FILED
MAR 24 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DOROTHY LOUISE PODREBARAC and GEORGE FRANK PODREBARAC

Upon the Petition of	)	
DOROTHY LOUISE PODREBARAC,	)	Filed March 24, 1981
Petitioner-Appellee,	)	
And Concerning	)	
GEORGE FRANK PODREBARAC,	)	1-31 2-65132
Respondent-Appellant.	)	

Appeal from Polk District Court - John N. Hughes, Judge.

Respondent-husband appeals from trial court's denial of his application for modification of the alimony provisions of the parties' 1979 dissolution decree asserting 1) that the evidence was sufficient to show a material and substantial change of circumstances justifying elimination of his alimony obligations and 2) that petitioner-wife is estopped from asserting any right to alimony because of certain assertions in her application for further review of this court's decision on direct appeal from the dissolution decree. AFFIRMED.

Joseph B. Joyce of Adler, Brennan, Joyce & Steger, Des Moines, Iowa, for respondent-appellant.

William Scherle of Hansen, McClintock & Riley, Des Moines, Iowa, for petitioner-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Respondent-husband, George Frank Podrebarac, appeals from trial court's denial of his application for modification of the alimony provisions of the parties' 1979 dissolution decree. He asserts 1) that the evidence was sufficient to show a material and substantial change of circumstances justifying elimination of his alimony obligations and 2) that petitioner-wife, Dorothy Louise Podrebarac, is estopped from asserting any right to alimony because of certain assertions in her application for further review of this court's decision on direct appeal from the original dissolution decree. We affirm.

Trial court awarded no alimony to petitioner in its original decree. Following respondent's direct appeal from the provisions in the original decree, this court modified the decree to provide $150 per month alimony for petitioner, in lieu of the more generous property award trial court had given petitioner. In re Marriage of Podrebarac, No. 313/2-63298 (Iowa Ct. App., filed Nov. 19, 1979). Our opinion stated that "[i]f, however, petitioner returns to work or if her Social Security disability payments are terminated, respondent may seek modification of the alimony award." (Emphasis added). Petitioner's application for further review of this court's opinion stated that she neither sought nor desired alimony and asserted that this court had exceeded the scope of its review powers by awarding alimony when none was specifically requested in the pleadings. The supreme court subsequently denied further review.

On November 28, 1979, respondent filed the current application for modification alleging as change of circumstances: that petitioner's Social Security disability benefits had terminated; that petitioner had been gainfully employed from shortly after trial until November 14, 1979, when she became unemployed "through her own fault;" that petitioner was not disabled and was capable of gainful employment; and that respondent had ceased his part-time employment and had only his Social Security benefits for support.

In its order of April 29, 1980, trial court found that respondent still had his part-time employment, although his income may have been somewhat reduced due to a leg injury. The court further found that petitioner had tried to obtain employment but could not, had earned nothing in 1980, had used profit sharing funds awarded to her under the original decree for living expenses, and had been supported in part by the parties' son. The court concluded that petitioner's health prevented her from working and that petitioner, because her Social Security disability benefits had been terminated,

was more in need of the $150 per month alimony than when it was ordered by this court. Trial court therefore dismissed respondent's application and this appeal followed.

I. Scope of Review. Appellate review of the modification proceeding is **de novo.** Iowa R. App. P. 4; Walters v. Walters, 203 N.W.2d 376, 378 (Iowa 1973).

II. Modification of Alimony Provision. A decree of dissolution is subject to modification only if the moving party establishes by a preponderance of the evidence that there has been a material and substantial change of circumstances since entry of the decree, or any subsequent modification, such that enforcement of the provisions would be attended by positive wrong or injustice. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978). In making this determination, we first note that mere occurrence of the conditions set forth in our earlier opinion (petitioner's return to work or termination of petitioner's Social Security disability payments) did not per se result in respondent's entitlement to modification. We must consider each party's earning capacity, available resources, and relative needs in light of the alleged changes. In so doing, we agree with trial court's conclusion that respondent has not shown the requisite change in circumstances to warrant elimination or diminuition of his alimony obligation. Although the respondent testified that his 1980 income would not be as much as previously, the record is completely devoid of how much less this income would be. The record also establishes that petitioner has made a good faith attempt to obtain employment but has been unable to do so. Also, despite respondent's assertions that petitioner filed no financial statement, we find that her testimony at the hearing on this application establishes her continued need.

III. Preclusive Effect of Petitioner's Statements in her Application for Further Review. As noted above, petitioner's application for further review of this court's opinion stated, in part, that "[a] request for alimony was not pleaded or requested at any stage of this proceedings. [sic] The award of alimony by the Court of Appeals constitutes an over-reaching of its review power by granting relief that was not requested and, in all probability, cannot be collected." Respondent now asserts that petitioner is bound by her pleading, including her "pleadings" in her Application for Further Review, and is estopped from resisting respondent's application to modify the decree to end his alimony obligation. He further asserts that petitioner has waived any claim she may have had for alimony and has waived resistance to respondent's application. We find no merit in respondent's assertion. Respondent had the burden of

proving a material and substantial change of circumstances subsequent to this court's decision of November 19, 1979. Trial court found he had failed in that burden and we agree. Costs of this appeal are assessed against respondent. Judgment of trial court is affirmed.

AFFIRMED.