

IN THE COURT OF APPEALS OF IOWA

No. 2-944 / 12-0691
Filed December 12, 2012

**IN RE THE MARRIAGE OF WAYNE NATHEM
AND JOANNE NATHEM**

**Upon the Petition of
WAYNE NATHEM,**
Petitioner-Appellant,

**And Concerning
JOANNE NATHEM,**
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Petitioner appeals the district court's decision dismissing his petition to
modify a dissolution decree. **AFFIRMED.**

Terry D. Parsons of Olsen & Parsons Law Firm, Cedar Falls, for appellant.
John J. Wood and Kate B. Mitchell for Beecher, Field, Walker, Morris,
Hoffman & Johnson, P.C., Waterloo, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Bower,
J. takes no part.

VOGEL, J.

Wayne Nathem appeals the district court's decision dismissing his petition to modify the decree dissolving his marriage to Joanne. He claims his inability to become self-supporting was due to no fault of his own, and it is equitable and appropriate to extend and increase the provision for spousal support.

I. Background Facts and Proceedings

On January 18, 2007, the district court entered a decree of dissolution of marriage dissolving the thirty-six year marriage of Wayne, then age sixty-two, and Joanne, then age fifty-seven. The dissolution decree divided the marital property between the parties, set off some inherited property to Wayne, and ordered Joanne to pay \$700 per month in spousal support to Wayne for a period of forty-eight months, beginning February 1, 2007, and ending January 1, 2011. Each party was awarded a residence and the vehicles they drove. Wayne was awarded one-half of Joanne's retirement pensions, with payments starting upon Joanne's retirement. In addition to his inherited property, Wayne was awarded the trucking business, Nathem Enterprises, Ltd., and the real estate used by the business. Wayne was also ordered to make an equalization payment to Joanne, which forced him to liquidate certain property, including selling his residence. Without putting the house on the market, Wayne sold it to a close friend for approximately \$30,000 less than its fair market value.

At the time of the dissolution Nathem Enterprises was valued at approximately \$90,000, not including an airplane, which was owned by the business. Rather than award the airplane to either party, as both parties requested it, and because the airplane was of "uncertain value," the dissolution

court ordered the airplane be sold and the parties would share equally in any profit or contribute equally to any shortfall. The dissolution court did not put a specific date by which the airplane must be sold, nor did it name the party responsible for actually selling the airplane or maintaining it in the interim.

Unfortunately, the airplane has not sold, and Wayne has incurred additional expenses including hangar rental, insurance, advertising, licensing, and registration fees. Wayne also hired a company to perform repairs and maintenance, and that company has an approximately \$22,000 lien against the airplane. Additionally, as of January 2011, the airplane was only appraised at \$54,000 with approximately \$32,000 of debt owed on it, for which the parties remain jointly liable. Wayne testified that Nathem Enterprises, as the title holder of the airplane, has paid out \$159,402.70 for loan payments and expenses since the original trial, effectively draining tens of thousands of dollars from the company's annual income.

Joanne, as the chief nurse executive at a county hospital, has increased her income from approximately \$100,000 at the time of the initial decree to \$116,000 by the time of the modification proceedings. She has also expended substantial sums in caring for the parties' adult son after he suffered major injuries in an accident. Since 2010 Wayne has begun drawing Social Security benefits, netting \$1089 per month after payment of his health insurance through Medicare. This is \$330 per month more than he expected to receive in the dissolution proceeding. His W-2 income from Nathem Enterprises was reported as \$950 in 2011. Nathem Enterprises showed a loss of \$2490 in 2010 but had income of \$2250 in 2009.

On November 30, 2010, Wayne filed a petition to modify the decree, asking for “permanent spousal support, or in the alternative, for spousal support to continue until such time as [Joanne] retires.”

II. Standard of Review

We review an action to modify a decree of dissolution of marriage de novo. *In re Marriage of Guyer*, 522 N.W.2d 818, 820 (Iowa 1994). While we give weight to the findings of the trial court, they are not binding on appeal. Iowa R. App. P. 6.904(3)(g). The de novo review in a financial dissolution modification focuses on whether the decision by the trial court fails to do equity between the parties. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). The party seeking a modification has the burden to establish entitlement by a preponderance of the evidence. *In re Marriage of Wessels*, 542 N.W.2d 486, 490 (Iowa 1995). In order to meet this burden, the party requesting modification must demonstrate all of the following: (1) that there has been a substantial and material change in the circumstances occurring since the entry of the decree; (2) that “continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice”; (3) that the change is permanent or continuous; (4) that the change in financial conditions is substantial; and (5) that the change in circumstances was not within the contemplation of the district court when it entered the decree. Iowa Code § 598.21C (2009); *In re Marriage of Bolick*, 499 N.W.2d 333, 334 (Iowa Ct. App. 1993).

Inasmuch as Wayne is requesting the conversion of rehabilitative support into traditional spousal support, he must meet an “extraordinary burden” to show a “rare and unique” change in circumstances. *Wessels*, 542 N.W.2d at 490.

III. Substantial Change

Wayne claims his current financial hardship is a significant change in circumstances to warrant modification of the decree. He raises three main reasons for his financial state: (1) his declining health; (2) economic recession; and (3) the non-sale of the airplane. Regarding his health problems, Wayne points out his hearing loss and his prostate cancer—currently in remission—that the dissolution court was aware of, as well as his recent carpal tunnel syndrome in his hands and lower back problems. Medical problems associated with the aging process are in the contemplation and knowledge of the trial court when a decree is entered. *In re Marriage of Skiles*, 419 N.W.2d 586, 589 (Iowa Ct. App. 1987). They are reasonable and ordinary changes that are likely to occur. *Id.* Just as Joanne has encountered medical challenges and multiple surgeries, the medical problems suffered by Wayne are not “an unexpected calamity” as to rise to the level of a substantial change warranting modification. *See id.*

Wayne next faults the “dramatic increase in fuel prices” for cutting into Nathem Enterprises’s profits as evidence of a substantial change. Wayne further argues “[i]t was not contemplated the nation-wide economic recession would negatively impact the amount of goods being transported.” The dissolution court was somewhat guarded in assessing the economic viability of Nathem Enterprises. While according to Wayne his trucking business is not as profitable as it was at the time of the dissolution trial, general complaints regarding the

state of the economy cannot satisfy the burden to prove a substantial change not contemplated by the decretal court. See *In re Marriage of Trickey*, 589 N.W.2d 753, 758 (Iowa Ct. App. 1998) (“Financial success of a business is often speculative, especially when looking three to eight years into the future of an already struggling business.”).

Wayne also faults his economic hardship on the unsold airplane. The uncertainty as to the value of this airplane was noted by the dissolution court. While Joanne suggests Wayne has not put forth significant effort in selling the airplane, the dissolution court assigned no date by which the airplane should be sold nor did it specify which party was responsible for selling or maintaining it until sale. Wayne complains of the large amount of money Nathem Enterprises has spent on the airplane since the decree. Whether Joanne should pay for part of this upkeep was pursued in multiple post-decree motions, and the court declined to order her to do so each time. Then, on July 8, 2009, after noting Wayne did not appeal a prior order denying his request that Joanne share in the interim expenses, the court again denied Wayne’s request but added that its decision did not preclude Nathem Enterprises from bringing a civil action against Joanne for the expenditures. We agree with the modification court that the unsold airplane, with the terms of the sale undefined by the decretal court, provides no basis for a modification of spousal support as an unanticipated substantial change.

IV. Conclusion

While we appreciate that Wayne may be going through a difficult financial time, he has not proven a substantial change of circumstances not considered by

the dissolution court to warrant modification of the spousal support. His own decisions with regards to running his business, maintaining and marketing the airplane, and experiencing medical problems associated with aging are not sufficient to carry his substantial burden.

AFFIRMED.