IN THE COURT OF APPEALS OF IOWA

No. 4-361 / 93-1965

FILED
JAN 23 1995
CLERK SUPREME COURT

IN RE THE MARRIAGE OF JULIE ANN TOTH AND LASZLO GEORGE TOTH

Upon the Petition of
JULIE ANN TOTH,

Petitioner-Appellee,

And Concerning
LASZLO GEORGE TOTH,

Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Carl D. Baker, Judge.

George appeals from the modification of the dissolution decree. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Thomas J. Cahill of Cahill Law Offices, Nevada, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

This appeal concerns an application for modification of an alimony and child support award made in an original dissolution decree.

The original Decree of Dissolution was entered on August 6, 1992, granting Laszlo George Toth (George), the respondent-appellant, custody of the parties' two minor children, Ryan, born August 5, 1982, and Jason, born February 14, 1986. That decree ordered the petitioner-appellee, Julie Ann Toth (Julie), to pay child support in the amount of $103 per month. George was also ordered to pay alimony to Julie in the amount of $650 a month for a period of eight consecutive years. The alimony is to terminate July 15, 2000.

George filed an Application to Modify the Decree to reduce or eliminate the alimony award and to increase Julie's child support obligation. After a hearing on the merits, the trial judge reduced the alimony award to $403 per month by offsetting Julie's support obligation of $103 per month, the net effect was that George would pay Julie $300 per month. This decree was to be in effect for two years at which time the alimony award would return to the $650 per month level. George appeals and Julie cross-appeals. We affirm as modified.

George and Julie were married in 1982. George yet has custody of his two minor children. George, at the time of the dissolution and now, works for United Parcel Service.

The dissolution court found George to be thrifty and a good provider. The dissolution court also found George's wages were $35,672 and with overtime he could make as much as $42,000.

Julie was employed at a department store at the time of the dissolution, and the trial court found her monthly income after taxes to be $600 a month. By the time of the modification hearing, Julie had quit working and moved in with a male companion.

George contends, without a modification of his alimony obligation, the children will suffer. George was required to assume substantial debt in the dissolution. He had a positive net worth before the dissolution and a negative net worth after the dissolution. Before the dissolution, George had planned to refinance the home to obtain a more favorable interest rate rather than the 13.2 percent he was currently paying. George contended, because of his current alimony obligation, he could not get refinancing. He also contends it is not in the children's best interests for him, as custodial parent, to be paying twenty-four percent of his net disposable income in alimony.

The trial court found, because Julie did not have the children in her physical care and her support obligation is low and she has the ability to earn $600 a month and because she receives financial support from others, the alimony should be reduced for a twenty-four month period to give George the opportunity to refinance his home.

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 burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Mears v. Mears, 213 N.W.2d 511, 513 (Iowa 1979); Thayer, 286 N.W.2d at 223. 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. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983).

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. Full, 255 N.W.2d at 159; Leo v. Leo, 213 N.W.2d 495, 496 (Iowa 1973). 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. Mears, 213 N.W.2d at 514.

George has met the burden to modify. We disagree with his argument his alimony requirements should be terminated. Rather, we beleive the decree should be modified so as to reduce his alimony payment from $650 a

month to $450 per month effective on the fifteenth day of the month after the filing of his modification application. The alimony payments of $450 per month shall continue until July 15, 2000, unless either party dies or Julie remarries before that date in which event the alimony payments shall terminate. We modify accordingly.

George next contends child support should be increased because the trial court only considered Julie's earnings, not her alimony, in fixing her child support obligation.

Alimony is considered income to the payee for federal and state income tax purposes. In cases where alimony is payable in a substantial amount for an extended period of time, in computing child support, it is deducted from the income of the payor and added to the income of the payee. See In re Marriage of Allen, 493 N.W.2d 273, 275 (Iowa App. 1992); see also In re Marriage of Lalone, 469 N.W.2d 695, 697 (Iowa 1991). We distinguish In re Marriage of Miller, 475 N.W.2d 675 (Iowa App. 1991), where alimony was in a lesser amount paid for a shorter period. Id. at 680.

Julie was netting earnings of $600 at the time of the dissolution. She has elected not to be employed since she moved in with a companion. She receives $450 a month alimony. For child support purposes, we find Julie's net monthly income to be $1050 and find George's net monthly income to be over $1001.[1] Julie should pay child support

1. The current child support guidelines for two children provide when a noncustodial parent's net monthly income is between $1001-$3000 and a custodial parent's net

at the rate of thirty percent, or $315. Iowa code section 598.21(9), as amended effective July 1, 1992, provides:

> Notwithstanding subsection 8, a substantial change of circumstances exists when the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established pursuant to subsection 4 . . .

There was more than a ten percent increase in support. George made the required showing for modification. Also see Schuler v. Rodberg, 516 N.W.2d 902, 904 (Iowa 1994).

We modify to increase Julie's child support obligation to $315 per month commencing on the date George's reduced alimony payments took effect.

Julie contends the trial court should have ordered George pay her attorney fees. 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981).

Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.

Hayden, P.J., concurs; Sackett, J., dissents.

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income is $1001 or more, the percentage used to multiply would be thirty percent.

SACKETT, J. (dissenting)

I dissent. I disagree with the majority's conclusion George has shown a change of circumstances to justify reduction of his alimony obligation. The trial court found George did not show the required change but temporarily reduced alimony. I would modify the trial court and reinstate the original alimony award.

George, at the time of the dissolution and now, works for United Parcel Service. The dissolution court found George's wages were $35,672 and with overtime he could make $42,000. Julie was employed at a department store at the time of the dissolution, and the trial court found her monthly income after taxes to be $600 a month. By the time of the modification hearing, Julie had quit working and moved in with a companion. George's income has not changed.

George contends, without a modification of his alimony obligation, the children will suffer. George was required to assume substantial debt in the dissolution. He had a positive net worth before the dissolution and a negative net worth after. Before the dissolution, George had planned to refinance the home to obtain a more favorable interest rate rather than the 13.2% he was currently paying. George contended, in lieu of his current alimony obligation, he could not get refinancing. He also contends it is not in the children's best interest for him, as custodial parent, to be paying twenty-four percent of his net disposable income in alimony.

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 burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. Mears v. Mears, 213 N.W.2d 511, 513 (Iowa 1979); Thayer, 286 N.W.2d at 223. 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. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. In re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983).

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. Full, 255 N.W.2d at 159; Leo v. Leo, 213 N.W.2d 495, 496 (Iowa 1973). 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. Mears, 213 N.W.2d at 514.

George had not met the burden to modify. While I agree the alimony award in addition to the debt George was left with following the dissolution coupled with his responsibility for the children was substantial, these were factors before the dissolution court.

I agree with the majority that Julie's child support obligation should be increased because the trial court considers only her earnings and not her alimony in fixing child support.

Alimony is considered income to the payee for federal and state income tax purposes. In cases where alimony is payable in a substantial amount for an extended period of time, in computing child support, it is deducted from the income of the payor and added to the income of the payee. See In re Marriage of Allen, 493 N.W.2d 273, 275 (Iowa App. 1992); see also In re Marriage of Lalone, 469 N.W.2d 695, 697 (Iowa 1991). I distinguish In re Marriage of Miller, 475 N.W.2d 675, 680 (Iowa App. 1991), where alimony was in a lesser amount paid for a shorter period.

Julie was netting $600 at the time of the dissolution. She has elected not to be employed since she moved in with a companion. I consider her earning capacity after tax deduction to be $600 a month. She receives $600 a month alimony. I consider $50 of her alimony should be for tax deductions. For child support purposes, I find her net monthly income to be $1200 and find George's net monthly income to be over $1000.[1] Julie should pay child support at the rate of thirty percent, or $360. Iowa Code section 598.21(9) as amended effective July 1, 1992, provides:

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1. The current child support guidelines for two children provide when a noncustodial parent's net monthly income is between $1001-$3000 and a custodial parent's net monthly income is $1001 or more, the percentage used to multiply would be thirty percent.

> Notwithstanding subsection 8, a substantial change of circumstances exists when the court order for child support varies by ten percent or more from the amount which would be due pursuant to the most current child support guidelines established pursuant to subsection 4 . . . .

There was more than a ten percent increase in support. George made the required showing for modification. See also Schuler v. Rodberg, ___ N.W.2d ___, ___ (Iowa 1994).

I would modify to increase Julie's child support obligation to $360 a month commencing May 17, 1993, the date of the filing of the petition.