IN THE COURT OF APPEALS OF IOWA

FILED
DEC 22 1988
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARY BETH HILGER
AND MICHAEL J. HILGER

Upon the Petition of)
MARY BETH HILGER,)
Petitioner-Appellant,)
And Concerning)
MICHAEL J. HILGER,)
Respondent-Appellee.)

121

8-513
88-296

Appeal from the Iowa District Court for Black Hawk County (No. 32985), James L. Beeghly, Judge.

Petitioner former wife appeals from the district court order which granted respondent former husband's application for modification of marriage dissolution decree and denied petitioner former wife's counter-application for modification. **AFFIRMED AS MODIFIED.**

Patricia A. McGivern of Clark, Butler, Walsh & McGivern, Waterloo, for appellant.

David H. Correll of Correll & Sheerer, Cedar Falls, for appellee.

Considered by Donielson, P.J., and Sackett and Habhab, JJ.

PER CURIAM 135

Mary Beth Hilger appeals the modification court's decision decreasing the amount of alimony previously awarded her as a result of the dissolution of her marriage to Michael Hilger. She contends the trial court erred in failing to consider all relevant factors as set forth in Iowa Code section 598.21(8) upon ordering a reduction of alimony. We affirm the trial court, but modify in the respects hereafter noted.

Our review is de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

Mary Beth and Michael Hilger were married for twenty-two years. Their marriage was dissolved on November 30, 1984. Michael was ordered to pay Mary Beth alimony in the amount of $700 a month until her death or remarriage. There is an additional provision that alimony is to be reduced at such time as she receives social security by an amount equal to the payments she receives as the divorced spouse of Michael. In addition, Mary Beth is required on January 1 of each year to furnish Michael with a medical doctor's statement as to "whether she is able to seek full- or part-time employment."

On March 23, 1987, the appellee, Michael Hilger, filed an application for modification of the dissolution decree seeking termination or reduction of alimony. He asserts,

as grounds for modification, that Mary Beth is capable of gainful employment. Mary Beth resists the application and filed a counter application asking the court to increase the amount of alimony previously awarded her.

The term "alimony" generally means an allowance for spousal support and is distinguishable from property division. Brin v. Brin, 240 Iowa 659, 651, 37 N.W.2d 261, 262 (1949). It is an allowance to the spouse in lieu of the legal obligation for support. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). It is not an absolute right. In re Marriage of Maskel, 225 N.W.2d 115, 120 (Iowa 1975). However, once entered, it survives the marriage. As the supreme court in In re Marriage of Carlson, 338 N.W.2d 136, 140 (Iowa 1983), stated:

> When the court awards alimony, however, it refuses to wipe clean the marital slate. The court determines, instead, the husband has a continuing support obligation and the lots of the parties are to this extent still bound together. The reach of that obligation may vary with the financial fates of the parties, but the obligation has been created and it survives the marriage.

Thus, modification of the alimony provisions of a dissolution decree is justified only if there has been some material and substantial change in the circumstances of the parties, financially or otherwise, making it equitable other terms be imposed. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Id.;

Mears v. Mears, 213 N.W.2d 511, 513 (Iowa 1973). 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. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983).

Turning to the record, when this marriage was dissolved in 1984, Mary was on a leave of absence from a housekeeping position at Cedar Falls Lutheran Home. She took a temporary leave of absence on June 30, 1984, under the advice of her doctor for mental health reasons. In that position, she grossed approximately $136 every week. She subsequently terminated her employment with Cedar Falls. In the spring of 1986 she began baby-sitting for a family of two children. Her present gross earnings in this position are $100 every week. Mr. Hilger's gross income was $40,087 in 1984. His present gross earnings are approximately $51,000. His current wife grosses $16,640 annually.

Mary's medical expenses have increased approximately $500 since 1985. She has several physical and mental disorders which require daily medication. She has no insurance and testified regarding her inability to afford such. She suffers from high blood pressure, arthritis,

depression, low thyroid, and post menopausal syndrome. She is currently under doctors' care for these problems.

Mary Beth's emotional health is progressing slowly. Her treating physician testified that she is currently capable of working in a sheltered environment and that her position as baby-sitter aides her recovery. Appellee's consulting physician testified she could seek retraining, but concurred in the diagnosis with the treating physician. She has been encouraged by her doctor and others to seek vocational rehabilitation or other training that will qualify her for better employment, but she has declined to do so. The trial court, in reducing the alimony, determined that her "psychiatric condition did not prevent her from working at employment for which she is physically and educationally prepared" and concluded that the level of alimony now provided appears to exacerbate her emotional difficulties and has proven to be counterproductive.

However, a substantial part of Mary Beth's problems existed at the time of the dissolution decree. In its decree the dissolution court found, among other things, that:

> [S]he [Mary] has no particular work skill although she has worked outside of the home on several occasions . . . . More recently she worked for another year at the Lutheran Home . . . . She ran a floor waxer and cleaned floors and also worked in the laundry. She was earning $4.25 an hour for 32 hours a week. On the advice of a doctor, she left the employment and this particular job is no longer. Petitioner is under the care of a medical

> doctor who has prescribed certain medication. She also has been evaluated by Dr. Peburn, a psychiatrist, whose diagnosis of petitioner is depressive neurosis . . . . Due to her present emotional and physical problems, employment was not recommended at this time as part of her therapy. He present condition would make it difficult for her to become financially independent.

As we previously stated, the burden is on the party seeking modification of a dissolution decree to prove a substantial change in circumstances from the time the decree was entered which makes modification of the decree equitable and just. In this respect, even if a substantial change is shown, we will not modify the terms of the decree unless its enforcement will be attended by a positive wrong or injustice as a result of changed conditions. Ellis v. Ellis, 262 N.W.2d 265, 267 (Iowa 1978).

Iowa Code section 598.21(8) (1987) states in part:

> In determining whether there is a substantial change in circumstances, the court will consider the following:
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> a. Changes in the employment, earning capacity, income, and resources of a party.
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> * * *
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> c. Changes in the medical expenses of a party.
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> * * *
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> e. Changes in the physical or emotional health of a party.
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> g. Remarriage of a party.

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

Mary Beth was not employed at the time of the dissolution decree. Since then, however, she has been employed and is presently earning about $100 per week. When we combine this amount with the $700 of alimony she receives each month, she has income of $1,100. According to her financial statement, this is somewhat less than the $1,164 monthly expenses she sets forth.

On the other hand, Michael's income has increased since the dissolution decree from an annual gross income of $40,000 to $51,000, and when we combine his present wife's gross income, Michael has household gross earnings of $67,500.

After considering all the attending circumstances, including Mary's needs and Michael's ability to provide spousal support, we find it equitable and just that the decree be modified but not to the extent provided by the trial court. Mary Beth may very well be in a position to earn greater sums of money from other types of employment, but thus far she has not exhibited this propensity. We urge her, as the trial court did, to reach out and obtain employment more consistent with her physical and emotional ability.

We conclude that respondent's obligation to pay alimony should be reduced to $600 per month. In doing so, we

recognize that this reduction represents but 25% of the amount she is earning over and above the amount of her earnings (which were nil) at the time of the decree. But when we couple her additional medical expenses with Michael's increase in earnings, we believe this result to be equitable. The dissolution court's decree, as it relates to alimony, is in other respects affirmed.

Mr. Hilger was ordered by the court upon dissolution of his marriage to maintain his existing life insurance policies and name Mary Beth as beneficiary on such policies a long as he has an obligation to pay alimony. At the modification hearing, he testified that he removed Mary Beth as beneficiary from one policy and borrowed against the other, thereby diminishing the proceeds should they be distributed. He is directed to name Mary Beth as beneficiary on those life insurance policies that were in existence at the time the dissolution decree was entered and such designation is to continue as long as he has an obligation to pay alimony.

Mary Beth requests we award attorney fees to her. Attorney fees are not a matter of right, but rest within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). Because Michael is in a much better financial position than Mary Beth, he is hereby ordered to pay $750 of her appellate attorney fees. Costs are taxed to Michael.

AFFIRMED AS MODIFIED.