IN THE COURT OF APPEALS OF IOWA

No. 2-687 / 12-0156
Filed September 19, 2012

IN RE THE MARRIAGE OF DORIS E. MILLER
AND DWAYNE L. MILLER

Upon the Petition of
DORIS E. MILLER,
Petitioner-Appellee/Cross-Appellant,

And Concerning
DWAYNE L. MILLER,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Franklin County, Christopher C. Foy, Judge.

Dwayne Miller appeals from the district court's dismissal of Dwayne's application to modify the parties' dissolution decree; Doris Miller cross-appeals from the amount of the attorney fee award. **AFFIRMED ON BOTH APPEALS.**

Judith O'Donohoe of Elwood, O'Donohoe, Braun, White, L.L.P., Charles City, for appellant/cross-appellee.

Timothy M. Sweet and Maria L. Hartman of Sweet Law, P.L.C., Reinbeck, for appellee/cross-appellant.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

POTTERFIELD, J.

Dwayne Miller appeals from the district court's dismissal of Dwayne's application to modify the parties' dissolution decree; Doris Miller cross-appeals from the amount of the attorney fee award. We affirm on both appeals.

I. Background Facts and Proceedings.

Dwayne Miller and Doris Miller were married for thirty-four years. The decree dissolving their marriage entered on November 22, 1993, incorporated the terms of Dwayne and Doris Millers' stipulation. Under the decree,

> The Respondent [Dwayne] shall receive his pension with IPERS subject, however, to the requirements of this paragraph. The IPERS Plan Administrator shall withhold 46% of the amount of Respondent's period payments or $488.52 per month, as they become due, and pay it to the Franklin County Clerk of Court . . . to apply on Respondent's alimony obligation under paragraph 14 . . . . If Respondent predeceases Petitioner [Doris], Petitioner shall receive the full death benefit under the IPERS plan, and Respondent shall maintain his beneficiary designation accordingly.
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> . . . .
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> Respondent shall pay alimony for the benefit of Petitioner equal to 46% of the amount of his periodic pension payments from IPERS, or $488.52 per month, payable as said payments become due, continuing until the earlier of Petitioner or Respondent's death.

At the time of dissolution, Dwayne was fifty-nine years old, retired from teaching receiving monthly pension benefits from IPERS in the amount of $1218, and working part-time as a custodian earning about $300 per month; Doris was two days shy of sixty years old and self-employed as a home health aide with no regular income.

Doris's father passed away in 1994 and Doris and her siblings each inherited a one-third share of one-half of 120 acres of farmland. Her mother received the other one-half interest.

Dwayne married Ardith in 1994. Dwayne and Ardith have operated two small businesses and own rental properties. They live on an acreage Ardith owned before she married Dwayne, and which they now own as joint tenants.

In February 2005, Dwayne filed an application to modify the decree by terminating alimony. He asserted Doris's income had increased substantially. A hearing was held at which Doris contended the IPERS payments, though titled alimony, were actually part of a property settlement. On November 28, 2005, the district court ruled the IPERS payments were alimony, but "Doris does not have income such that her need for alimony has been alleviated" and "Dwayne's financial circumstances have not changed sufficiently to warrant modification."

In 2006, Doris's mother passed away. The farmland was sold and Doris received a portion of the proceeds of which she placed some in investments and applied the rest toward repairing her home.

On March 1, 2010, Dwayne filed this second instant application for modification, again seeking to terminate alimony, asserting Doris had inherited monies from her mother's estate and "has become self-supporting and is no longer in need of alimony to maintain her standard of living, which is currently higher than the standard of living of the Respondent."

On December 27, 2011, the district court entered its ruling dismissing Dwayne's application and awarding Doris $1700 in attorney fees. Dwayne appeals the dismissal of his application; Doris cross-appeals the amount of attorney fees awarded.

II. Scope of Review.

We review this appeal de novo. *In re Marriage of Morris*, 810 N.W.2d 880, 885 (Iowa 2012); *see also In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006) ("'A proceeding to modify or implement a marriage dissolution decree subsequent to its entry is triable in equity and reviewed de novo on appeal.'" (citation omitted)).

III. Discussion.

A. *Dwayne's Appeal*. We begin with the pivotal question of whether the division of Dwayne's IPERS pension was alimony or a property division. If alimony, the award is subject to modification. *See* Iowa Code § 598.21C(1) (2011);[1] *In re Marriage of Martin*, 641 N.W.2d 203, 204 (Iowa Ct. App. 2001). If the court intended the award to be a property division, it is not modifiable. Iowa Code § 598.21(7).

The 1993 dissolution decree adopted the parties' stipulation, and both parties assert their original intentions with respect to the stipulation. However, our inquiry does not focus on the parties' intent. *See Morris*, 810 N.W.2d at 886. "[O]nce the court enters a decree adopting the stipulation, '[t]he decree, not the stipulation, determines what rights the parties have.'" *Id.* (citation omitted). It is thus the intent of the district court that is relevant. *Id.*

Here, we have a 2005 determination by the district court that the award was one of alimony. *Cf*. *Morris*, 810 N.W.2d at 888 (remanding to district court for its interpretation of the dissolution decree). Neither party appealed. In 2011, the district court determined it was not precluded from revisiting the issue, but

[1] Section 598.21C(1) states the court "may subsequently modify . . . spousal . . . support orders when there is a substantial change in circumstances."

again determined the award was alimony. Because the district court intended the award to be spousal support, it is modifiable under certain circumstances.[2] *See In re Marriage of Marshall*, 394 N.W.2d 392, 394 (Iowa 1986) (stating "where the duration of alimony payments is indefinite, the dissolution decree may be modified on a showing of substantial change in circumstances, not contemplated by the court at the time of its initial decree").

We next consider whether Dwayne demonstrated the circumstances necessary to justify modification. A party seeking modification of a dissolution decree must establish by a preponderance of the evidence that "there has been a substantial change in the circumstances of the parties since the entry of the decree or of any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief." *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). The changes must be more or less permanent and continuous. *In re Marriage of Wessels*, 542 N.W.2d 486, 489-90 (Iowa 1995). We note that the initial decree is entered with a view to reasonable and ordinary changes that may be likely to occur, including medical problems associated with the aging process. *See id.* at 490 (citing *In re Marriage of Skiles*, 419 N.W.2d 586, 589 (Iowa Ct. App. 1987)). "The trial court nevertheless has reasonable discretion in passing upon the advisability or necessity of a

[2] Relevant factors are set forth in section 598.21C(1)(a)-(*l*) and include: changes in the employment, earning capacity, income, or resources of a party; receipt by a party of an inheritance, pension, or other gift; changes in the medical expenses of a party; changes in the physical, mental, or emotional health of a party; changes in the residence of a party; remarriage of a party; possible support of a party by another person; and other factors the court determines to be relevant in an individual case.

dissolution decree provision. On appeal we do not disturb the trial court's conclusion unless there has been a failure to do equity." *Id.*

The district court made detailed findings of fact analyzing the parties' income and net worth history since the 2005 action, and we find no reason to repeat them here. There is substantial support in the record, especially considering the court's credibility findings, to conclude "[t]he circumstances of Doris and Dwayne are not significantly different now than they were at the time of the first modification trial." We agree with the district court that Dwayne has failed to establish a change of circumstances warranting modification of the alimony provisions of the dissolution decree. We affirm on Dwayne's appeal. *See* Iowa Ct. R. 21.29(1)(b), (d), (e).

B. *Doris's cross-appeal*. With respect to Doris's cross-appeal, the district court awarded Doris $1700 in attorney fees. She contends this was insufficient. An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We find no abuse of discretion; therefore, we affirm on the cross-appeal.

C. *Appellate attorney fees*. Doris also seeks an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (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. *Maher*, 596

N.W.2d at 568. In light of the parties' similar incomes, we deny the request for appellate attorney fees.

Costs on appeal are taxed to Dwayne.

AFFIRMED ON BOTH APPEALS.