

IN THE COURT OF APPEALS OF IOWA

No. 8-034 / 07-1225
Filed February 13, 2008

**IN RE THE MARRIAGE OF SUE ELLEN RATHBUN
AND JAMES L. RATHBUN**

**Upon the Petition of
SUE ELLEN RATHBUN,**
Petitioner-Appellee,

**And Concerning
JAMES L. RATHBUN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Allamakee County, Monica L. Ackley, Judge.

James Rathbun appeals from the district court's decree denying his petition for modification of his alimony obligation. **AFFIRMED AS MODIFIED.**

Jeffrey L. Swartz of Jacobson, Bristol, Garrett & Swartz, Waukon, for appellant.

Laura J. Parrish Maki of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C., Decorah, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

HUITINK, P.J.

James Rathbun appeals from the district court's decree denying his petition for modification of his alimony obligation. He argues the evidence supports the relief requested, and the trial court erred by concluding otherwise. We affirm as modified.

I. Background Facts and Proceedings

The district court's February 24, 1993 original decree dissolved James and Sue Rathbun's marriage. Based upon the circumstances surrounding the marriage, the district court's March 9, 1993 supplemental decree ordered James to pay \$500 per month in alimony until Sue's death or remarriage. At the time of the supplemental decree, Sue, who was forty-one years old, was employed full-time with the Allamakee Community School District making \$979.44 per month and part-time with a local hospital making \$186.67 per month. James, who was forty-six years old, was employed as a vice-president at Farmers & Merchants Savings Bank making \$56,500 per year. In addition, he received stock dividend income totaling \$1400 per year. Neither party had serious health problems at the time the original decree was entered.

On October 9, 2006, James filed a petition for modification of alimony, alleging a substantial and material change of circumstances since the supplemental decree was entered. More specifically, James cited his declining health, loss of employment and resulting diminished earning capacity, as well as Sue's increased earnings. James accordingly requested termination of his alimony obligation or alternatively a reduction in the amount of alimony. Sue denied these allegations, and the matter proceeded to trial on its merits.

The evidence at trial revealed the following: James, who was sixty years old at the time of trial, was diagnosed in 2006 with degenerative peripheral neuropathy, degenerative disc disease, and low back pain. Because of these conditions, James quit his job at Farmers & Merchants Savings Bank on March 18, 2006. He applied for and began receiving disability insurance from his employer in the amount of \$2800 per month in October 2006. He will receive disability payments until he turns sixty-five, when he is eligible for social security. In addition, he continued to receive stock dividend income. His total earnings for 2006 were \$25,227. His IRA retirement account was valued at \$151,000.

At the time of trial, Sue was fifty-six years old. She suffered from high blood pressure, high cholesterol, diabetes, and psoriasis. Sue was still employed full-time with the school district making \$22,665 per year and part-time with the hospital working ten hours every two weeks at \$11.42 per hour. She had recently reduced her work hours, citing health reasons. Sue's IPERS retirement account was valued at \$43,197. In 2006 Sue filed for bankruptcy and discharged approximately \$36,000 in debts. She also sold her home and moved into an apartment. She claimed monthly expenses of \$2200.

The district court's June 21, 2007 modification order denied James's petition but modified the alimony so it would terminate at James's death. On June 28, 2007, James filed a motion for enlarged or amended findings and different judgment. The district court denied the motion on July 2, 2007.

II. Standard of Review

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly

presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Modification of Alimony

The alimony provision of an original decree may be modified if there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (Supp. 2005). In making this determination, the court must consider “[c]hanges in the employment, earning capacity, income or resources of a party,” “[c]hanges in the physical, mental, or emotional health of a party,” and other relevant factors. *Id.* § 598.21C(1)(a), (e), (f). Our supreme court has previously delineated the following relevant principles that may be considered when ruling on a petition for modification:

- (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree;
- (2) not every change in circumstances is sufficient;
- (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice;
- (4) the change in circumstances must be permanent or continuous rather than temporary;
- (5) the change in financial conditions must be substantial; and
- (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

In re Marriage of Walters, 575 N.W.2d 739, 741 (Iowa 1998) (quoting *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983)). The party seeking modification bears the burden of proof by a preponderance of the evidence. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992).

Based on our de novo review, we find James has met his burden to show a substantial change in circumstances. These circumstances include his earlier-mentioned health problems and resulting decline in his earning capacity, as well as Sue's increased earnings. The amount of relief to which he is entitled must, however, be tempered by Sue's continuing need for support, despite the change in circumstances. See *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We accordingly modify the trial court's modification decree by reducing James's alimony obligation to \$300 per month. We affirm the trial court's decree in all other respects.

IV. Appellate Attorney Fees

Sue requests attorney fees on appeal. The award of attorney fees is discretionary and is not a matter of right. *In re Marriage of Sprague*, 545 N.W.2d 325, 328 (Iowa Ct. App. 1996). We must consider "the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal." *Id.* After considering these factors, we decline to award attorney fees. Costs shall be taxed equally to the parties.

AFFIRMED AS MODIFIED.