IN THE COURT OF APPEALS OF IOWA

No. 6-175 / 95-822

IN RE THE MARRIAGE OF MERYL A. BULLARD AND JAMES R. BULLARD

FILED
SEP 30 1996
CLERK SUPREME COURT

Upon the Petition of
MERYL A. BULLARD,

Petitioner-Appellee/Cross Appellant,

And Concerning
JAMES R. BULLARD,

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, David L. Christensen, Judge.

James appeals from the district court's denial of his petition to modify the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

James L. Sayre of James L. Sayre, P.C., Des Moines, for appellant.

C. Carleton Frederici and Patricia A. Shoff of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellee.

Considered by Cady, P.J., Streit, and Vogel, JJ. Sackett, C.J., takes no part.

CADY, P. J.

James Bullard appeals from the district court's denial of his petition to modify the parties' dissolution decree. He claims the court erred in failing to find a substantial change in circumstances warranting an elimination of alimony. Meryl Bullard cross-appeals from the district court's denial of her request for attorney fees. Additionally, Meryl requests appellate attorney fees. We affirm with modification.

The marriage of Meryl and James Bullard was dissolved in 1979. Two of the parties' four children were adults at the time of the dissolution and James was ordered to pay child support. The dissolution decree also required James to pay Meryl $800 per month in alimony for one year and then $600 per month until her remarriage, her cohabitation on a regular basis, or until James retires. The decree provided the alimony would be re-evaluated when James retires based on his retirement income.

James filed a petition for modification of the dissolution decree in June 1994 requesting alimony be eliminated based on his expected retirement and Meryl's financial security.

At the time of the dissolution Meryl earned approximately $7000 per year. James earned $45,000 per year. Following the dissolution, Meryl received her Masters of Public Administration and began working for the Veterans Administration. At the time of the modification hearing, Meryl, who was age 62, earned $79,200 in her position with the Veterans Administration. James had remarried and, at age 64,

was a bank president. His income after deduction of his alimony payments was $108,085.

Both James and Meryl intend to retire in the near future. James will receive approximately $60,000 per year in retirement income. Testimony at the modification hearing indicated Meryl will receive between $17,000 and $38,000 per year in retirement income.

Two additional facts will impact the parties' respective financial situations upon retirement. First, all four children born during the marriage are adults. Consequently, James no longer pays child support. Meryl does, however, continue to sporadically provide monetary assistance to the children. Second, Meryl has Crohn's disease, a chronic antoimmune inflammatory disease of the colon. Many of the medical expenses resulting from this disease which are now covered by health insurance, will not be covered upon her retirement.

The district court determined Meryl's employment status and salary increases were within the contemplation of the court at the time of dissolution and therefore found no material and substantial change in circumstances to support a modification. The court denied both James' request for a modification and Meryl's request for attorney fees.

James appeals. He contends the court erred in failing to find a material and substantial change in circumstances. James maintains Meryl's current income was not contemplated by the court at the time of the dissolution.

Meryl cross-appeals. She argues the district court erred in denying her request for $5000 for attorney fees. Additionally, Meryl requests appellate attorney fees.

I. Scope of Review:

Our scope of review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Modification of Alimony:

In order to justify modification of an alimony provision of a dissolution decree, the party seeking the modification must prove, by a preponderance of the evidence, a material and substantial change in the circumstances of the parties, financially or otherwise, making modification equitable. *In re Marriage of Sales*, 419 N.W.2d 586, 588 (Iowa App. 1987). The change in circumstances must be that which was not within contemplation of the trial court when the original decree was entered. *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa App. 1991).

The knowledge of the trial court at the time the award is the reference point for determining whether there has been a change of circumstances. *Full*, 255 N.W.2d 153, 159 (Iowa 1977); *Leo v. Leo*, 213 N.W.2d 495, 496 (Iowa 1973). The original decree is entered with a view that reasonable and ordinary changes may be likely to occur in the relations of the parties. *Id.* Moreover, even if a substantial change is

shown, the decree will not be modified unless its enforcement will be attended by a positive wrong or injustice as a result of changed conditions. *In re Marriage of Sjulin*, 431 N.W.2d 773, 776 (Iowa 1988).

We find James met his burden of proof to show the parties' circumstances today were not envisioned by the trial court when the dissolution decree was granted. Language from the original decree is helpful to our finding. The trial court which granted the original decree found:

> Petitioner (Meryl) is a college graduate. She is an Occupational Therapist. She has not worked full time in the past few months. She has maintained her license and is capable of earning $15,000 per year gross. Petitioner is now 45 years of age and in good health.

It is apparent from this finding the trial court contemplated Meryl would secure full-time employment utilizing her college education. Further, a normal progression of raises in Meryl's income would have been within the contemplation of the trial court. However, the professional and financial success Meryl has achieved through furthering her education, securing her job with the federal government, and progressing through the ranks could not have been within the contemplation of the trial court at the time the dissolution decree was granted. Her annual earnings of $80,000 are more than five times what the original trial court contemplated she would earn. This is a change of circumstance sufficient to warrant modification of alimony.

To determine the amount of an award of alimony we generally balance James' ability to pay alimony against Meryl's need for alimony. *See In re Marriage of Stark*,

542 N.W.2d 260, 263 (Iowa App. 1995). James' income has more than doubled since the time of the dissolution decree, increasing from $45,000 to approximately $110,00. Balancing Jim's increase in income against Meryl's income and needs, and considering the factors which militate against termination of alimony including the impending retirements of both parties, Meryl's medical problems, and Meryl's continued sporadic financial assistance to the adult children, we find a reduction of alimony from $600.00 per month to $400.00 per month is warranted.

III. Attorney Fees:

Meryl contends the trial court erred in denying her request for attorney fees. She seeks an award of $10,000 for her appellate attorney fees.

A. Trial Court:

Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa App. 1983). To overturn an award the complaining party must show the trial court abused its discretion. *In re Marriage of Schettler*, 455 N.W.2d 686, 689 (Iowa App. 1990). Awards of attorney fees must be for fair and reasonable amounts, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa App. 1982). We find no abuse of discretion in this case. The trial court properly declined to award attorney fees.

B. On Appeal:

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *Schettler*, 455 N.W.2d at 689. When evaluating a request for attorney fees, we are to 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 trial court's decision on appeal. *In re Marriage of Hayne*, 334 N.W.2d 347, 353 (Iowa App. 1983); *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

Meryl's application for appellate attorney fees is denied. Costs of appeal are taxed to Jim.

AFFIRMED AS MODIFIED