

IN THE COURT OF APPEALS OF IOWA

No. 1-277 / 10-1624
Filed May 25, 2011

**IN RE THE MARRIAGE OF MICHELE M. O'KELLY
AND KASEY L. O'KELLY**

Upon the Petition of

**MICHELE M. O'KELLY n/k/a
MICHELE M. SKAGGS,**
Petitioner-Appellant,

And Concerning

KASEY L. O'KELLY,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Bobbi Alpers,
Judge.

Michele O'Kelly appeals from the district court order denying her motion to
modify the support provisions of the decree dissolving her marriage to Kasey
O'Kelly. **AFFIRMED.**

Mark Joseph Neary, Muscatine, for appellant.

Linda L. Allison of Allbee, Barclay, Allison, Denning & Oppel, Muscatine,
for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

TABOR, J.

Michele O’Kelly¹ appeals from the district court order denying her motion to modify the support provisions of the December 2008 decree dissolving her marriage to Kasey O’Kelly. She contends her alimony should be increased from \$700 per month to \$2700 per month for a period of forty-two months, alleging two changed circumstances justifying this modification: (1) she has been unable to find steady employment despite her diligent efforts, and (2) Kasey reneged on a promise to “take care of her” after the divorce. Because neither allegation constitutes a substantial change in circumstances warranting modification of her spousal support, we affirm the district court.

I. Background Facts and Proceedings.

Michele and Kasey were married in 1998 and have two sons, who were fifteen and ten years old at the time of the modification hearing. By agreement of the parties, Michele stayed home to care for the children during the marriage. Kasey worked his way up from being a cashier to being a store director for Hy-Vee Drug Stores. He earned an average of \$293,000 a year between 2005 and 2009.

In September 2008, Michele filed for dissolution of the marriage. She was represented by an attorney during the proceedings but Kasey was not. Kasey provided Michele with all the documentation she requested. The parties reached an agreement on the property division, child custody, and awards of child and spousal support. Specifically, they agreed to joint legal custody and a shared

¹ The petitioner is now known as Michelle Skaggs.

care arrangement. The stipulation provided for Kasey to pay Michele \$2800 per month in child support and \$700 per month in alimony for a period of ten years. As part of the property settlement, Kasey offered Michele \$122,000 in funds from his 401K plan or, alternatively, to pay off the \$177,000 mortgage remaining on the marital residence—which she would be keeping. But Michele declined, articulating her wish to be self-supporting. Michele’s attorney asked for the following advisory to be included in the decree: “Advice of Counsel. Petitioner has entered into this agreement against the advice of her attorney”

After the decree was entered, Michele refinanced the mortgage on her residence, decreasing the term and increasing her payments. She paid off a camper in the amount of approximately \$10,000, even though the decree awarded it to Kasey and made him responsible for the debt. Although she was awarded two unencumbered vehicles in the divorce, Michele took out a \$14,500 home equity loan to purchase a third car and pay off credit card debts incurred after the divorce.²

Due at least in part to the economic downturn, Michele was unable to obtain the employment she had anticipated following the divorce. Michele has an undergraduate degree in communications and public relations and has taken some classes toward a Master’s in Business Administration. She testified her job search was hampered by the fact that she had been out of the work force for ten years and did not speak Spanish. She has enrolled in Spanish classes. But the only work she was able to find was through a temporary agency: one job lasted

² At the time of the divorce, Michele had no credit card debt.

four months and the other lasted two days. Despite applying for as many as thirty jobs, Michele was unable to find steady employment. Michele decided to enroll in graduate school to pursue her Master's in social work.

On March 10, 2010—about fourteen months after the final decree—Michele filed an action seeking to modify the amount of the child support and spousal support. She cited as substantial changes in circumstances her inability to secure gainful employment with an income commensurate with her education and subsequent enrollment in graduate school—contrasted with Kasey's high salary. She also alleged Kasey engaged in a pattern of fraud against her at the time of the entry of the final decree. She sought an increase in the amount of her spousal support from \$700 per month to \$2700 per month for a period of forty-two months.

Following an August 2010 trial, the district court entered its order denying modification. The court found Michele failed to prove a substantial change in circumstances since the decree was entered. It noted Michele's attorney advised her against entering into the decree and that the debts she is concerned about "appear to be debts that she has created with her own financial choices post-divorce." The court further found, "There is no credible evidence presented to the Court that Kasey hid any assets from Michele or tried to take advantage of Michele financially."

In this appeal, Michele challenges only the court's denial of modification with respect to spousal support.

II. Scope and Standard of Review.

The district court tried the modification case in equity, so our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Beecher*, 582 N.W.2d 510, 512 (Iowa 1998). Our job is to examine the entire record and decide anew the issue raised on appeal. *In re Marriage of Beecher*, 582 N.W.2d 510, 512-13 (Iowa 1998). We defer to the district court's opinion regarding the credibility of the parties because of the trial judge's superior ability to gauge their demeanor. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996).

III. Analysis.

Michele alleges the district court erred in denying her motion to modify her spousal support award. She alleges a substantial change of circumstances exists because she has been unable to find a job and because Kasey induced her into accepting an inequitable property settlement agreement based on a promise to "take care of [her] for the rest of [her] life regardless of the divorce settlement."

Modification of the spousal support provisions of a dissolution decree is justified only if there has been a material and substantial change in the circumstances of the parties making it equitable that other terms be imposed. *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991). The burden rests on the party seeking modification to prove such a change of circumstances by a preponderance of the evidence. *Id.* To justify modification, the circumstances that have changed must not have been contemplated at the

time the original decree was entered. *Id.* The changes must also be more or less permanent or continuous, not temporary. *Id.*

In determining whether a substantial change of circumstances has occurred, Iowa Code section 598.21C(1)(a) (2009) states the court shall consider “[c]hanges in the employment, earning capacity, income, or resources of a party.” Although she anticipated finding a job, Michele was unemployed at the time the dissolution decree was entered. The decree provided she would receive \$3500 per month in support, including \$2800 in child support—though she only cared for the children half of the time. She also received a \$50,000 cash settlement in the divorce. She had no debts, other than her mortgage in the amount of approximately \$1300 per month. Her current financial position can be more easily attributed to a series of ill-advised monetary decisions Michele made following the divorce than to her inability to find employment. Her choices with regard to refinancing her mortgage and paying off a debt assignable to Kasey are not grounds for modification of her spousal support award. *Van Doren*, 474 N.W.2d at 586 (holding a self-inflicted reduction in income is not grounds for modification).

Michele compares her case to *In re Marriage of Trickey*, 589 N.W.2d 753 (Iowa Ct. App. 1998). We find the case distinguishable. In *Trickey*, the wife was awarded \$800 per month for three years and one dollar per month thereafter. *Trickey*, 589 N.W.2d at 755. She had sought a full-time teaching position for eight years, with no success due to factors beyond her control. *Id.* at 756. In light of those circumstances, our court found that the rehabilitative purpose of the initial

alimony award was not served and there had been a substantial change in circumstances justifying a continuation of the original alimony award. *Id.* at 758-59. Michele is not in a similar situation. She agreed to spousal support in the amount of \$700 per month and then asked for it to be increased by \$2000 per month less than a year after her temporary job ended. Michele has not shown that her current employment situation marks a material and substantial change in circumstances not contemplated at the time of the decree that is more or less permanent.

In determining the existence of a substantial change of circumstances, the court also may consider other factors it determines to be relevant to an individual case. Iowa Code § 598.21C(1)(I). Michele argues the alleged fraud Kasey engaged in to procure the settlement agreement falls into this category. Michele has not proved Kasey unfairly induced her into accepting the settlement agreement that framed the terms of their dissolution decree. Michele had a lawyer during the dissolution proceedings while Kasey was not represented. She provided Kasey with the figures for child and spousal support and Kasey accepted them. Kasey offered a more generous settlement, including money from his 401K plan or payments to clear the mortgage on the marital home, which was awarded to Michele. The district court found “no credible evidence . . . that Kasey hid any assets or tried to take advantage of Michele financially.” Michele entered into the settlement over objections voiced by her counsel and of her own accord. She is now bound by its terms. See *In re Marriage of Knott*, 331 N.W.2d 135, 137 (Iowa 1983) (inequitable property

division in dissolution decree should be corrected by an appeal and not by a modification action).

Because Michele has failed to prove a substantial change in circumstances that warrants modification of the spousal support provisions of the dissolution decree, we affirm the district court order dismissing the action.

AFFIRMED.