IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 6-304 / 95-860

IN RE THE MARRIAGE OF CONNELLA J. GARRETT AND CHARLES T. GARRETT

Upon the Petition of
CONNELLA J. GARRETT,
Appellant,

And Concerning
CHARLES T. GARRETT,
Appellee.

Appeal from the Iowa District Court for Linn County, Thomas L. Koehler, Judge.

Connella Garrett appeals a district court ruling modifying her husband's alimony obligations. **AFFIRMED AS MODIFIED.**

Mark H. Rettig of Hines, Pence, Day & Powers, P.C., Cedar Rapids, for appellant.

David S. Good of Nazette, Marner, Good, Wendt & Knoll, Cedar Rapids, for appellee.

Considered en banc.

VOGEL, J.

Connella (Connie) and Charles Garrett (Jim) were married for twenty seven years when their marriage was dissolved on November 29, 1993. At the time of the decree, Jim was working at the Cedar Rapids Area Convention and Visitors Bureau, earning approximately $67,000 plus $22,000 in benefits, per year. Connie had only low-paying, part-time jobs during the marriage, while being primarily responsible for maintaining the home and raising the children. The court found Connie's earning capacity to be approximately $15,000 per year. Jim was ordered to pay Connie $1000 per month alimony.

On October 4, 1994, Jim filed an application for modification of the decree, claiming a substantial change in circumstances. He then failed to pay the court-ordered alimony and reduced his payments to $100 per month. Jim maintained he had lost his employment and was working as a salesperson for satellite televisions in rural counties. He claimed his net wages in this new job amounted to $200 per week. Due to Jim's reduction in alimony payments, Connie was forced to liquidate assets and seek charity from her church to help pay her rent and utilities. She temporarily lost her health insurance. At the time of the modification hearing, Connie was a realtor in Plano, Texas, earning approximately $15,000 per year, but with erratic commissions.

Following a hearing on the application for modification, the district court concluded there was a substantial change in circumstances and ordered Jim's alimony payments be reduced from $1000 per month to $100 per month.

Connie appeals.

I. ***Scope of Review.*** We review a district court's modification of a dissolution decree de novo. *In re Marriage of Jacobo*, 526 N.W.2d 859, 864 (Iowa 1995). We give weight to the district court's findings of fact but they do not bind us. *In re Marriage of Sjulin*, 431 N.W.2d 773, 776 (Iowa 1988).

II. ***Modification of Alimony.*** Connie contends the district court erred in modifying Jim's monthly alimony obligation under the original dissolution decree from $1000 to $100.

A party seeking modification of a dissolution decree must establish by a preponderance of the evidence that there has been a substantial change in circumstances since the entry of the decree. *Jacobo*, 526 N.W.2d at 864; *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992). Our supreme court has delineated the following principles regarding modifications of dissolution decrees: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstance is sufficient; (3) it must appear continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change

in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the district court when the original decree was entered. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983).

We believe the change in Jim's circumstances must be examined in light of the series of events which led up to Jim's forced resignation, in addition to what happened after he left the Cedar Rapids Area Convention and Visitors Bureau. Connie testified Jim was very upset in January 1994 because he did not want to pay alimony. Jim asked Connie to call the district court and request that alimony be terminated. He also asked both of the children to plead with their mother to have the alimony terminated. This was prior to Jim's resignation. In September 1994 Jim told Connie "he was going to get the alimony terminated one way or the other."

Robert Moorman, a board member of the Cedar Rapids Area Convention and Visitors Bureau, testified regarding the board's increasing concern over Jim's job performance in 1994. He stated the board repeatedly discussed Jim's performance over a three or four month period in 1994 and had several "heart-to-heart conversations" with Jim concerning what he needed to do to improve. Moorman testified Jim's job performance did not improve despite the board's communications of dissatisfaction with his job performance. Moorman testified that when the board determined Jim could not meet the expectations of the board, they requested his resignation.

We find Jim's comments regarding his dissatisfaction in paying alimony and attempts to have the alimony discontinued prior to his resignation cannot be ignored and are relevant, particularly in light of both his downward spiraling job performance in 1994 and his current income level. *See In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987) (alimony obligations should not be reduced where petitioner's current inability to pay alimony is self-inflicted due to petitioner's own fault, his voluntary wastage and dissipation of his talents). Despite repeated efforts by the board to aid Jim in improving his job performance, Moorman's testimony indicated Jim put forth little effort to meet the expectations of the board.

We also conclude Jim's extensive list of potential employers which he has contacted in searching for a job is only mildly pursuasive. It is merely a list that did not, through anything other than self-serving testimony, demonstrate true determination in actually securing a new position. Furthermore, we note Jim had been off of the Cedar Rapids Convention and Visitors Bureau payroll for only about five months at the time of trial. Jim's own expert testified it was too soon to tell whether Jim would be able to obtain a similar job in the convention and visitors bureau industry. The expert stated Jim had a good personality, was well liked in the convention and visitor bureau industry, and had good earning potential. Jim also testified he believed his own earning capacity was significantly higher than what he is currently earning selling satellite televisions in rural areas.

We find that while there has been a change in circumstances since the decree, we cannot find this change is permanent or continuous. We also find that while Jim is currently earning about $200 per week in net income, his true earning capacity has not changed. We also find Jim has assets to draw on for income and payment of alimony. *See Kern*, 408 N.W.2d at 390. We determine the district court erred in modifying Jim's alimony obligation under the dissolution decree. Accordingly, we modify the district court's ruling and reinstate Jim's monthly alimony obligation to the level it was under the original dissolution decree.

III. ***Attorney Fees.*** Connie requests appellate attorney fees 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. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996); *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). 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 district court's decision on appeal. *In re Marriage of Miller*, 524 N.W.2d 442, 445 (Iowa App. 1994). We determine each party should pay his or her own attorney fees for this appeal.

AFFIRMED AS MODIFIED.

All judges concur except Sackett, C.J., and Huitink, J., who dissent in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part. I agree with the majority that the record does not support decreasing Connella's alimony to $100 per month. I find, however, the trial court was correct in concluding there had been a change of circumstances and in modifying the alimony award. I would decrease the alimony to $500 per month.

Huitink, J., joins in this partial dissent.