IN THE COURT OF APPEALS OF IOWA

No. 9-083 / 98-0154
Filed June 23, 1999

IN RE THE MARRIAGE OF GERALD G. DAVIES AND NESTA W. DAVIES

Upon the Petition of GERALD G. DAVIES,

Appellant,

And Concerning NESTA W. DAVIES,

Appellee.

FILED
JUN 23 1999
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge.

Petitioner appeals the denial of his application to modify child support payments. **AFFIRMED.**

Brett A. Nelson of Nelson, Keys, Keys & Schultz, P.C., Rock Island, Illinois, for appellant.

Steven E. Ballard of Leff, Haupert, Traw & Willman, L.L.P., Iowa City, for appellee.

Considered by Sackett, C.J., Streit, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

The petitioner-appellant, Gerald Davies, appeals the district court's denial of his application to modify his child support obligation. He claims the court erred in determining a substantial change in circumstances had not occurred. He also contends the circumstances surrounding his reduction in income were neither temporary nor voluntary. Finally, he argues the court's award of attorney fees to the respondent, Nesta Davies, was an abuse of discretion. We affirm.

Gerald and Nesta married in 1983. Their two children were born in 1983 and 1985. In 1991, their marriage was dissolved. The court ordered Gerald, an anesthesiologist, to pay monthly rehabilitative alimony of $2500 for six years and monthly child support of $4600.

Gerald remarried and has two children from this marriage and one stepson. In late 1992, Gerald and some other physicians formed a company with the intent of creating an outpatient surgical center. As the center developed, it competed with area hospitals where Gerald practiced. In 1994, the hospitals contracted with a company which did not compete with them to provide anesthesia services. Gerald filed suit in federal court against the hospitals, alleging discrimination and violations of antitrust laws and seeking more than $2 million in damages.

In 1994, Gerald filed an application to modify the support provisions of the 1991 decree of dissolution, anticipating a reduction in income. For a time, he did not pay the support as ordered, but paid Nesta $33,100 in a lump sum just before trial.

The district court determined Gerald "failed to prove any material change in circumstances, permanent in nature, and not within the contemplation of the decretal court" and dismissed his application and awarded Nesta attorney fees.

In 1995, Gerald was disciplined by the hospitals after he was discovered drinking with a patient in the hospital while on call. He investigated job opportunities in Florida and Hawaii, but remained in Iowa. He continues to provide anesthesia services at the outpatient surgical center. He also owns half of a development company which is purchasing land around the center to develop or sell.

In February 1997, Gerald stopped making support payments. In March, Nesta filed a contempt application. She also sought a general execution and subsequently conducted a debtor's examination of Gerald, who had refused to answer the sheriff's interrogatories. One week after Nesta filed her contempt application, Gerald filed a second application to modify the support provisions of the decree of dissolution. In May, the court refused Gerald's request for a temporary reduction in support. Gerald did not pay the full support ordered after the temporary hearing. He closed a bank account and put money in an account held only in his wife's name to avoid Nesta's general execution. Just days before the contempt hearing, Gerald paid Nesta $32,000 in a lump sum. The two actions were tried together in October and December 1997.

The district court found Gerald's income apparently was less than in 1995. It also found the surgical center was generating substantial income for Gerald and many of the expenses claimed by Gerald were the result of his voluntary acts involving the

company which developed the center and the land development company. The court cited testimony by Gerald, his new wife, and another doctor at the surgical center that the income of the center was increasing and they thought or hoped it would continue to grow. Concluding the decrease in income was temporary, the court denied Gerald's application for modification and found him in contempt. Gerald could purge the contempt by paying all arrearages by the beginning of February 1998. Nesta received a total award of $6000 in attorney fees.

On appeal, Gerald first claims a substantial change in circumstances exists as a matter of law under Iowa Code section 598.21(8) and (9) (1997). He claims his net monthly income has decreased from the 1995 figure of $13,359 to only $3754, so the variation in child support would approach sixty-six percent. However, he makes no cite to the record to show the "uncontroverted evidence produced at trial" supporting this claim. The schedule of income and expenses shows Gerald had gross income from his work as an anesthesiologist of $293,440 for the first nine months of 1997. His tax returns show his gross income for 1996 was $328,550 and for 1995 was $328,615. On a proportional basis, his gross earnings in 1997 exceed his historical earnings.

Gerald further argues the loss of fees from the hospitals caused a significant, permanent change in circumstances. Yet his 1997 earnings through September *only* from the surgical center, less expenses, totaled $230,779. At that rate his annual earnings would be $307,705, assuming the center did not increase its earnings. Even

applied for a modification in 1994. Like the trial court, we do not find a substantial change in circumstances justifying modifying Gerald's child support obligation.

Gerald also claims the court abused its discretion in awarding attorney fees to Nesta in the modification and contempt actions. Iowa Code section 598.36 provides a court may award attorney fees to the prevailing party in a modification action. In addition, Gerald has far greater income than Nesta and his actions caused her legal fees to increase. The district court did not abuse its discretion in awarding Nesta attorney fees.

Nesta seeks appellate attorney fees and has filed an affidavit showing attorney fees and expenses of $5288 for this appeal. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa App. 1994). We 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 Cooper*, 524 N.W.2d 204, 207 (Iowa App. 1994). Gerald is better able to pay and forced Nesta to defend the district court's decision in her favor. We order him to pay $2000 of Nesta's appellate attorney fees.

AFFIRMED.

Streit J., concurs; Sackett, C.J., concurs specially without opinion.

No. 98-0154. [9-083] IN RE MARRIAGE OF DAVIES

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Jr., Judge. **AFFIRMED.** Considered by Sackett, C.J., Streit, J., and Habhab, S.J. Opinion by Habhab, S.J. Sackett, C.J., concurs specially without opinion.

(5 pages $2.00)

Gerald and Nesta married in 1983. Their two children were born in 1983 and 1985. In 1991, their marriage was dissolved. The court ordered Gerald, an anesthesiologist, to pay monthly rehabilitative alimony of $2500 for six years and monthly child support of $4600. Gerald remarried and has two children from this marriage and one stepson. Gerald and some other physicians formed a company with the intent of creating an outpatient surgical center. As the center developed, it competed with area hospitals where Gerald practiced. In 1994, the hospitals contracted with a company which did not compete with them to provide anesthesia services. In 1994, Gerald filed an application to modify the support provisions of the 1991 decree of dissolution, anticipating a reduction in income. The district court determined Gerald "failed to prove any material change in circumstances, permanent in nature, and not within the contemplation of the decretal court." In 1995, Gerald was disciplined by the hospitals after he was discovered drinking with a patient in the hospital while on call. He continues to provide anesthesia services at the outpatient surgical center. In February 1997, Gerald stopped making support payments. In March, Nesta filed a contempt application. One week after Nesta filed her contempt application, Gerald filed a second application to modify the support provisions of the decree of dissolution. In May, the court refused Gerald's request for a temporary reduction in support, yet Gerald did not pay the full support ordered after the temporary hearing. Concluding the decrease in income was temporary, the court denied Gerald's application for modification and found him in contempt. On appeal, Gerald first claims a substantial change in circumstances exists as a matter of law under Iowa Code section 598.21(8) and (9) (1997). The schedule of income and expenses shows Gerald had gross income from his work as an anesthesiologist of $293,440 for the first nine months of 1997. His tax returns show his gross income for 1996 was $328,550 and for 1995 was $328,615. On a proportional basis, his gross earnings in 1997 exceed his historical earnings. Gerald's income without working at the hospitals has only decreased very slightly and is expected to rise. Like the trial court, we do not find a substantial change in circumstances. The district court did not abuse its discretion in awarding Nesta attorney fees. Nesta seeks appellate attorney fees. We order him to pay $2000 of Nesta's appellate attorney fees.