IN THE COURT OF APPEALS OF IOWA

No. 3-035 / 12-1473
Filed February 13, 2013

IN RE THE MARRIAGE OF DAVID A. MYERS
AND JODY R. MYERS

Upon the Petition of
DAVID A. MYERS,
Petitioner-Appellee,

And Concerning
JODY R. MYERS,
Respondent-Appellant.

Appeal from the Iowa District Court for Howard County, Richard D. Stochl, Judge.

Jody Myers appeals from the district court's modification of the spousal support and insurance provisions of the decree dissolving her marriage to David Myers. **AFFIRMED AS MODIFIED.**

Jeremy L. Thompson, Decorah, for appellant.

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

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Jody Myers appeals from the district court's modification of the spousal support and insurance provisions of the decree dissolving her marriage to David Myers. We affirm as modified.

***I. Background Facts and Proceedings*.**

On July 1, 2008, the district court entered its decree dissolving David and Jody's thirty-year marriage. David appealed, asserting the court erred in ordering him to pay spousal support to Jody of $1000 per month until she dies or re-marries, and he argued the court's division of property was unjust and inequitable. *See In re Marriage of Myers*, No. 08-1310, 2009 WL 928708, at *1-*2 (Iowa Ct. App. April 8, 2009). In our affirming opinion, we set forth the facts as follows, in relevant part:

> David was fifty-one years of age at the time of trial. He has been employed at R.R. Donnelley since 1984 and has farmed for twenty-four years. David's 2007 W-2 form shows gross pay of $43,027.91, from which $4,302.79 went into a 401(k) plan, and another $6,602.24 was used to purchase additional "cafeteria" benefits. He had a retirement account with a value of $247,111. The district court found that although David has some pain in his knees and back the pain was not inconsistent with his age and the type of work he does, and it did not preclude him from continuing any of his work. The parties agreed David would receive the family homestead at the appraised value of $137,000, subject to the debt on it, and that he would keep certain equipment that he would need to continue farming.
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> Jody was forty-eight years of age at the time of trial. She completed school only through the eighth grade and never received a GED. She reads at approximately a third grade level, does math at a fifth grade level, has difficulty spelling words beyond the third grade level, and has an overall IQ of eighty. She has done manual labor her entire working life, and during the parties' marriage worked in a hog confinement facility as well as on their farm.
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> In January 1999 Jody injured her back while working at the hog confinement facility and has not been employed since. Under the Social Security Administration's rules and regulations Jody was

> classified as totally disabled as of March 1999. She receives $669 per month in social security disability benefits as a result of this classification, but is required to pay $100 per month of that for Medicaid, giving her a net monthly amount of social security benefits of $569.
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> Jody also received a worker's compensation award in November 2001 as a result of her work-related injury. The Iowa Worker's Compensation Commissioner assigned her a seventy-five percent industrial disability and awarded her 375 weeks of permanent partial disability at $311.28 per week, effective January 11, 2001. We note that based on this date and the number of weeks of benefits Jody's worker's compensation benefits ended approximately a month before trial in this case.
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> Jody continues to have several health problems, including chronic back pain and chronic pain syndrome, and takes a multitude of prescription medications for these and other problems. The district court found that her limited education and health issues are significant and permanent problems that will preclude her from obtaining employment and make it highly unlikely that she will ever become self-supporting in any work, let alone be in a position to enjoy the standard of living she enjoyed during the marriage.

Regarding the spousal support award, David contended "the district court's award of $1,000 per month [of] traditional alimony to Jody was excessive relative to his income and ability to pay, and particularly so given the court's property division." *Id.* at * 3. We disagreed, explaining:

> David was in relatively good health other than some minor knee, back, and hip problems, which the district court found were not inconsistent with his age and work, and no substantial evidence indicates these problems will prevent him from working and continuing to farm, now or in the foreseeable future. The evidence shows that David's gross income for 2007 was $43,027.91.
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> Jody, on the other hand, has been found by the Social Security Administration to have become permanently disabled in 1999, has been found by the worker's compensation commissioner to have a seventy-five percent industrial disability, and suffers from several work-related and other health problems. She attended school only through the eighth grade, and reads, writes, and performs math at very low levels. Jody has not worked outside the home since her 1999 work injury. Although she has attempted to obtain other employment she has been unsuccessful due to her physical conditions and her limited reading, writing, and math abilities. Jody's only sources of income at the time of trial were her

> social security disability benefits and temporary spousal support. Accordingly we, like the district court, find Jody's health problems and her low level of education and functioning to be significant and permanent problems that severely limit her earning capacity and ability to work, even if they perhaps do not entirely prevent her from some work. Further, Jody is only forty-eight years of age and her health problems may only worsen with age. It is highly unlikely she will ever become self-supporting at a standard of living comparable to the one she enjoyed during marriage.
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> Applying the factors under [Iowa Code] section 598.21A(1) [(2007)], and for the reasons set forth above, we conclude Jody is entitled to the award of traditional spousal support of $1,000 per month until she dies or remarries. Although we agree with the district court that the amount of $1,000 per month of traditional alimony is rather high, based on the particular facts and circumstances of this case as detailed above we conclude the district court did not act inequitably or abuse its discretion in awarding the amount and duration of alimony. As noted above, in marriages of long duration where the earning disparity between the parties is great, such as here, both spousal support and nearly equal property division may be appropriate. [*In re Marriage of Weinberger*, 507 N.W.2d 733, 735 (Iowa Ct. App. 1993)]. David's alimony payments will be deductible from his gross income in calculating his income tax obligation, giving him some income tax benefit. *See* I.R.C. §§ 62(a)(10), 215(a) (2007). David received a substantial property award, including the homestead, which will allow him to continue working and farming, thus enjoying a lifestyle approaching the one he enjoyed during the course of the marriage, even after his alimony payments. The alimony award was not excessive in relation to David's current income and earning capacity.

Id. at *3. We likewise concluded the court's property division was not unjust or inequitable

> [c]onsidering the fact David received the homestead, thus allowing him to continue the farming operation, the length of the marriage, Jody's poor health, and the great disparities in income and earning capacities of the parties . . . . [W]e believe the property division, while somewhat favorable to Jody, would nevertheless remain equitable. The economic provisions of a dissolution decree are "not a computation of dollars and cents, but a balancing of equities." [*In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998)].

Id. at *4.

Less than two months after our opinion was filed, David filed his petition for modification, asserting there had been a material and substantial change of circumstances since the time of the decree, necessitating a modification of alimony and insurance requirements. His petition stated that "[a]s a result of the [c]ourt's orders, David does not have sufficient assets to farm at a sufficient rate. As a result, he is unable to earn the income necessary to pay the excessive alimony award." Additionally, his petition stated that "[s]ince the original [d]issolution of [m]arriage, [David's] health has rapidly deteriorated. His back is shown evidence of nerve impingement, which has created more of a disability. This has also deteriorated his ability to work and earn money . . . ." Shortly before trial, David was permitted to amend his petition to add that, as an alternate ground for eliminating his spousal support obligation, Jody's "need for alimony no longer existed." Jody resisted.

Following a trial, the district court in May 2012 entered its order, later amended, finding a substantial change in circumstances had occurred since the entry of the original decree.[1] Concerning Jody's disability and expenses, the court found:

> [Jody] claims to continue to suffer from back pain and recently underwent a cognitive restructuring program at the Mayo Clinic in Rochester, Minnesota. Based on their findings, her condition and pain complaints are without any objective findings. She claimed at trial a need for future surgery but provided no medical basis for her opinion. She reported limitations which included an inability to travel long distances. Based on the medical evidence Jody provided, the court questions her claims of total disability. A determination by the Social Security Administration of her disability

[1] We note that the dissolution and modification trials were held before different judges.

> is not found to be conclusive evidence of her inability to supplement her income.
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> Jody reports a mortgage payment of $251 per month. She also claims expenses which are in excess of $2000 per month. She claims she cannot survive without $1000 per month. She still has her IRA with a balance of $103,000. She resides with her mother who shares in some of her household expenses.
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> Jody enjoys gambling and has dedicated a lot of time to the endeavor since the marriage was dissolved. She gambles frequently at various casinos around Iowa. Her trips contradict her claims of travel restriction and financial hardship. She has risked over $100,000 since 2008.

The court determined David's spousal support award should be modified to $500 a month, explaining:

> David's health has deteriorated. He is making less money in an economy with a much higher cost of living than at the time of the divorce. He is barely able to meet his monthly expenses.
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> Jody has not established an ongoing need for support in the amount of $1000 per month. Her monthly expenses are low based on her residence with her mother. She has sufficient disposable income to gamble an average of nearly $2000 per month since the dissolution. While she is entitled to some ongoing spousal support, circumstances at the present time merit a modification of the decree.

The court also found that, based on David's "current financial circumstances," David was no longer obligated to maintain a life insurance policy as ordered in the dissolution decree to provide Jody support in the event of David's death.

Jody now appeals.[2]

II. Scope and Standards of Review.

As an equitable action, our review of this modification proceeding is de novo. Iowa R. App. P. 6.907. We examine the entire record and decide anew

[2] We note the parties' appendix contains an all too frequently seen error: the violation of Iowa Rule of Appellate Procedure 6.905(7)(c) which mandates "[t]he name of each witness whose testimony is included in the appendix shall be inserted on the top of each appendix page where the witness's testimony appears."

the legal and factual issues properly presented and preserved for our review. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). Especially when considering the credibility of witnesses, we give weight to the district court's findings of fact, but are not bound by them. Iowa R. App. P. 6.904(3)(g). We need not separately consider assignments of error in the 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*, 156 N.W.2d 845, 846 (1968).

III. Discussion.

On appeal, Jody argues the modification court erred, in numerous respects, in finding a substantial change of circumstances had occurred since the entry of the original decree. She contends argues the court erred in (1) finding David's health had deteriorated; (2) calculating David's monthly income and finding he is barely able to meet his monthly expenses; (3) shifting the burden of proof to Jody to establish she had an ongoing need for support in the sum of $1000 per month; (4) questioning Jody's disability status; and (5) admitting and relying upon evidence of Jody's gambling activity. Jody also argues the modification court erred in terminating David's obligation to maintain an insurance policy or provide other security for future alimony payments; and in not ordering David to pay Jody's attorney fees at the modification trial. Both parties seek appellate attorney fees.

A. Substantial Change in Circumstances.

We begin our analysis with these relevant legal principles. "[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) (2011); *see also In re Marriage of Pals*, 714 N.W.2d 644,646 (Iowa 2006). In determining whether there was a substantial change of circumstances, a court may consider the factors set forth in section 598.21C(1).

The modification court determined David's health had deteriorated, his income had decreased, and as a result, he had difficulty meeting his monthly expenses. As to Jody, the court found her monthly expenses were lower than she claimed, particularly in light of her ability to spend money gambling. Based on these determinations, the court found David's support obligation should be reduced by half. Upon our thorough de novo review of the record, we find the court did not err in reducing David's support obligation, but we find it incorrectly considered certain evidence and therefore reduced the obligation too much.

Ultimately, David testified his health began to change two to three years ago, when he was put on light duty, though he testified "maybe even before that" he was having problems. He testified his employer had eliminated his light-duty job a month-and-a-half to two months before the modification trial, and he had to change to a $17-an-hour job, which was less than the $22 an hour he was earning at the time of the dissolution trial.

It is clear the dissolution court considered David's health at the time it entered the decree, and although it generally noted David had some wear and tear, it found David could continue working at the amount of pay he was receiving indefinitely. However, based upon David's health records, information from his employer, and David's testimony, we agree with the modification court's determination that David's health had deteriorated since the entry of the

dissolution decree, and the deterioration required him to change to a position with a lower hourly wage that reduced his employment income by about 23%. This finding was properly considered by the modification court in determining whether there was a substantial change in circumstances. *See* Iowa Code § 598.21C(1)(a) ("Changes in the employment, earning capacity, income, or resources of a party."), (e) ("[c]hanges in the physical . . . health of a party.").

David also testified his farming income had decreased, and the modification court did not attribute any farming income to him in its ruling. At the time of the dissolution, David was farming on his own farm, but at the time of the modification, after having sold the farm, he was custom farming. David stated the decrease was caused "in part, by the fact that he had to sell a substantial amount of his equipment at the farm auction ordered by the dissolution court." However, the dissolution decree states, and the dissolution trial transcript evidences, the parties agreed that David would keep certain property that he would need to continue farming, and he accepted the appraised value for those items. It is unclear why he sold the equipment, but in any event, he did not appeal that portion of the decree in his direct appeal, and we find it to be irrelevant at this point, particularly in light that the decision to sell and then repurchase certain equipment was self-inflicted. Similarly, David now complains about the dissolution court's valuation of the crops existing at the time of the dissolution, but he did not appeal their valuation on direct appeal. He does not now get a second bite at the apple on these issues. Finally, David testified he still had outstanding crops to be sold and was unsure of their value, but clearly he had some farming income coming in. As the dissolution court noted in its

decree, "[t]he court recognizes that the farming operation always will show losses because of its expense deductions and depreciation, but certainly David is not farming for free . . . ."

The modification court also noted Jody was brought before the court on contempt charges for her refusal to cooperate in signing necessary satisfactions to remove judgment liens against David's property, which "contributed substantially to [David's] loss of income from farming," a proper consideration under Iowa Code section 598.21C(1)(j). While this is certainly not condoned, Jody testified there had been a disagreement as to what items were satisfied, and she ultimately provided the satisfaction. Additionally, David testified that after he was unable to get refinancing because of the judgment liens still attached to the property, he sold the farm to his parents in an arm's length transaction, and he continued to live in the house rent free. Despite his hardships, he was able to increase his 401(k) value by approximately $40,000 since the dissolution, and the account had a balance of approximately $140,000 at the time of the modification trial.

In addition, David's 2010 federal tax return reported actual net farm earnings on his Schedule F[3] of $34. Although that amount is nominal, it is a far cry from the Schedule F net losses shown on his 2008 and 2009 tax returns of $25,286 and $13,845, respectively. Similarly, the couples' prior tax returns from 2002 to 2007 also show Schedule F losses anywhere from approximately $11,000 to $40,000. As noted above, these losses include expenses and depreciation which David is entitled to for purposes of calculating his tax liability.

[3] Profit or Loss from Farming.

But, given the history of his farm income reported and the evidence David presented at the modification trial, we cannot say, and the modification court did not expressly find, that David established there had been a substantial change of circumstances as to his farming income since the entry of the dissolution decree.

The modification court also found Jody did not need $1000 a month in support, specifically finding her monthly expenses were lower than she claimed and noting she had spent quite a bit of money gambling. The modification court did not state which paragraphs in Iowa Code section 598.21C(1) it considered in its determinations. Accordingly, we address each potentially relevant factor.

Section 598.21C(1)(a) permits the court to consider changes in the employment, earning capacity, income, or resources of a party. David presented no evidence that Jody's employment or income had changed, so we rule out those factors. Jody testified that her mother now lived with her, and she paid for some of their groceries—a slight increase in Jody's resources.

As to Jody's earning capacity, David again argued, as he did at the dissolution trial, that Jody was not truly disabled. At the dissolution trial, David testified and called several witnesses that testified, including the parties' two sons, Jody regularly performed yard work, including mowing, weeding, and helping build a rock wall. Jody admitted at the dissolution trial that she did all of those things. However, she testified she did them over a span of time, and she was regularly in pain as a result. The parties' sons testified she had pain; the other witnesses testified they did not know the amount of time it took Jody to complete any of those tasks or the status of her pain. Despite this testimony, the dissolution court believed Jody and found she continued to have chronic back

pain and chronic pain syndrome. A panel of this court found that determination was supported by the record in our 2009 opinion.

At the modification trial, David, in questioning Jody's disability, testified Jody still performed yard work, though he acknowledged he testified at her disability hearing in 1999 that she had a disability. Additionally, he presented a video recording his sister made of Jody moving boxes into her house and carrying her grandchild as evidence Jody was not truly disabled. Jody admitted she had moved the boxes because she could not afford a mover and had no one else to do it. Moreover, she testified she was in pain afterward. Although the modification court questioned whether Jody was actually disabled, it did not make a finding that David had established a substantial change a circumstances in Jody's earning capacity concerning her disability since the entry of the dissolution decree.[4]

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[4] Although it did not make any finding that David proved Jody was not or was no longer disabled, the modification court questioned Jody in depth at the modification trial concerning an April 2008 report from a Mayo Clinic physician, and the court referred to the report in its modification order as the basis of questioning Jody's disability. While the court's description of the doctor's opinions in the report are accurate, upon our de novo review of the record, we do not find the report was relevant, given the report was admitted in the dissolution trial and that court still found Jody was disabled and required support.

Additionally, the modification court's report of the Mayo Clinic doctor's opinions, without further context, did not reflect the full picture. At the very beginning of the doctor's examination report, attached to his cover letter, he notes Jody

> underwent a third lumbar spine surgery in 2005 for what she describes as cyst removal and this did not help her symptoms. She was subsequently told that she needs spine fusion surgery.
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> Her physician back home referred her to the Twin Cities Spine Center and she was evaluated by Dr. Francis Dennis in approximately December 2007. Spinal fusion surgery was recommended once again for her. She is not necessarily eliminating the possibility of that procedure being done but is here for further evaluation.

Although that Mayo Clinic physician had a different opinion as to whether Jody needed surgery, his report clearly states surgery was recommended to Jody by two other doctors and that she was seeing that doctor at the Mayo Clinic to pursue other options.

Other possible factors the court may consider in determining whether there has been a substantial change of circumstances include changes "in the physical, mental, or emotional health of a party" and "in the residence of a party," as well as "[p]ossible support of a party by another person." Iowa Code § 598.21C(1)(e), (f), & (h). The modification court made no specific determination that David established there had been changes in Jody's physical, mental, or emotional health. It indicated Jody's mother shared in some of the household expenses, though Jody testified her mother only paid for groceries. Additionally, the modification court noted Jody's mortgage payment was less than the amount she had previously indicated she would be paying in rent. Nevertheless, although those findings were certainly permissible under paragraphs (f) and (h), Jody was not required to prove she needed the entire amount of spousal support awarded to her in the original dissolution decree. Her social security disability income was $622 a month. Comparing Jody's expenses listed on her 2008 affidavit of financial status to those expenses listed on her 2011 affidavit of financial status, her reported monthly expenses in 2011 were about $1000 less than her 2008 reported monthly expenses. Even after adding in the full amount of monthly spousal support awarded to her by the dissolution court, her expenses still exceed her monthly income. There was no showing that her earning capacity had changed.

Finally, it is clear the modification court was not pleased with the amount of money Jody spent gambling. Over the course of three years, the evidence

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Additionally, that doctor's final diagnoses stated, among other things, Jody suffered from chronic pain syndrome. We do not find this report to be evidence that Jody does not suffer a disability, and we do not address this report further.

shows she had "risked over $100,000 since 2008," as the modification court found. While that may be so, she received a $100,000 property award in the dissolution. It may not have been spent wisely, or how David would like to have seen the money spent, but that money was Jody's to spend as she wished. *See In re Marriage of Olson*, 705 N.W.2d 312, 316-17 (Iowa 2005). Moreover, we are not in the business of making moral judgments of whether or not people have spent their money wisely. As our supreme court has pointed out:

> [W]e should not consider the constraints a payor spouse would like to place on the payee spouse when the payee spouse uses the support in a manner inconsistent with the wishes of the payor spouse. Nor should a court punish a person who is entitled to support because we disapprove of the way the person receiving the support spends the support.
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> [The former wife] is entitled to support because of the factors set forth in Iowa Code section 598.21(3). Those factors indicate [the former wife] is entitled to traditional alimony due to the minimal property distribution, her poor health, the length of the marriage, and the disparity in earning potential. If [the former wife] spends her support on gambling, rather than on the necessities of life, she will have to live with the consequences of that decision, not [the former husband].

See id. In conclusion, the fact that she spent money gambling is not evidence that her support award was excessive or not needed, particularly in light of Jody's $100,000 property settlement and considering no change in her earning capacity was established. Consequently, we determine the modification court improvidently considered Jody's gambling activity in determining the amount of support David should pay.

Upon our de novo review, we agree with the modification court's determination there had been a substantial change in David's employment or physical health since the entry of the dissolution decree which resulted in a

decrease in his employment income by 23%. Beyond that, we conclude David did not establish any other factors applied in considering whether a substantial changes in circumstances since the entry of the decree that would warrant an additional reduction of his spousal support obligation had occurred, and to the extent the modification court so found, we conclude that finding was an error. Accordingly, we find David's support obligation should only be reduced by 23% to $770 a month.[5]

B. Insurance Policy.

Jody also argues the modification court erred in terminating David's obligation to maintain an insurance policy or provide other security for future alimony payments. We agree. For all the reasons stated above, David established his employment income had decreased, and we decreased his spousal support amount by that percentage. That does not change Jody's need for spousal support, particularly if something were to happen to David. Accordingly, we reverse the modification court's finding that David no longer needed to provide an insurance policy with Jody as a beneficiary, and we reinstate the insurance policy provision in the decree of dissolution.

C. Attorney Fees.

Jody argues the modification court should have awarded her attorney fees for the modification trial. Trial courts have considerable discretion in determining whether to award attorney fees. *In re Marriage of Guyer*, 522 N.W.2d 818, 822

[5] Because we find the modification court improvidently considered Jody's gambling activity, we do not further address Jody's challenge that the modification court erred in allowing David to amend his petition shortly before trial to include a claim that Jody did not need the support.

(Iowa 1994). "Whether attorney fees should be awarded depends on the respective abilities of the parties to pay." *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006) (*quoting Guyer*, 522 N.W.2d at 822). Additionally, an award must be fair and reasonable. *Guyer*, 522 N.W.2d at 822.

The modification court required each party to pay their respective trial attorney fees, and although we modify the court's reduction of David's spousal support obligation, we cannot find the court abused its discretion in requiring each party to pay their own trial attorney fees. Accordingly, we affirm the district court's denial of trial attorney fees to Jody.

Both parties request an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We 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 district court's decision on appeal. *See In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Because we find the modification court erred in reducing David's spousal support award to $500 a month, and Jody was required to defend that decision on appeal, we award Jody $1000 in appellate attorney fees.

IV. Conclusion.

For the reasons stated above, we modify the modification court's reduction of David's spousal support obligation to $770 a month. We also find the court erred in terminating David's insurance policy requirement, and we accordingly reinstate that provision of the original dissolution decree. Finally, we conclude the court did not abuse its discretion in requiring each party to pay their

respective trial attorney fees, but we award Jody appellate attorney fees of $1000. Costs on appeal are assessed to David.

AFFIRMED AS MODIFIED.