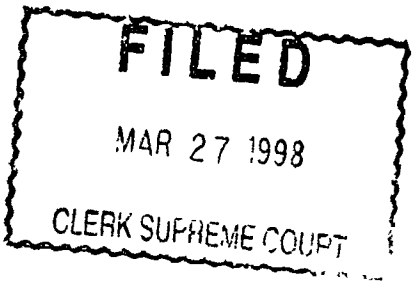
IN THE COURT OF APPEALS OF IOWA

000353

No. 8-043 / 97-0964
Filed March 27, 1998



IN RE THE MARRIAGE OF BARBARA JANE SHIVAPOUR AND EZZATOLLAH TORAGE SHIVAPOUR

Upon the Petition of
BARBARA JANE SHIVAPOUR,
Appellee,

And Concerning
EZZATOLLAH TORAGE SHIVAPOUR,
Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

The respondent appeals a district court ruling denying his application to modify the parties' dissolution decree. **AFFIRMED.**

Michael G. Dieterich of Michael G. Dieterich, P.C., Burlington, for appellant.

Mary Ann Brown of Bauer, Schulte, Hahn, Swanson & Brown, Burlington, for appellee.

Heard by Sackett, P.J., and Streit and Vogel, JJ.

STREIT, J.

A father appeals the district court's refusal to decrease his child support obligation. Because he cannot modify his support obligation pursuant to the statutory provisions of Iowa Code section 598.21(9) and he has not proved his decreased income was not contemplated by the court in ordering the initial support obligation, we affirm.

I. Background & Facts.

Ezzatollah and Barbara Shivapour were divorced in April of 1994. The parties stipulated to a court-approved decree regarding all dissolution issues. Barbara was awarded primary physical care of the children, Daniel, eleven at the time of the divorce, and Sara, nine at the time of the divorce. Ezzatollah was awarded liberal visitation. He was ordered to pay Barbara $3000 per month in child support, to be reduced to $2000 per month when there is only one minor child in the home. Barbara was awarded the tax exemptions for the two children, and Ezzatollah was required to provide them with health insurance.

Both Barbara and Ezzatollah are practicing physicians. Barbara worked part-time at a clinic run by the Burlington Medical Center, and Ezzatollah was a neurologist. At the time of the dissolution decree, an accountant estimated Ezzatollah's net monthly income was $11,904 and Barbara earned $3219 per month. Ezzatollah was awarded $664,255 in marital property and $10,053 in debt, for a net award of $654,202. Barbara was awarded the marital home, a 1992 Dodge Caravan,

life insurance policies, bank accounts, savings bonds, and all assets of the Barbara Shivapour trust account, and was ordered to pay Ezzatollah a $65,000 property settlement in order to equalize the property division. Barbara received a net award of $603,703.

II. Standard of Review.

This modification action was tried in equity. Our review is de novo. Iowa R. App. P. 4. We give weight to the trial court's factual findings but are not bound by them. *In re Marriage of Guyer*, 522 N.W.2d 818, 820 (Iowa 1994). Child support orders may be modified where there has been a "substantial change in circumstances." Iowa Code § 598.21(8) (1997). Section 598.21(9) provides that a substantial change in circumstances exists when the court-ordered child support award deviates by ten percent or more from the amount that would be due pursuant to the most current child support guidelines. *In re Marriage of Bolick*, 539 N.W.2d 357, 359 (Iowa 1995).

III. Modification Pursuant to Iowa Code Section 598.21(9).

Ezzatollah argues his child support obligation should be modified because the child support previously ordered deviates by ten percent or more from the amount which would be due pursuant to the most current child support guidelines.

Ezzatollah's net monthly income at the time of the petition was $11,392. The child support guidelines then in effect provided that when the noncustodial parent's net monthly income is $3001 or more, the amount awarded in child support rests

within the sound discretion of the trial court. *See* Iowa Child Support Guidelines (December 31, 1990). The court ordered $3000 per month in child support.

Since the time child support was set the Uniform Support Guidelines have increased the discretionary figure from $3001 to a monthly net income of $6001. Since support was set, Ezzatollah's net monthly income has decreased to $9527, including the contributions to his pension plan. Ezzatollah's net monthly income continues to remain within the discretionary parameters of the court.

Because Ezzatollah's income is within the discretionary range of the guidelines, Iowa Code section 598.21(9) does not apply. Ezzatollah cannot have his child support obligation modified under this section. To do so would amount to "no more than a substitution of one judge's discretionary call for another's." *In re Marriage of Bolick,* 539 N.W.2d at 359. Following the holding of *Bolick*, we hold because Ezzatollah's income is within the discretionary range of the child support guidelines, the court was correct in refusing to revisit the wisdom of an earlier award based solely on an alleged ten-percent deviation from what could be due if a new calculation were performed.

IV. Substantial Change in Circumstances Based on Decreased Income.

Because Iowa Code section 598.21(9) does not apply, the only way for Ezzatollah to prove a modification of his child support obligation is warranted is to prove there has been a material and substantial change in circumstances since the order. He argues the decrease in his income constitutes a substantial change.

Modification of support 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 that other terms be imposed. *In re Marriage of VanDoren,* 474 N.W.2d 583, 586 (Iowa 1991). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. *Id.* 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. *Id.* Such changes must be more or less permanent or continuous, not temporary. *Id.*

Decrease in the income of a party can constitute a substantial change in circumstances to justify a modification of child support. *In re Marriage of Phares*, 500 N.W.2d 76, 79 (Iowa App. 1993). This is especially true when the custodial spouse's income has increased. *See id.* Barbara's income has increased from $3419.26 at the time of the original order was entered to $4115.08.

Even if the change is substantial, however, it must be a change that was not within the knowledge of the trial court at the time the award is made. *Id.* At the time of the dissolution Ezzatollah informed the court, through his affidavit of financial status, he expected a decrease in gross earnings of $90,000 annually. Thus, the court was aware Ezzatollah expected a decrease in income for upcoming years when setting his child support obligation. The court was also aware of many of the factors Ezzatollah relies on to establish his reduced income, such as changes in the

neurological services at the Burlington Medical Center. The original trial court contemplated reasonable and ordinary changes likely to occur in the relations of the parties and it was correct of the district court not to disturb the decree. *See id.* Further, Ezzatollah has not met his burden of proving the changes in his income are permanent or continuous.

Because it has not been shown the court abused its discretion in awarding Barbara attorney fees, we affirm. *See In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Both parties shall pay their own attorney fees on appeal.

AFFIRMED.