IN THE COURT OF APPEALS OF IOWA

No. 6-393 / 95-1263

IN RE THE MARRIAGE OF ANNE LOUISE WILLIAMS and JAMES HOWARD WILLIAMS

Upon the Petition of
ANNE LOUISE WILLIAMS
n/k/a ANNE LOUISE RANARD,

Petitioner-Appellee,

And Concerning
JAMES HOWARD WILLIAMS,

Respondent-Appellant.

FILED
MAR 28 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Linn County, William R. Eads, Judge.

James Williams appeals from a modification of the parties' dissolution decree.

MODIFIED IN PART AND REVERSED IN PART.

Stephen B. Jackson and Stephen B. Jackson, Jr. of Jackson Law Office, Cedar Rapids, for appellant.

Sherry L. Schulte of White & Johnson, P.C., Cedar Rapids, for appellee.

Considered by Sackett, P.J., and Cady and Streit, JJ.

SACKETT, P.J.

Respondent-appellant James Howard Williams challenges the district court's order modifying and increasing his child support obligation for children in the primary care of his former wife, petitioner-appellee Anne Louise Ranard. We find Anne has not met the necessary burden to modify the decree. We modify in part and reverse in part.

James and Anne were divorced in August 1987. Anne was awarded primary physical care of Jill, born January 8, 1979, and twins Sarah and Emily, born December 31, 1981. James was ordered to pay $500 per month child support and the children's medical insurance. He has been current paying this ordered support and insurance.

Anne filed an application seeking an increase in child support on September 27, 1994, after James, who was seriously injured in the course of his employment, received money to compensate him for his injuries. Following trial, the court determined Anne met her burden on modification and a decree was entered on March 22, 1995. James was ordered to pay $836.86 commencing September 27, 1994, the date the application for modification was filed, resulting in a judgment being entered against James for $6400.34 in retroactive support. This decree further made provisions for payment of the children's post high school education, though the original decree had not addressed this issue. James was ordered to pay seventy

percent of the children's post high school expenses limited to the tuition at an Iowa Regents school. The child was ordered to pay fifteen percent of the cost and Anne fifteen percent.

James contends (1) Anne failed to meet the necessary burden to justify a modification; (2) the trial court made an erroneous assumption on the earnings his settlement would generate; (3) the increase in child support should not have been made retroactive; and (4) the trial court allocated too large a percent of the children's post high school education expense to him. He also challenges the trial court's award of attorney fees to Anne.

To modify a dissolution decree (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that 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 trial court when the original decree was entered. *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983); *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987).

James was injured in December 1991 and received approximately $440,000[1] about two years later. Though unemployed during that period, he continued paying child support. James spent a portion of the money for a new van, tools to assist him in caring for his home, loans accrued during the pendency of his disability, including those made for payment of child support, and items for his new family. He also put $20,000 in a rental property from which he currently realizes about $11,500 annually. The balance of the money, some $365,000,[2] was invested with advice from Norwest Financial Services and appears to give him a return of approximately six percent, or about $20,000 annually. He draws $18,000 annually from his funds.

At the hearing, Anne introduced the testimony of a financial planner who testified by making different investments James could realize an eight percent return. The trial court, on the basis of this testimony, determined James could realize an eight percent return and used an eight percent return in computing his income for child support purposes at $29,200 annually.

James' injuries are debilitating and his employment opportunities have been curtailed by the injuries. His loss of wages was not self-inflicted. *In re Marriage of*

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[1] James settled with his employer Chicago-Northwestern Railroad for $122,000. A jury ordered Cargill, where the injury occurred, to pay him $548,881. The net James received from these two amounts was $439,465.31.

[2] $315,000 is in a Norwest trust account and $50,000 is in a Vanguard security account.

Swan, 526 N.W.2d 320, 324 (Iowa 1995). James does some general maintenance and assists his current spouse with her antique business. As a railroad employee, he had railroad retirement and he did not have social security. The only testimony is that he did not work long enough to vest his railroad retirement.

At the time of the dissolution, according to Anne's testimony, when James was working for the railroad, he was earning in the high twenty thousands and she earned between seven and eight dollars an hour working on a sometimes part-time and sometimes full-time basis. Anne currently is employed part-time, working for ten dollars an hour cleaning homes. She earns about $6000 annually.

The first question we address is whether the trial court correctly determined James' income for child support purposes should be based on an eight percent return of his money. James invested his money on the advice of Norwest Financial Services and realizes about six percent on his money. We recognize in today's market there are investments that can afford a higher return. Norwest Financial is a reliable investment counsel. Contrary to the findings of the trial court, we determine James has used reasonable discretion in following Norwest Financial's investment advice. We find the income from his investments for child support purposes to be the actual return on his money as opposed to what he could receive if he invested the money in different securities.

Based on this finding, James' current income is less than his income was at the time of the dissolution. He also has suffered a serious physical injury and he no

longer can perform his prior employment as a switchman. There was some argument about his ability to engage in other employment. He does work on his rental house and in an antique business some twenty hours a week. There is no evidence that with his disability he can engage in more remunerative employment. He did not voluntarily reduce his income.

Additionally, the only evidence is James has no retirement benefits available to him. His principal need remains to assure payment of future child support and provide for his retirement.

We find the income from James' investments, together with rental income and income from other sources, is not equal to nor greater than the income he earned at the time of the dissolution, nor does it result in an increase in child support by applying the guidelines. The trial court found James' yield from his investments, though they did not provide a greater yield than his income at the time of dissolution, justify modification. We disagree. We reverse the order modifying child support.

Having determined the child support should not have been modified, we need not address James' allegation concerning the trial court's determination of his income or his claim the increase in child support should not have been made retroactive.

James further contends the trial court should not have modified to order he pay seventy percent of the children's post high school education expenses. The dissolution decree made no provision for post high school education. The trial court modified to provide payment of the children's post high school education expenses,

limited to an Iowa Regent college's highest tuition expenses, allocated seventy percent to James, fifteen percent to the child, and fifteen percent to Anne. James contends Anne failed to meet her burden for modification on this issue, but accepts responsibility for one-third of these costs.

Without addressing whether Anne met the necessary burden for modification on this issue, we confirm James' acceptance of one-third of these costs, with one-third to the child and one-third to Anne. *See In re Marriage of Lindberg*, 462 N.W.2d 698, 701 (Iowa App. 1990). We modify the decision appealed from accordingly.

The trial court awarded Anne $2000 in attorney fees and she asks for additional fees on appeal. The trial court has considerable discretion in awarding attorney fees. The court may award attorney fees to the prevailing party. *See* Iowa Code § 598.36. Attorney fees in a modification depend on success of position and ability of the other to pay. *See In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995). We reverse the order awarding Anne attorney fees and we award no attorney fees on appeal. Costs are assessed to Anne.

MODIFIED IN PART AND REVERSED IN PART.