

IN THE COURT OF APPEALS OF IOWA

No. 9-236 / 08-1326
Filed May 29, 2009

**IN RE THE MARRIAGE OF DAVID L. JOHNSON
AND PAMELA S. JOHNSON**

**Upon the Petition of
PAMELA S. JOHNSON,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
DAVID L. JOHNSON,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, John D. Lloyd
(summary judgment) and Karen A. Romano (trial), Judges.

David Johnson appeals the denial of his application to modify the parties'
dissolution decree. Pamela Johnson cross-appeals the denial of her request for
attorney fees. **AFFIRMED.**

Robert A. Nading II of Nading Law Firm, Ankeny, for appellant.

Susan L. Ekstrom, Des Moines, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

David Johnson appeals from the district court's ruling on his application for modification of the parties' dissolution decree. Pamela Wobbeking (f/k/a Pamela Johnson) cross-appeals the denial of her request for attorney fees. We affirm.

I. Background Facts and Proceedings.

Pamela and David's fifteen-year marriage was dissolved by joint stipulation and decree on January 30, 2004. The dissolution decree includes eleven separately numbered paragraphs under the title "ORDERS,"¹ by which the court divided the parties' property and debts and ordered David to make certain payments to Pamela. The decree contained provisions in separate paragraphs for "spousal support" and for "health and dental insurance coverage."

The specific provisions provide:

4. Spousal Support. David agrees to pay Pamela \$700 per month until he reaches the age of 65, until she remarries, or until his death, whichever sooner occurs. . . . The parties agree that this award may be reviewed upon David reaching the age of 65, and if the review indicates that Pamela is still in need of support from David, and, David's financial situation would permit him to continue the payments, the alimony payments shall continue as may be agreed upon by the parties, and if the parties are unable to agree, the Court may review the alimony obligation of David and make a determination at that time based upon Pamela's needs and David's ability to pay. . . . These alimony payments, and all property awards in this Decree, will not be dischargeable in bankruptcy, and, in the event of bankruptcy, David will reaffirm any such property awards that may, by law, be discharged in bankruptcy to reinstate them in full once the bankruptcy action has been completed.

In addition, David will purchase and maintain a life insurance policy on his life with Pamela as the beneficiary in the face (pay out) amount of \$100,000. Pamela may request, and David will supply to Pamela, proof of such coverage at any time.

5. Health and dental insurance coverage. David is presently providing medical and dental coverage for Pamela, and David shall

¹ The paragraphs are numbered 1-12, but there is no paragraph 3.

be required to pay to Pamela up to \$300 per month for health insurance after entry of the Decree. If the cost to Pamela is less than \$300, David shall only be required to pay the lesser cost of the insurance. If Pamela should be eligible to receive health insurance benefits through employment at a cost to her, David shall be required to pay for that insurance, as long as it does not exceed \$300.00 per month. Should Pamela become eligible for any government health care benefits which provides her health benefits, David shall provide Medicare Supplemental Insurance at a cost not to exceed \$300.00 per month until David turns age 65, and at that time, the parties will determine if David shall continue to provide Medicare Supplemental Insurance to Pamela. If the parties cannot agree, the Court retains jurisdiction to review Pamela's need in this regard and shall made a determination at that time as to whether or not David should provide said insurance based upon Pamela's needs and David's ability to pay. In any event, under no circumstances, will David's obligation in this regard exceed \$300.00 per month.

Pursuant to the dissolution decree, Pamela was awarded the personal property in her possession, a vehicle, enumerated furniture, mutual funds owned prior to the marriage, one parcel of real estate (her residence), \$700 per month "spousal support," not more than \$300 per month for "health and dental insurance coverage" David was currently providing, her retirement accounts owned prior to marriage plus fifty percent of one of David's IRA accounts, and her separate bank account(s). She was ordered to forgive a \$10,000 loan she made to David.

David was awarded the personal property in his possession; several vehicles; "MWR Racing assets, Johnson Properties (cash), MWR (cash), MWR Holdings, JR Motorsports holdings, the interest in Holm's Radiator, the 1978 Beechcraft Barron plane, and the pool table"; fifty percent of one IRA and all of another; his separate bank account(s); and seven parcels of real estate. Although the decree indicates the parties filed financial affidavits, they were not

included in the record. Testimony at the modification hearing established that Pamela's net worth at the time of the dissolution decree was approximately \$220,000. David's net worth substantially exceeded that amount. David testified as to making two different financial affidavits: he provided one in the dissolution action stating his net worth was about \$300,000; he provided another to a bank that listed his net assets at about \$1.4 million.

On October 17, 2007, David filed an application to modify the dissolution decree, alleging "there has been a substantial and material change in circumstances which warrants modification . . . regarding alimony and health insurance payments made by" David. Pamela answered and denied there had been a change in circumstances warranting modification. Pamela affirmatively stated that she was not remarried and asked for attorney fees. Pamela later filed a counterclaim seeking an increase in the medical insurance payment.

On February 18, 2008, David filed a motion for summary judgment, which the district court denied.

A hearing was held on June 5, 2008, at which the parties stipulated that Pamela had remarried on January 8, 2008, and that spousal support terminated at the time of her remarriage. At the conclusion of the hearing, the district court ruled the health and dental insurance coverage paragraph was "separate and distinct from the spousal support" and "more akin to part of the property settlement." Consequently, the court found David was required to continue to pay \$300 towards Pamela's insurance. The court took under advisement the question of whether the spousal support should have ceased retroactive to the date of cohabitation.

On August 1, 2008, the district court entered a written ruling reiterating its conclusion regarding health insurance coverage. It denied Pamela's request to have the insurance payment increased. The court then addressed the question of "whether cohabitation is a substantial and material change in circumstances such that modification of the alimony² provision is warranted." It noted that because the decree did not include "cohabitation" as an event that would terminate David's obligation to provide spousal support, but cohabitation was established, it was Pamela's burden to show an ongoing need justifying continuation of spousal support. The court found that when Pamela moved in with her now-husband, she paid her portion of household expenses and worked twenty hours per week due to health problems. The court found Pamela's net worth was slightly more than at the time of dissolution, but her expenses were slightly more. It court found that because of Pamela's reduction in work hours, she was less able to meet her expenses than at the time of the decree. The court concluded Pamela had an ongoing need for spousal support during the period of cohabitation and ruled that the spousal support terminated effective the date of Pamela's remarriage. Finally, the court denied Pamela's request for attorney fees, finding each party had sufficient resources to pay his or her own attorney fees.

² Spousal support and alimony are used interchangeably by courts; however, the term "alimony" was formally eliminated from our statutory law in 1980 and replaced by "spousal support." See *In re Marriage of Ales*, 592 N.W.2d 698, 702 n.2 (Iowa Ct. App. 1999).

David now appeals,³ and Pamela cross-appeals. David contends the health insurance coverage required in the dissolution decree is spousal support, and that both the \$700 spousal support and \$300 health insurance coverage should have terminated upon cohabitation. Pamela contends the district court erred in denying her attorney fees.

II. Scope and Standard of Review.

This action for modification of a dissolution decree is an equity case. See Iowa Code § 598.3 (2007) (“An action for dissolution of marriage shall be by equitable proceedings”); *Id.* § 598.21C (providing for modification of orders for disposition and support when there is a substantial change in circumstances). Our review is thus de novo. Iowa R. App. P. 6.4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. 6.14(6)(g). We accord the district court considerable latitude in making its determinations and will disturb its rulings only where there has been a failure to do equity. See *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998) (citing *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996)).

III. Appeal.

“[C]hild, spousal, or medical support orders” of a dissolution decree may be modified when there has been “a substantial change in circumstances.” Iowa Code § 598.21C(1) (enumerating factors to be considered for modification); see

³ David’s first issue on appeal is that the “trial court erred by denying respondent’s motion for summary judgment.” He concedes we need not address this issue. See *Kiesau v. Bantz*, 686 N.W.2d 164, 174 (Iowa 2004) (noting that “[a]fter a full trial on the merits, a previous order denying a motion for summary judgment is no longer appealable or reviewable”).

In re Marriage of Maher, 596 N.W.2d 561, 564-65 (Iowa 1999) (noting that the party seeking modification must establish substantial change in the circumstances). The medical support subject to modification pursuant to section 598.21C is defined in section 598.21B(3): “*Medical support*. The court shall order as *child medical support* a health benefit plan as defined in chapter 242E if available to either parent at a reasonable cost” (Emphasis added). See also § 598.1(9) (noting that “medical support is not included in the monetary amount of child support”).

However, the property division of a dissolution decree is not subject to modification. *Id.* § 598.21(7) (“Property divisions made under this chapter are not subject to modification.”); see *In re Marriage of Knott*, 331 N.W.2d 135, 136-37 (Iowa 1983). This is because an inequitable property division in a dissolution decree should be corrected by an appeal; thereafter, property rights ought to be accorded some permanency. *Id.* at 137.

The district court concluded that the health and dental insurance coverage provision of the dissolution decree was akin to a property division and thus not subject to modification. David argues this conclusion was erroneous.

A. Nature of the Award of Health and Dental Insurance Coverage.

David seeks to preclude our consideration of any evidence beyond the four corners of the dissolution decree, and he argues that no evidence should have been received by the modification court. We reject David’s assertion. Whether the trial court intended the health insurance coverage to be spousal support (subject to modification) or part of the property division (not subject to modification) depends upon many relevant factors.

The court must take into consideration all the relevant factors, including the provisions of the agreement between the parties, the circumstances under which the agreement was made, the nature and value of the property owned by and to be divided between the parties, the original divorce proceedings, and the terms of the dissolution decree sought to be modified.

In re Marriage of Von Glan, 525 N.W.2d 427, 430 (Iowa Ct. App. 1994). Thus, the modification court properly allowed evidence on these relevant factors.

When we interpret the dissolution decree, the determinative factor is the intent of the trial court as gathered from the decree and other proper evidence.

In *Bowman v. Bennett*, 250 N.W.2d 47, 50 (Iowa 1977), our supreme court noted:

[O]ur task is to interpret the divorce decree issued by [the trial judge]. It is susceptible of interpretation on the same basis as other written instruments, the determinative factor being intent of the court as gathered from the decree, and other proper evidence. Effect must be given that which is both expressed and implied. Extrinsic evidence may be received to aid a court in this interpretive process, not to show language used means something other than as stated, but to reveal the true meaning of what is said.

Here, the dissolution decree includes eleven separately numbered paragraphs under the title "ORDERS," by which the court divided the parties' property and debts and ordered David to make certain payments to Pamela. The "health and dental insurance coverage" provision is separate and distinct from "spousal support." Where provisions relating to the homestead sought to be modified were set out as part of a "Property Settlement," our supreme court found that it was the trial court's intent to make the provision a part of the property division, which could not be modified. *Knott*, 331 N.W.2d at 137.

David contends paragraphs four and five of the dissolution decree should be read together as both providing spousal support. Pamela contends the two paragraphs are distinct and separate, and that paragraph five was part of the

court's property division. We believe that the dissolution court intended the health and dental insurance coverage to be part of the property division.

First, we note that the "spousal support" was to continue until David "reaches the age of 65, until [Pamela] remarries, or until [David's] death." When an award terminates upon death, it is indicative of a support provision. See *Van Glan*, 525 N.W.2d at 430 (payments terminable upon death indicative of spousal support); see also *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (noting that "[t]raditional or permanent alimony is usually payable for life or for so long as the dependent is incapable of self-support").

The "health and dental insurance coverage," on the other hand, was awarded in a paragraph separate and distinct from "spousal support." The insurance coverage does not terminate on Pamela's remarriage or David's death. Instead, it was awarded in an amount not to exceed \$300 "until David turns age 65, and at that time, the parties will determine if David shall continue [to] provide Medicare Supplemental Insurance to Pamela."

Moreover, the decree awarded David more assets than Pamela. In addition, Pamela was ordered to forgive a \$10,000 loan to David. David was then providing health insurance coverage to Pamela, and the court ordered him to continue to do so. It is reasonable to presume the dissolution court intended the award to balance the inequities of the property division. See Iowa Code § 598.21(5)(h) (noting one factor in making property division is "[t]he amount and duration of an order granting support payments to either party pursuant to section 598.21A and whether the property division should be in lieu of such payments"). Thus, we agree with the modification court that the insurance coverage provision

is more in the nature of a property distribution. *See Knipfer v. Knipfer*, 259 Iowa 347, 353, 144 N.W.2d 140, 143-44 (1966) (noting difference between provisions for future support versus those meant as an adjustment of property rights; the division of property “has for its basis the wife’s right to a just and equitable share of that property which has been accumulated by the parties as the result of their joint efforts during the years of the marriage to serve their mutual needs”). Having received more property under the dissolution decree than did Pamela, the insurance coverage established a more equitable division of the parties’ assets.

We conclude the health and dental insurance coverage provision was in the nature of a property division, which is not subject to modification.

B. Does Cohabitation Necessitate Modification?

The support provisions of a dissolution decree can be modified if there has been a substantial change in circumstances. Iowa Code § 598.21C. Section 598.21C(1) states the court shall consider the following:

- a. Changes in the employment, earning capacity, income, or resources of a party.
- b. Receipt by a party of an inheritance, pension, or other gift.
- c. Changes in the medical expenses of a party.
- d. Changes in the number or needs of dependents of a party.
- e. Changes in the physical, mental, or emotional health of a party.
- f. Changes in the residence of a party.
- g. Remarriage of a party.
- h. Possible support of a party by another person.
- i. Changes in the physical, emotional, or educational needs of a child whose support is governed by the order.
- j. Contempt by a party of existing orders of court.
- k. Entry of a dispositional or permanency order in juvenile court pursuant to chapter 232 placing custody or physical care of a child with a party who is obligated to pay support for a child. Any

filing fees or court costs for a modification filed or ordered pursuant to this paragraph are waived.

I. Other factors the court determines to be relevant in an individual case.

“[T]he ultimate issue in a modification action should be whether the recipient spouse has a continuing need for support despite the changed circumstances.” *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App.1999). We are mindful that the burden was on Pamela to establish continued need. *Id.* at 702-03 (noting that it is petitioner’s burden to show a cohabitation and then recipient’s burden to show why spousal support should continue in spite of cohabitation).

Upon our de novo review, we conclude Pamela established that she continued to need the spousal support despite the fact of cohabitation.

At the time of the dissolution, Pamela worked full-time. However, at the time she began cohabiting with Wobbeking, she had to reduce her hours at work to twenty-hours per week.⁴ While her net worth is now slightly more than when the decree was entered, her expenses are also slightly more. Upon cohabiting with Wobbeking, Pamela paid one-half of the utilities and household expenses. She and Wobbeking entered into a prenuptial agreement that continued this allocation of obligations. We accordingly conclude David’s obligation to provide spousal support continued until the date of Pamela’s remarriage. With respect to the health and dental insurance coverage, the obligation continues as provided in the dissolution decree. *See In re Marriage of Bell*, 576 N.W.2d 618, 623 (Iowa Ct. App. 1998) (noting that due to recipient’s health condition she should

⁴ David argues that Pamela has offered no medical testimony to support her claim that she could only work part-time. However, the district court impliedly found Pamela’s testimony on this issue credible when it found “Pamela has had to reduce her hours at work” and we give weight to that finding.

continue to receive coverage equal to that provided in the marriage where dissolution decree stated petitioner must provide health insurance with coverage equivalent to that provided during the marriage; and specifically modifying the district court decree to provide that after recipient qualifies for Medicare, petitioner shall provide supplement medical insurance to ensure insurance benefits received during the marriage), *abrogated on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998).

IV. Cross-appeal.

In her cross-appeal, Pamela contends the district court erred in denying her request for attorney fees. An award of attorney fees lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay. *Id.* In addition, the fees must be fair and reasonable. The district court did not abuse its discretion in denying Pamela's request for attorney's fees.

V. Request for Appellate Attorney Fees.

Pamela seeks attorney fees on appeal. This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Given the relative asset positions of the parties, we deny Pamela's request for appellate attorney fees. Costs on appeal are assessed to David.

AFFIRMED.