

IN THE COURT OF APPEALS OF IOWA

No. 2-058 / 11-0541
Filed February 15, 2012

**IN RE THE MARRIAGE OF JANICE LYNN BUCKINGHAM
AND LARRY EUGENE BUCKINGHAM**

Upon the Petition of

JANICE LYNN BUCKINGHAM,
Petitioner-Appellee,

And Concerning

LARRY EUGENE BUCKINGHAM,
Respondent-Appellant.

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

Larry Buckingham appeals the district court's denial of his motion to
continue and his motion to modify the dissolution decree. **AFFIRMED.**

Larry Buckingham, Bloomfield, pro se appellant.

Cynthia D. Hucks of Box & Box Attorneys at Law, Ottumwa, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

BOWER, J.

Larry Buckingham appeals the district court's denial of his motion to continue and his motion to modify the 2006 decree dissolving his marriage to Janice Buckingham. Larry contends the district court should have granted him a trial continuance as he had yet to receive subpoenaed documents. He also claims the district court erred in failing to modify the terms of the property division in his dissolution decree. For the reasons stated below, we affirm.

I. BACKGROUND AND PROCEEDINGS. Larry and Janice Buckingham were divorced by entry of a stipulated decree of dissolution on March 24, 2006. The decree provided, among other things, for Janice to receive the monthly income from Larry's pension.

Larry filed a petition on October 7, 2009, seeking to modify the custody, visitation, and property provisions of the dissolution decree and also seeking DNA testing to confirm paternity of the parties' children. Larry sought a trial continuance on January 14, 2011, stating he needed additional time to obtain information subpoenaed from medical providers and the department of human services. The court denied Larry's motion stating the parties and children involved in this case are in significant turmoil while the matter is pending, and the matter desperately needed to be resolved. Larry filed a motion to reconsider, which was again denied by the district court finding it was not in the best interest of either party or the children that the case be continued. The court stated that it would consider leaving the record open after trial, if necessary, for the parties to submit additional documents.

The modification action proceeded to trial on January 26, 2011. The parties were able to resolve the issues of custody, visitation, and DNA testing, but were unable to resolve Larry's claim to modify the property settlement. Larry claimed Janice had obtained his pension income through fraud, and asked the court to modify this provision to grant him the right to receive the pension income. The court denied Larry's request holding property divisions are not subject to modification except in extraordinary circumstances such as fraud, duress, or mistake. The court found Larry's claim was barred as he failed to file his petition for modification within one year after the entry of the dissolution decree pursuant to Iowa Rule of Civil Procedure 1.1013. In addition the court found that even if the action had been timely filed, Larry failed to sustain his burden to prove Janice committed fraud.

II. MOTION TO CONTINUE. Larry first alleges the district court erred in not granting his motion to continue, which he claims would have permitted him time to obtain the documents to support his fraud claim. Our review of the district court's decision denying a motion to continue is for abuse of discretion. *In re Marriage of Hatzievgenakis*, 434 N.W.2d 914, 916 (Iowa Ct. App. 1988). In order to justify a reversal, prejudice must be shown. *Id.* Trial courts are accorded broad discretion, and we will not interfere with their decision absent a clear showing of abuse. *Michael v. Harrison Cnty. Rural Elec. Co-op.*, 292 N.W.2d 417, 419 (Iowa 1980).

Upon our review of the record, we find no abuse of discretion by the district court in denying Larry's motion to continue the trial. The court found that

a further delay of trial would leave the parties and children in a significant turmoil, and the best interests of all involved required the case to be resolved. In addition, the court noted it would consider leaving the record open for additional documents, if there was a need to do so. However, during trial Larry never asked the court for additional time in order to produce any documents in support of his claim. We find no abuse of discretion and Larry has failed to demonstrate on appeal that he suffered any prejudice as a result of the court's ruling.

III. MODIFICATION OF PROPERTY SETTLEMENT. Next, Larry asserts the district court erred in not modifying the property settlement to award him the income from his pension. He maintains Janice induced him to agree to the property division by fraudulently telling him they would get back together following the divorce once the department of human services was no longer involved with their family.

As noted by the district court, property divisions of a dissolution decree are not modifiable except on direct appeal or through an action under rule 1.1012.¹ See *In re Marriage of Knott*, 331 N.W.2d 135, 136 (Iowa 1983). As Larry did not appeal the dissolution decree, his request to modify the property division must be based on rule 1.1012. Our review of a claim under rule 1.1012 is at law, not de novo. *In re Marriage of Butterfield*, 500 N.W.2d 95, 97 (Iowa Ct. App. 1993).

¹ Iowa Rule of Civil Procedure 1.1012 states in part:

Upon timely petition and notice under rule 1.1013 the court may correct, vacate or modify a final judgment or order, or grant a new trial on any of the following grounds:

....

1.1012(2) Irregularity or fraud practiced in obtaining it.

The district court's decision is binding on appeal if supported by substantial evidence. *In re Marriage of Cutler*, 588 N.W.2d 425, 430 (Iowa 1999).

In this case, we agree with the district court that Larry's attempt to modify the property division of his dissolution decree is time barred. Actions under rule 1.1012 must be filed within one year after the entry of the judgment. See Iowa R. Civ. P. 1.1013. Larry filed his petition for modification over three years after the dissolution decree was entered. His action is therefore time barred. See *In re Marriage of Waggoner*, 438 N.W.2d 850, 851–52 (Iowa Ct. App. 1989). Because we find his action is barred, we need not address the merits of his claim.

IV. APPELLATE ATTORNEY FEES. On appeal Janice requests \$2000 in appellate attorney fees for defending this appeal, which she maintains is completely without merit. An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). In determining whether an award will be made, we consider the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the decision of the district court on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Considering the frivolous nature of the appeal, we believe an award of attorney fees is warranted, but considering Larry's limited ability to pay, we award Janice \$250 in appellate attorney fees.

AFFIRMED.