumstances that were not contemplated by the trial court. See In re Marriage of Skiles, 419 N.W.2d 586, 588-89 (Iowa App. 1987).

Deborah lastly contends the trial court should have awarded her attorney fees. 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 (Iowa App. 1981).

Pursuant to Iowa Code section 598.36, a court may award attorney fees to the prevailing party in a modification action. Considering that Deborah was not successful in her application, we decline to award Deborah attorney fees. Each party shall be responsible for his or her own attorney fees. Deborah shall be assessed costs on appeal.

AFFIRMED.

All judges concur except Sackett and Schlegel, JJ., who partially dissent.

SACKETT, J. (concurring in part and dissenting in part)

I concur in part and dissent in part. Unlike the majority, I consider Jeffery's \$4.00 an hour or \$6,700 annual salary increase a substantial change in circumstances. I would remand to the trial court to apply the child support guidelines. I find meeting the increased needs of these growing children to be the responsibility of both parents, not just Deborah's.

I agree, however, with the majority's decision on the alimony issue.

Schlegel, J., joins this partial dissent.