IN THE COURT OF APPEALS OF IOWA

No. 2-003 / 90-983

FILED
FEB 25 1992
COURT

IN RE THE MARRIAGE OF MICHAEL L. RIFFEL AND SUSAN M. RIFFEL

Upon the Petition of

MICHAEL L. RIFFEL,

Petitioner-Appellee/Cross-Appellant,

And Concerning

SUSAN M. RIFFEL,

Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Polk County, Theodore H. Miller, Judge.

Susan appeals and Michael cross-appeals from the district court's ruling concerning Michael's application to modify the alimony provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Leslie Babich of Babich, Bennett and Nickerson, Des Moines, for appellant.

Mary S. Barnabe and Thomas Levis of Brick, Seckington, Bowers, Swartz & Gentry, P.C., Des Moines, for appellee.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Respondent Susan M. Riffel appeals and petitioner Michael L. Riffel cross-appeals from a trial court order deferring a portion of Michael's alimony obligation to Susan. Susan contends Michael has not shown a change of circumstances to justify modification. She contends the attorney fee award made to her at the trial court level was not adequate. She also seeks attorney fees on appeal. Michael contends the trial court should have actually reduced his alimony obligation, and Susan is not entitled to attorney fees. We agree with the trial court that Michael has shown a substantial change of circumstances, and his alimony obligation should be reduced, not just deferred. We modify the trial court's decree to decrease his alimony award. We affirm the trial court award of attorney fees to Susan, and find the parties should pay their own attorney fees on appeal. Affirmed as modified.

The parties were married in 1963. They had two children born in 1968 and 1974. Their marriage was dissolved in June 1988. The decree provided Michael should pay $600 per month child support for the younger child who was in Susan's physical care. He was also ordered to pay $150 per month for the older child's education beyond high school. The older child is now over twenty-two years old and lives with Michael. In addition, Michael was ordered to pay Susan alimony of $1,100 per month plus an annual

payment of $3,000 for ten years. The result was Michael had an annual alimony obligation of $16,200 per year. The original dissolution decree found the child support awarded was based on an annual income for Michael of $64,000 a year, and an annual income for Susan of $6,000 per year.

While the dissolution was pending, Michael changed jobs. He testified he was concerned about the security of his current job. He hoped his new job would provide income equal to or better than his old job.

On June 30, 1989, Michael filed an application to modify the decree, alleging there has been a substantial change of circumstances, and his alimony obligation should be reduced.

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. 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, 515 (Iowa 1973). Changed circumstances that justify a 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). Any change must be permanent and not temporary. Mears, 213 N.W.2d at 515.

Michael contends his income has decreased since the dissolution and that Susan's income has increased. He also contends that Susan's financial condition has improved because she received a $30,000 net settlement in a dental malpractice case after the decree was entered.

Michael's income has substantially decreased since the dissolution. At the time of the dissolution, Michael was a salaried employee. When he changed jobs he became self-employed. Michael's 1990 federal income tax return shows a net profit from business earnings of $32,468; his 1989 federal tax return shows net profit from business earnings of $25,508; his 1988 federal tax return shows net profit from business earnings of $6,675, and a salary of about $28,000.

Susan contends Michael's income has not changed because his gross income as a self-employed person is equal to the salary he received as a salaried person. Michael claims business deductions on the Schedule C, business schedule, of his tax returns. We do not find, and Susan has not shown us, any of the claimed deductions are excessive. Michael must furnish his own transportation, office, and office expenses. These expenses are necessary expenses and are paid from Michael's gross income, with the exception of minimal deduction for straight line depreciation. These expenses reduce his disposable income. The expenses are neither paper losses nor accelerated deductions, thereby

distinguishing this case from In re Marriage of Gaer, 476 N.W.2d 324 (Iowa 1991). Furthermore, even if home office expenses were excluded from deductible expenses, Michael's income would be substantially less than the salary he was earning at the time of the dissolution.

Susan argues even if Michael's income has decreased, we should not consider any decreases in his income because his change of jobs was voluntary. Michael changed jobs before the dissolution was granted. The trial court found Michael's change of jobs was in good faith and was not an attempt to intentionally reduce his income. We agree with this conclusion of the trial court. There is also evidence Michael's salary might have decreased if he had stayed at his old job.

Susan next argues Michael has not shown the change to be permanent. Michael has shown a $30,000 decrease in taxable earnings for a two-year period. Michael has shown a decrease in his long-range earning capacity. See In re Marriage of Vetternack, 334 N.W.2d 761, 762-63 (Iowa 1983). Michael has met the burden necessary for modification. See In re Marriage of Wahlert, 400 N.W.2d 557, 560-61 (Iowa 1987).

We modify the decree to reduce Michael's alimony obligation to $900 a month commencing July 31, 1991, the date of the order from which this appeal was taken, and to eliminate the $3,000 a year annual payment starting with the calendar year 1991.

The trial court ordered Michael to pay $1,000 toward Susan's attorney fees. Susan contends this is not sufficient because her attorney fees for the modification matter total nearly $5,000. 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 that the trial court abused its discretion. See id. 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 affirm the attorney fee award made by the trial court. We deny Susan's request for attorney fees on appeal. Each party shall be responsible for his or her own attorney fees on appeal. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.

Schlegel, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent.

I would affirm the trial court on all issues.