

IN THE COURT OF APPEALS OF IOWA

No. 2-462 / 01-1541
Filed July 19, 2002

**IN RE THE MARRIAGE OF MARY KEOUGH LYMAN
AND HERBERT M. LYMAN, SR.**

**Upon the Petition of
MARY KEOUGH LYMAN,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
HERBERT M. LYMAN, SR.,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Johnson County, Amanda
Potterfield, Judge.

The respondent appeals and the petitioner cross-appeals a ruling
modifying the alimony provisions of the dissolution of marriage decree.

AFFIRMED.

Mark McCormick and David Charles of Belin Lamson McCormick
Zumbach Flynn, P.C., Des Moines, for appellant.

Daniel Bray, Iowa City, and Steven Lytle of Nyemaster, Goode, Voigts,
West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Considered by Mahan, P.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Herbert M. Lyman, Sr. appeals a ruling modifying the alimony provisions of the dissolution of marriage decree. He argues the alimony should be eliminated or reduced to a nominal amount. Mary Keough Lyman cross-appeals contending the alimony provisions should not be modified, and she should be granted a new trial and attorney fees. We affirm.

I. Background Facts and Proceedings. The parties' marriage ended on March 10, 1995. They had been married for twenty-three years, had raised a family and attained an affluent lifestyle. Contemplating continued high income for Herbert, the parties agreed Herbert would pay monthly alimony of \$33,333.33 to Mary. If Herb's adjusted gross income exceeded \$1,500,000.00 in any year, an additional alimony payment of ten percent of adjusted gross income was ordered.

The decree included the following:

Herbert shall devote his best efforts to maintain full-time employment, and it is intended and anticipated by the parties that Herbert shall maintain annual earnings at least equivalent to earnings of 1993 and 1994 until Mary reach age 65 on April 26, 2014.

Herbert's 1993 income was \$1,525,339.00 and \$847,716.00 in 1994. On December 5, 1997, Herbert was terminated from his employment with A.G. Edwards and Sons. After trying and failing to find work in New York in the securities business, he opted to join a friend in Texas in the on-line securities sales business. After his loss of employment there was a series of missed alimony payments, contempt applications, contempt findings, and an application to modify the decree filed in the Texas courts.

Herbert has had two marriages since this dissolution. Herbert's view of the alimony agreement changed over the years. A friend described Herbert's alimony obligation as a "source of aggravation" for him. He viewed it as allowing her to get on with her life and his paying for it. Herbert stopped making the alimony payments until found in contempt. He failed to appear for judgment debtor examinations. He has ignored the provision of the decree requiring him to provide Mary with copies of his tax return.

Herbert brought an action to modify his alimony obligation based on his loss of employment with A.G. Edwards. He alleged his earnings had not been equivalent to his earnings in 1993 and 1994 as was anticipated in the dissolution decree. After trial, the district court found Herbert had shown a substantial change in circumstances warranting modification of his alimony obligation from \$33,333.33 per month to \$10,000.00 per month.

II. Scope of Review. Our review is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). No hard and fast rules govern the economic provisions of a dissolution decree, rather, each decision turns on its own uniquely relevant facts. *Id.* Thus, we accord the trial court considerable latitude in resolving disputed claims and will disturb a ruling only when there is a failure to do equity. *Id.*

III. Modification of Alimony. Modification of a dissolution decree is governed by Iowa Code section 589.21(8) (2001). "Modification of the alimony provisions of a decree is justified only if there has been some material and substantial change in circumstances of the parties, financially or otherwise,

making it equitable that other terms be imposed.” *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991). The party seeking the modification must prove the change in circumstances by a preponderance of the evidence. *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998); *Van Doren*, 474 N.W.2d at 586.

In determining whether there is a substantial change in circumstances, one of the things the court considers is a change in the employment, earning capacity, income, or resources of a party. Iowa Code § 598.21(8). “Circumstances that have changed, to justify modification of alimony, must be those that were not within contemplation of the trial court when the original decree was entered.” *Van Doren*, 474 N.W.2d at 586 (citing *In re Marriage of Full*, 255 N.W.2d 153, 159 (Iowa 1977)). Such changes also must be more or less permanent or continuous, not temporary. *Id.*

There is no dispute Herbert’s income from employment has been reduced. The trial court found, “Herbert did not intentionally reduce his income to deprive Mary of support.” Such credibility determinations are for the trier of fact. *Nichols v. Schweitzer*, 472 N.W.2d 266, 275 (Iowa 1991). The question then is whether his overall financial circumstances have changed sufficiently and permanently enough to warrant modification. We find they have.

Herbert lost his job. This was not contemplated by the court at the time of the decree. At the time of the modification hearing, Herbert was earning approximately \$100,000 to \$120,000 per year. However, it is his earning capacity that is considered when determining the amount of alimony to which a party is entitled. *In re Marriage of Wegner*, 434 N.W.2d 397, 399 (Iowa 1988).

The district court found Herbert's earning capacity at this point in his life is between \$200,000 and \$250,000 per year. It made this assessment based on Herbert's past success as a stockbroker and his considerable skill in that area.

Mary argues the district court erred in reducing Herbert's alimony obligation to \$10,000 per month because, after losing his job, he voluntarily chose to leave his career as a stockbroker to pursue an entrepreneurial endeavor. On the record before us, we find Herbert's position at A.G. Edwards had allowed him a unique opportunity that resulted in his high income. His decision to change careers was not for the purpose of reducing his income. Although we cannot approve of some of Herbert's behavior, we must separate it from the economic reality existing when this case was tried. We find the district court's assessment of Herbert's earning capacity and the modification of the alimony award to be within the permissible range of the evidence.

IV. Motion for New Trial. In her cross-appeal, Mary argues the district court erred in denying her motion for new trial. She claims Herbert's return to his retail broker career within one month after trial is newly discovered evidence that could not have been discovered prior to the conclusion of trial.

A district court has broad discretion in ruling on new-trial motions, and we will not interfere in the exercise of that discretion in the absence of an abuse. *In re Marriage of Wagner*, 605 N.W.2d 605, 609 (Iowa 2000). The trial court is accorded broad but not unlimited discretion. *Id.* at 608. An abuse of discretion is found when the trial court has clearly exercised its discretion on untenable grounds or acted unreasonably. *Id.*

Iowa Rule of Civil Procedure 1.1004(7) allows a party to seek a new trial on the ground material evidence was discovered which could not with reasonable diligence have been discovered and produced at trial. A party seeking a new trial on such grounds must demonstrate three things: (1) the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) the evidence is material and not merely cumulative or impeaching; and (3) the evidence will probably change the result if a new trial is granted. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). Under Iowa law, "newly discovered evidence" sufficient to merit a new trial is evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time. *Id.* at 762-63. Motions for new trial based on newly discovered evidence are not favored. *Id.* at 762.

The district court denied Mary's motion for a new trial, finding Mary's counsel declined to question Herbert about the positions for which he had interviewed. Had counsel done so, the information regarding Herbert's new position with Morgan Stanley could have been discovered. The court noted Herbert's actual income information would be available when Herbert disclosed his tax returns to Mary, as required in the original decree and the modification. If Herbert's income changes substantially, Mary is free to file another request for modification based on Herbert's new employment. Accordingly, we find no error in the district court's denial of Mary's motion for new trial.

V. Attorney Fees. Mary requests an award of trial and appellate attorney fees. Attorney fees are not a matter of right but rest within the sound discretion

of the reviewing court. *In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). We decline to award Mary attorney fees.

AFFIRMED.