IN THE COURT OF APPEALS OF IOWA

FILED
OCT 25 1994
CLERK SUPREME COURT

No. 4-147 / 93-0843

IN RE THE MARRIAGE OF KAY A. BOVY AND WILLIAM F. BOVY

Upon the Petition of
KAY A. BOVY,

Appellee,

And Concerning
WILLIAM F. BOVY,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Alan L. Pearson, Chief Judge.

William F. Bovy appeals from a modification of the alimony provisions of the parties' dissolution decree. **REVERSED AND DISMISSED.**

Terry D. Parsons of Olsen, Parsons & Ament, Cedar Falls, for appellant.

Timothy J. Luce of Randall, Anfinson & Luce, Waterloo, for appellee.

Considered en banc.

SACKETT, J.

This is an appeal from a trial court order modifying a dissolution decree to increase an alimony award. Respondent-appellant William F. Bovy contends petitioner-appellee Kay A. Bovy failed to meet the necessary burden to support modification. We agree and reverse the trial court and dismiss Kay's petition to modify.

William and Kay had been married for twenty-five years when, in 1985, their marriage was dissolved. William, who had been employed with John Deere and Company in Waterloo since 1960, then had an annual salary of $32,000. Kay suffered from multiple sclerosis and was unable, because of her condition, to obtain outside employment.

In the dissolution, the trial court divided equally about $100,000 in assets and ordered William to pay Kay alimony in the amount of $250 a week. In making the alimony award, the trial court specifically found, "There is no way the Court can solve the financial problems that these two parties will face in the future, particularly because of large expenditures that may be required by the physical condition of the petitioner." The trial court also determined it not possible to determine the condition of the parties at the time William retires and specifically retained jurisdiction for the single purpose of reviewing alimony payments at the time he retires or is, for some reason, unable to work.

William has paid his alimony as ordered. He has remarried, and he and his current wife live with her child from a prior marriage.

In 1992, Kay filed a petition to increase the amount of alimony. She contended her medical expenses had increased, as had William's income. The trial court, after hearing the evidence, concluded the court, in entering the dissolution decree, had anticipated Kay's physical condition would worsen and her health care expenses would increase. The trial court also found the court, in entering the dissolution decree, had understood William's income would increase at least at the rate of inflation. The trial court went on to find William's income had risen more quickly or significantly than anticipated by the court granting the dissolution. The weekly alimony was increased to $315. William was also ordered to pay $250 toward Kay's attorney fees and the court costs.

William contends Kay failed to meet her burden of showing a material and substantial change in circumstances not anticipated by the trial court when the decree of dissolution was entered.

At the time of the dissolution, William's salary from John Deere was $32,000. In 1992, William's wages from John Deere were $45,484, and he had additional interests and rents income of $800.

The trial court concluded William's net income[1] had nearly doubled in the time since the dissolution. Prior to the dissolution, William filed a joint return with Kay and out of his salary came the entire income tax obligation. After the dissolution, the alimony William paid was deductible to him. Kay now pays income tax on the alimony. A comparison of William's after-tax income before and after the dissolution is not a fair comparison. The trial court, in awarding alimony, was aware of the tax implications that would flow from the alimony award.

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 that other terms be imposed. Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). The knowledge of the trial court at the time the award is made is the basis for determining whether there has been a change of circumstances. See In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. See Mears v. Mears, 213 N.W.2d 511, 514 (Iowa 1973). We agree with the modification court that the dissolution court, in entering the decree, anticipated there would be an increase in William's wages.

---

1. The trial court apparently used net income to define the money William had after income taxes were paid.

At the time of the dissolution, William had a wage of $32,000 and he was ordered to pay forty percent of his total wages before taxes in alimony. The alimony ordered in 1985 represents twenty-eight percent of his 1992 wages before taxes.

William has remarried. "[A] new marriage by either party is not unusual, and that fact alone is not grounds for modification." Holesinger v. Holesinger, 252 Iowa 374, 379-80, 107 N.W.2d 247, 251 (1961) (cited in Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974)). William's current wife has a salary of $32,000. His new wife has no obligation to support his former wife but it is proper to consider William's overall financial condition in fixing the amount he should pay. See Page, 219 N.W.2d at 558. However, we cannot ignore his current spouse's responsibilities to her child and the efforts she has put forth in the current marriage.

Both William and Kay have aged. William was born on November 10, 1939. It is general knowledge certain health problems come with the aging process. In re Marriage of Skiles, 419 N.W.2d 586, 588 (Iowa App. 1987). Medical problems associated with the aging process are in the contemplation and knowledge of the trial court when a decree is entered. Id. They are reasonable and ordinary changes that are likely to occur. See Mears, 213 N.W.2d at 514.

Kay has not shown the necessary change of circumstances. The alimony award when made constituted forty percent of William's earnings before deductions for taxes. Kay had also received one-half of the assets she and William owned. The increases in William's income after the dissolution were anticipated increases. Kay, in her statement of affairs, related William would receive the increases and she asked that her alimony automatically increase on the Consumer Price Index or by a pro-rata percentage of William's increased yearly earnings at John Deere. At the time of the dissolution, William had been employed for a number of years with John Deere and had had regular periodic increases in wages. The increases in wages he has received have been periodic raises and would have been envisioned by the trial court at the time the dissolution was granted. See Skiles, 419 N.W.2d at 589. William continues to pay a substantial portion of his income to Kay as alimony. Kay has shown no increased expenses not anticipated when the decree was entered. William has aged and he has suffered health problems. The income of William's new wife is needed to support her and her child and should not be considered. Kay is protected on William's retirement by the reservation of that issue made by the trial court in the original decree.[2]

---

2. Retention of jurisdiction to review alimony is discouraged but not forbidden. See In re Marriage of Schlenker, 300 N.W.2d 164, 166 (Iowa 1981). The reservation of this issue was a part of the original decree and is not before us in this modification action.

William challenges the award of $250 to Kay for attorney fees. We have determined the decree should not have been modified. We strike the provision for attorney fees.

REVERSED AND DISMISSED.

All judges concur except Cady, J., who dissents.

CADY, J. (dissenting)

I respectfully dissent. I believe a material and substantial change in the circumstances of the parties has taken place which makes it equitable to increase the alimony to meet Kay's basic needs.

Iowa Code Section 598.21(8) (1991) identifies numerous factors to consider in a modification action to determine whether a substantial change in circumstances of the parties has occurred. They include changes in income or resources of a party, changes in medical expenses of a party, changes in health of a party and remarriage of a party. Id. I believe the majority has failed to consider two of these factors. The changes in William's resources and his remarriage make it equitable in this case to modify the alimony.

I acknowledge that the changes in Kay's health and medical expenses would not justify a modification. The original trial court recognized her disease may be progressive and she may experience future increases in the costs of her medical care. Kay's physical condition has continued to deteriorate as forecasted, but it has not significantly altered her lifestyle or increased her medical expenses at this time.

I also acknowledge that the increase in William's income since the divorce would not justify a modification. William's level of income has improved since the original decree, but a $14,000 increase over seven years would not constitute a substantial change, nor would it be beyond the contemplation of the original trial court. See In re Marriage of Skiles, 419 N.W.2d 586, 589 (Iowa App. 1987) ($34,000 increase in earnings over eleven years not beyond the contemplation of the trial court). Furthermore, the effect of the increase in William's income is diminished since Kay has failed to show additional needs. See In re Marriage of Schettler, 455 N.W.2d 686, 689 (Iowa App. 1990).

The determining factor in this case, however, is that William's remarriage has enhanced his financial condition well beyond the level anticipated by the original trial court. The original trial court portended that financial problems would accompany Kay and William long into the future. It understood Kay was precluded from assisting in her financial support and recognized that William's wages were inadequate to fully support two households. The court required William to pay a substantial portion of his net wages as alimony, approximately two-thirds, leaving both parties with inadequate funds to meet their needs. The original trial court forecasted a bleak financial picture for both parties. This picture has now changed.

William's remarriage has elevated him to a comfortable lifestyle. William and his wife had a joint income of $81,500 in 1992. William's financial condition is no longer bleak. On the other hand, Kay continues to struggle financially. At times she goes without needed medication due to insufficient funds.

In finding grounds to modify, I do not imply that William's new wife should share in his obligation to support Kay. She has no such responsibility. Remarriage, however, is a required consideration in modification's under Section 598.21(8)(g). See Page v. Page, 219 N.W.2d 556, 558 (Iowa 1974) (financial contribution of a new spouse is a factor in determining the amount of alimony). Court's must consider how remarriage following divorce affects the lives of the parties. Moreover, the impact of remarriage cuts both ways. Our court's are quick to recognize the impact of remarriage by the payee spouse as a factor in reducing or eliminating alimony. See In re Marriage of Hervey, 393 N.W.2d 312, 314 (Iowa 1986). (Economic change attendant to ex-wife's remarriage was sufficient change of circumstances to justify order modifying divorce decree so as to terminate ex-husband's alimony payments). We should have no similar hesitation to consider the impact of remarriage by the payor spouse in deciding to increase alimony.

William's enhanced financial condition since his remarriage constitutes a substantial change in

circumstances, and was not contemplated by the trial court at the time of the original decree. Furthermore, the overall improvement in William's financial condition makes it equitable to modify alimony. Although Kay's overall needs have not substantially changed, they were never met. William is now finally able to meet them. The district court correctly increased alimony, but the increase should be limited to the level of Kay's needs. The record reveals Kay's total monthly expenses are $1170. I would alter the district court's modified decree to set the weekly alimony at $270.