

IN THE COURT OF APPEALS OF IOWA

No. 0-444 / 10-0238
Filed July 14, 2010

**IN RE THE MARRIAGE OF JAN DIDDIUS EGBERS
AND BEVERLY KAY EGBERS**

**Upon the Petition of
JAN DIDDIUS EGBERS,**
Petitioner-Appellant,

**And Concerning
BEVERLY KAY EGBERS, n/k/a
BEVERLY KAY SMITH,**
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, Marlita A. Greve,
Judge.

Petitioner appeals the district court order denying his request to modify the
spousal support award in the parties' dissolution decree due to respondent's
remarriage. **REVERSED AND REMANDED.**

Robert J. McGee of Robert J. McGee, P.C., Clinton, for appellant.

Emilie Roth-Richardson of Roth Law Office P.C., Dubuque, and Richard
Farwell of Farwell & Bruhn, Clinton, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.**I. Background Facts & Proceedings**

Jan Egbers and Beverly Egbers, now Beverly Smith, were married in 1980. They had three children, all of whom are now adults. Jan and Beverly were divorced on November 8, 2006. At the time of the dissolution, Jan was employed at Bemis Company, where he had gross income of about \$110,000. Beverly was employed as a secretary for Clinton Community School District, where she had gross income of about \$16,400. Jan had a heart attack in 2002. He received a stent and takes medication for his condition. Beverly has bulging lumbar discs, fibromyalgia, allergies, and skin sensitivity.

In the dissolution decree, the district court equally divided the parties' net assets. The court determined traditional alimony was appropriate based on "the long duration of the marriage, the ages and health conditions of the parties, their earnings' histories and capacities of the parties, the consequences to each of them, and all other factors set forth in Iowa Code section 598.21(3)." The court ordered Jan to pay alimony of \$1100 per month until the death of either party, or upon the earlier of Jan's retirement or when he became sixty-five years old.

After the dissolution decree, Jan was transferred by Bemis to Crossett, Arkansas, where he earned \$124,000. He was laid off, however, in July 2008. Jan was unemployed until February 2009, when he began working for Lone Star Plastics in Garland, Texas. Jan's annual salary at Lone Star was \$110,000, but he was laid off in July 2009, after only seven months with the company. Jan purchased houses in both Crossett and Rockwell that he is now trying to sell. He makes a mortgage payment on each home. The Texas home is being rented out

for about the same amount as the mortgage payment on that property. Jan married Clydette Alsup-Egbers in July 2008. Clydette is an associate professor of horticulture at Missouri State University. Clydette has annual income of about \$60,000.

Beverly married George Smith on March 18, 2009. George is a professor of communication at University of Wisconsin—Platteville. He has annual income of about \$80,000. On May 7, 2009, Jan filed an application to modify the dissolution decree to reduce or eliminate his alimony obligation due to Beverly's remarriage.

The modification hearing was held on December 1, 2009. At that time Jan was fifty-two years old. Jan has remained unemployed since being laid off from his employment in July 2009. He was looking for work and testified he did not expect to be able to earn more than \$60,000 annually. In August 2009 Jan moved to Springfield, Missouri. The parties' youngest son, who is twenty-one years old, lives with Jan. Jan is helping this son with his college expenses.

Beverly, who was then fifty years old, testified she was starting work the next day as an administrative assistant at the Academic Success Center in the University of Dubuque, where her income would be about \$20,000 per year. After one year Beverly could attend college classes at the University without paying tuition, and would pay half tuition for graduate classes. Beverly had attended three or four years of college, but had no degree. She testified she intended to complete a college degree in psychology, and then get a master's degree.

Beverly stated she and George have separate finances. George pays housing costs and utilities, and Beverly pays for groceries. Beverly pays for her own car expenses, telephone expenses, and clothing. Other expenses they divide. George has been providing Beverly with health insurance, but she would have her own health insurance with her new job. Beverly testified she has provided financial assistance for all three children.

The district court found there had been a substantial change of circumstances in that Beverly had remarried and was receiving some support from her current husband, and Jan was no longer employed. The court found Jan would likely earn about \$60,000 per year when he finds employment. The court determined Jan's spousal support should not be completely terminated "due to his earning capacity when compared to [Beverly] and for the reasons she was initially awarded spousal support as set forth in the dissolution decree." The court reduced the amount to \$400 per month.

Both parties filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). The court determined Beverly "proved extraordinary circumstances exist showing that her current spouse's income is not sufficient to support her standard of living or lifestyle which was considered by the original decree's alimony award." The court again determined alimony of \$400 per month was equitable because it was clear Beverly still needed alimony. Jan appeals the decision of the district court.

II. Standard of Review

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.907 (2009). In equity cases, we give weight to the fact findings

of the district court, especially when considering the credibility of witnesses, but are not bound by those findings. Iowa R. App. P. 6.904(3)(g). In modification actions, the court has reasonable discretion in determining whether to modify a dissolution decree, and that discretion will not be disturbed unless there is a failure to do equity. *In re Marriage of Vetterneck*, 334 N.W.2d 751, 762 (Iowa 1983).

III. Merits

In Iowa, the remarriage of a spouse does not automatically terminate an alimony obligation, but it shifts the burden to the recipient to show extraordinary circumstances requiring the continuation of alimony payments. *In re Marriage of Shima*, 360 N.W.2d 827, 828 (Iowa 1985); *In re Marriage of Von Glan*, 525 N.W.2d 427, 431 (Iowa Ct. App. 1994). “The rationale underlying this rule is that it is contrary to public policy to allow a party to receive support from both a prior and current spouse.” *In re Marriage of Cooper*, 451 N.W.2d 507, 509 (Iowa Ct. App. 1989). In many instances, a party’s heavy burden to show extraordinary circumstances effectively eliminates alimony following remarriage. *In re Marriage of Wendell*, 581 N.W.2d 197, 199-200 (Iowa Ct. App. 1998).

“Such circumstances warranting a continuation of the alimony from the prior marriage are those which exist at the time of the petition for modification, not at the time of the original decree.” *Shima*, 360 N.W.2d at 829. Extraordinary circumstances may be present where a party’s new spouse is unable to support the party. *Id.* The continuation of alimony beyond remarriage may also be appropriate where the purpose of the alimony is rehabilitative, that is, where it assists a party is obtaining further education. *In re Marriage of Orgren*, 375

N.W.2d 710, 712 (Iowa Ct. App. 1985). Continued alimony after remarriage may also occur in the case of reimbursement alimony. *In re Marriage of Bell*, 576 N.W.2d 618, 622 (Iowa Ct. App. 1998), *overruled on other grounds by Wendell*, 581 N.W.2d at 200. “[T]he ultimate issue in a modification action should be whether the recipient spouse has a continuing need for support despite the changed circumstances.” *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999).

In the modification ruling, the district court found Beverly was entitled to continue to receive alimony due to Jan’s earning capacity when compared to hers, and for the reasons she was initially awarded alimony in the dissolution decree. The continuation of alimony once a party has remarried, however, must be based on the circumstances at the time of the modification, and not those present at the time of the dissolution decree. *See Shima*, 360 N.W.2d at 829.

In ruling on the rule 1.904(2) motions, the court concluded there were extraordinary circumstances based on a finding that George’s income was not sufficient to support Beverly’s standard of living. In reaching this conclusion, the court relied upon *In re Marriage of Gilliland*, 487 N.W.2d 363, 366 (Iowa Ct. App. 1992). The case of *Gilliland*, 487 N.W.2d at 365, involved rehabilitative alimony. As noted above, it may be “especially appropriate” to continue alimony despite a spouse’s remarriage where the spouse has been awarded rehabilitative alimony. *Orgren*, 375 N.W.2d at 712. Additionally, we are unable to agree with the conclusion that George’s income was insufficient to support Beverly’s standard of living.

Beverly also attempts to show that she remains in need of the alimony originally ordered because George is only providing her with limited support. We decline the invitation to delve into such a conundrum as sorting out the level of actual support provided by a new spouse as it would be difficult at best and subject to change based upon a myriad of personal or family circumstances.

In our de novo review, we conclude Beverly has not met her heavy burden to show extraordinary circumstances requiring the continuation of alimony. See *Wendell*, 581 N.W.2d at 200 (noting party has a heavy burden to show extraordinary circumstances). Beverly has not shown George was unable to support her or any other factors that have been held to constitute extraordinary circumstances.¹ See *Shima*, 360 N.W.2d at 829. At the time of the modification, George had the ability to earn about \$80,000 per year. While Jan had the ability to earn about \$60,000 per year, he was not currently employed. Looking at the total economic circumstances of both parties, including the income of their spouses, we conclude Beverly has not shown a continuing need for support despite her changed circumstances. See *Ales*, 592 N.W.2d at 702.

We reverse the decision of the district court continuing Jan's alimony obligation. We conclude his alimony obligation should be terminated as of the date of Beverly's remarriage.

¹ Extraordinary circumstances may be present where the second marriage has been annulled or otherwise declared invalid, the subsequent spouse dies, or there is a dissolution of the second marriage. See *Shima*, 360 N.W.2d at 829. The net result in all of these cases is the same, that the party is not being supported by the subsequent spouse.

IV. Attorney Fees

Beverly seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We determine Beverly is not entitled to attorney fees for this appeal.

We reverse the decision of the district court and remand for an order modifying the parties' dissolution decree. Costs of this appeal are assessed to Beverly.

REVERSED AND REMANDED.