IN THE COURT OF APPEALS OF IOWA

No. 0-579 / 10-0138
Filed October 6, 2010

IN RE THE MARRIAGE OF TAMMY LYNN KECK AND THOMAS WAYNE KECK

Upon the Petition of
TAMMY LYNN KECK,
Petitioner-Appellant,

And Concerning

THOMAS WAYNE KECK,
Respondent-Appellee.

Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson, Judge.

Petitioner appeals from the district court ruling dismissing her petition to modify the alimony provisions of the decree dissolving her marriage to respondent. **AFFIRMED.**

Bryan J. Goldsmith of Gaumer, Emanuel, Carpenter & Goldsmith, P.C., Ottumwa, for appellant.

Allan C. Orsborn of Orsborn, Milani, Mitchell & Goedken, L.L.P., Ottumwa, for appellee.

Considered by Sackett, C.J., Pottefield and Tabor, JJ.

SACKETT, C.J.

The eighteen-year marriage of Tammy and Thomas Keck was dissolved in December 2004. The district court approved the parties' agreement dividing substantial assets and providing Thomas pay spousal support of $2000 a month for sixty months with the provision "that neither the amount nor the term of the alimony shall be modified . . . ." On May 23, 2008, Tammy filed an application to modify and extend the term of the alimony. The district court denied it finding the parties' agreement to preclude modification of spousal support was enforceable and Tammy failed to show a substantial change in circumstances to warrant modification. Tammy contends the parties cannot contract away the court's power to modify spousal support and she established grounds to support her request. We find the district court did not abuse its discretion in not modifying as Tammy has failed to meet the extraordinary burden she carries to modify a finite award of alimony. We affirm.

Scope of Review. We review a district court's modification of a dissolution decree de novo. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992); *Myers v. Myers*, 195 N.W.2d 113, 114 (Iowa 1972). We give weight to the trial court's findings of fact but they do not bind us. *In re Marriage of Sjulin*, 431 N.W.2d 773, 776 (Iowa 1988). Even though we engage in a de novo review, we will not disturb the trial court's conclusions unless there has been a failure to do equity. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995); *In re Marriage of Wahlert*, 400 N.W.2d 557, 560 (Iowa 1987). In considering a

modification of alimony we recognize the decision rests within the district court's discretion. *In re Marriage of Marshall*, 394 N.W.2d 392, 397 (Iowa 1986).

Modification of Alimony. Our review starts by looking at the parties' situation at the time the decree was filed. The knowledge of the trial court at the time the award was made is the basis for determining whether there has been a change of circumstances. *See In re Marriage of Full*, 255 N.W.2d 153, 159 (Iowa 1977); *Leo v. Leo*, 213 N.W.2d 495, 496 (Iowa 1973). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. *Mears v. Mears*, 213 N.W.2d 511, 514 (Iowa 1973); *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991).

Both parties were born in September of 1963. They have two children, a son, born in 1987, and a daughter, born in 1990. At the time of the dissolution both parties were college graduates and both were employees of Winger Contracting, Inc., apparently drawing similar salaries. They owned substantial real estate and personal property and carried debt.

The parties reached an agreement settling all issues. Their agreement was approved by the district court and once approved; the agreement is "interpreted and enforced as a final judgment of the court." *In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004); *In re Marriage of Handeland*, 564 N.W.2d 445, 446 (Iowa Ct. App. 1997). The result of the approved settlement was that property and debt were allocated and Thomas paid Tammy an

equalization payment of $1,003,824.13.[1] Tammy, in addition to the $2000 a month alimony for sixty months, also received a five-year consulting contract with Winger that was to pay her $2100 a month plus provide a benefit package that would include individual health insurance, disability insurance, a 401(k), and life insurance.

The children, ages seventeen and fourteen at the time of the dissolution were placed in the parties' joint custody with Tammy to have physical care. Thomas was to pay child support of $1500 a month for each child. At the time of the hearing on the application to modify Thomas had discharged all of his above financial obligations to Tammy. The children were twenty-two and nineteen and attending college. Their support was not an issue.

Tammy contends that she now has less income than does Thomas and that his net worth exceeds hers. Thomas agrees that his earning capacity and the value of Winger has increased since the dissolution and that Tammy's earnings and net worth are less than his.

We find at the time of the modification hearing Thomas showed a net worth of $4,000,000 and Tammy of $690,500. Tammy claimed she had a budget of $9425 a month and needed monthly support of $7500 for three years and $5000 to her death or remarriage in order to continue to enjoy the lifestyle she had during the marriage.

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[1] The modification court opined that the property division was 50/50 and the parties divided about $3,000,000 in assets. We find no reason to disagree with this conclusion.

Tammy contends that the award she seeks is reasonable because she left the job market to raise the parties' children, she is not currently employed, and needs additional education to obtain a job and increase her earning potential. Thomas argues, and the district court found, that the original alimony award gave Tammy the opportunity to become self-supporting. We agree and also note that as Thomas argues, Tammy chose not to use it for that purpose despite the fact she was aware she had contracted for it to terminate in five years. Thomas also refutes Tammy's contention that the need to care for the children precluded her from taking a job or improving her skills. We note his testimony that he remained involved with the children. Considering the ages of the children at the time of the dissolution, her child care responsibilities should not have precluded her from improving her lot and rehabilitating herself.

Thomas also contends that the district court was correct in finding the alimony was not modifiable because Tammy had contracted away that right. Thomas argues that this court has said that parties can contract with reference to termination of alimony. He cites *In re Marriage of Aronow*, 480 N.W.2d 87, 89 (Iowa Ct. App. 1991). There this court said:

> Parties can contract and dissolution courts can provide alimony is not modifiable, does not terminate on remarriage, or is payable in a lesser sum on remarriage. (citation omitted). When the decree provides alimony should not terminate on remarriage, or provides for a reduced amount of alimony to be paid on remarriage, then the remarriage of the party receiving alimony is not a change of circumstances. In such cases, remarriage alone is not sufficient to justify modification or elimination of the alimony provision.

Aronow, 480 N.W.2d at 89.

He also cites *In re Marriage of Phares*, 500 N.W.2d 76, 79 (Iowa Ct. App. 1993), where this court said:

> The dissolution decree contained no language alimony did not terminate on remarriage. Parties can contract and dissolution courts can provide alimony is not modifiable, does not terminate on remarriage, or is payable in a lesser sum on remarriage.

We do not believe as did the district court, these cases necessarily settle the issue here.[2] We do, however, agree with the district court that in considering the agreement that alimony not be subject to modification, together with evidence of her current circumstances, that Tammy failed to meet the burden necessary to support an increase and extension of alimony where the decree provides it is payable for a finite period.

The Iowa Supreme Court addressed the modification of a finite award in *In re Marriage of Marshall*, 394 N.W.2d 392, 397 (Iowa 1986), saying, "the court retains the power to modify even a finite alimony award at any time when such an award was included in the initial decree . . . ."[3]

Tammy relies on *Marshall* in support of her position. In *Marshall*, there was an intervening health issue that is not present here. *See Marshall*, 394 N.W.2d at 393. The former wife, requesting modification to extend an initial two-

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[2] While an agreement on amount and duration of alimony and an agreement not to modify can be made, we do not reach the enforceability of the agreement in this case.

[3] The dissent noted, among other things, that when a potential modification would insert doubt into an otherwise definite provision of the decree, the concept of judicial stability is violated. *Marshall*, 394 N.W.2d at 399 (Larson, J., dissenting). It added that most dissolution settlements are negotiated by the parties, and it is important for parties, who might well be willing to pay a premium for it in the settlement proceedings, to be able to negotiate for certainty in future payments, and they should have some assurance that a decree incorporating the concept of certainty will mean what it says. *Id.*

year award had been diagnosed with breast cancer, had a double mastectomy, was unable to find local employment compatible with her medical condition and treatment, and continued in poor health. *Id.*

Tammy also relies on *In re Marriage of Wessels*, 542 N.W.2d 486, 488, (Iowa 1995), which again addressed a health issue and extended alimony for a spouse who had twelve psychiatric hospitalizations since the dissolution and although her primary diagnosis had remained the same, her condition had badly deteriorated and it was the opinion of her physician she would never work again.

Tammy's health is good. She is five years older than she was when the decree was entered. Problems associated with the aging process are in the contemplation and knowledge of the trial court when a decree is entered. They are reasonable and ordinary changes that are likely to occur. *See In re Marriage of Skiles*, 419 N.W.2d 586, 589 (Iowa Ct. App. 1987). Thomas does have a superior financial position. His income at this time is greater than Tammy's. He is a hard worker and it is reasonable to assume the parties would have recognized his earning and net worth would not remain stagnant.

This case does not qualify as the sort of rare and unique change that demands the extraordinary relief Tammy seeks. The district court did not abuse its discretion. *Marshall*, 394 N.W.2d at 397. We affirm the district court's decision not to continue the alimony and not to award attorney fees. We award no appellate attorney fees. *See In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999).

AFFIRMED.