IN THE COURT OF APPEALS OF IOWA

FILED
JUN 26 1984
CLERK SUPREME COURT

IN RE THE MARRIAGE OF S. FRED BRUNK AND PHYLLIS L. BRUNK

307

UPON THE PETITION OF)
S. FRED BRUNK,

Petitioner-Appellant,)

Filed June 26, 1984

4-141
83-770

AND CONCERNING)
PHYLLIS L. BRUNK,

Respondent-Appellee.)

Appeal from the Iowa District Court for Polk County—Theodore H. Miller, Judge.

Petitioner husband appeals from a modification of the decree dissolving the parties' marriage. AFFIRMED AS MODIFIED.

Michael J. Galligan, of James & Galligan, Des Moines, for petitioner-appellant.

John M. Parmeter and James E. Brick, Brick, Seckington, Bowers, Swartz & Gentry, Des Moines, for respondent-appellee.

Heard by Snell, P.J., and Schlegel, and Sackett, JJ

SACKETT, J.

Petitioner, S. Fred Brunk, appeals from the modification of his decree of dissolution. He contends that the trial court should not have increased alimony and child support. He further asserts that the trial court should not have reinstated Phyllis' application for modification after it was voluntarily dismissed and that the increases should not have been made retroactive to the date the application was originally filed.

Fred and Phyllis Brunk's marriage of 18 years was dissolved in 1976. Custody of the parties' five minor children was awarded to Phyllis. The children were: Samuel, born August 27, 1959; Jill, born December 29, 1960; Geoffrey, born February 10, 1962; Heather, born June 16, 1963; and Kersten, born July 2, 1970.

Fred was a medical doctor who enhanced his medical credentials while Phyllis remained home with the couple's five children. Fred was earning $41,000 per year as a medical professor when the parties were divorced in 1976. In 1977 his income was $140,575; in 1978, $380,783; in 1979, $270,600; in 1980, $258,000; and in 1981, $378,000.

Phyllis was 42 years old when the marriage was dissolved. A college graduate, she had just prior to the dissolution started working in real estate sales in Iowa City. Her income was $8,481 in 1978; $14,459 in 1980; and $11,931 in 1981. In 1979 she reported a loss of $5,248.

I.

Fred charges that the trial court should not have increased Phyllis' alimony award.

Phyllis was originally awarded alimony of $200 per month, payable $100 on the 1st and $100 on the 15th of each month. The alimony was to increase to $225

per month July 1, 1978, and to $250 per month when she began receiving child support for only 2 children. Fred's alimony obligation was to increase to $300 per month when she received no child support under the terms of the decree. Said alimony was to continue until Phyllis' death or remarriage, but was to terminate on Fred's death.

In the modification proceeding the trial court increased Phyllis' alimony award to $700 per month commencing May 1, 1979.

Fred argues that Phyllis should not benefit from his long working hours and demanding practice and that her level of alimony should remain at a rate consistent with that payable by a professor of medicine, which he would still be were it not for the financial demands of this divorce. He further argues that his alimony and support payments come very close to meeting the needs of Phyllis and the children and satisfy the standard of living they enjoyed when he was living in the home and supporting them on a medical professor's salary.

The record reflects that Fred may work as many as 90 hours a week in an extremely demanding profession. Fred has remarried and he and his present wife have two children.

Fred's diligence in employment is one reason for his substantial increase in salary. His medical degree and the additional credentials he earned while married to Phyllis have also contributed substantially to his ability to earn a large income. While Fred was enhancing his medical credentials, Phyllis remained at home caring for the couple's five children. Phyllis did not leave the marriage with the potential to earn substantial sums of money as did Fred.

The issue of alimony has long been a difficult one for the courts. The general concept of alimony and its purposes have changed posture in recent years with the advent of the women's movement. How long the issue of alimony will be

before us is in question.

In In re Marriage of Beeh, 214 N.W.2d 170, 174 (Iowa 1974), the Iowa Supreme Court said: "There is no evidence before us, nor can we judicially note, that women have yet achieved social and economic equality with men. It may be when that nirvana is attained the role of alimony in the ordinary dissolution case, for either spouse, will be insignificant. Id.

While women have made great strides economically and socially since 1974, women, especially those of Phyllis' age group, frequently lag behind their male counterparts in earning power. Phyllis and Fred were married in an era in which many couples ascribed to the traditional concept that men were to be educated and work to support the family, while women assumed homemaking roles and other less financially rewarding occupations that allowed them to be supportive of their husband's career. Fred and Phyllis adopted these traditional roles in their family unit.

The focal point of spousal support determinations have shifted in recent years from the concept of a permanent award made to a wife assuming she could not become self-supporting to a concept of rehabilitative alimony. See Otis v. Otis, 299 N.W.2d 114, 116 (Minn. 1980).

Iowa Code section 598.21(3)(e)-(f) (1981) provides that alimony must be based upon:

> e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibility for children under either an award of custody or physical care; and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
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> f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.

We are not here, however, to make an initial alimony award, but to determine whether an existing award should be modified and increased. To do so we must consider the reason for the award. To justify modification of alimony, circumstances which have changed must be those which were not within the contemplation of the trial court when the original decree was entered or at the time of a subsequent intervening proceeding which considered modification of the alimony provisions of the original decree. In Re Marriage of Carlson, 338 N.W.2d 136, 141 (Iowa 1983); Iowa Code §598.21(8)(1983). An alimony award or modification cannot be considered in a vacuum, but must be considered in the total spectrum.

Fred claims he is entitled to make a new life and that he and his new family should enjoy the fruits of his labor. He is critical of Phyllis' poor judgment in moving to New Mexico, depleting her assets, and failing in the real estate profession. He argues that he should not be saddled with paying her an annuity for the rest of her life. He further contends that Phyllis received a property settlement in the dissolution in excess of that received by him.

We have carefully examined the trial court's award. We consider Fred's substantial increase in income to be a substantial change of circumstance. We find no evidence that the trial court considered such a substantial increase in rendering the original decree.

We agree with Fred that in considering a modification the trial court should consider the fact that he works 90 hours a week and should not penalize him for these efforts. We said in Hayne v. Hayne, 334 N.W.2d 347 (Iowa Ct. App. 1983), that we will not award alimony so as to diminish the incentive of productive persons. We recognize Fred's responsibilities to his new family. We give no consideration to his present wife's income other than to consider it in assessing the needs of Fred's current family. We recognize that Fred has provided substantial sums for his children's educational expenses over and above the

amounts he was ordered to pay in the original decree.

We recognize that Phyllis has an obligation to contribute to her own support, but also that she is without the tools Fred has to provide for her support. We consider and give significant weight to the fact that Phyllis has provided care and a home for the five children of the marriage since the dissolution.

Considering the whole spectrum, we determine that the award made by the trial court under the facts here is fair and equitable and we therefore affirm the increase of alimony to $700 per month.

II.

Fred also challenges the child support award made by the trial court. The original decree ordered Fred to pay $200 per month per child until July 1, 1978 when the amount was increased to $250 per month per child as long as he has support obligations for 3 children; and $275 per month per child as long as he has support obligations for 1 child. The child support was to continue until the child reached 22 years if the child remained a full time student. Fred was responsible for the children's tuition, books and fees.

In this modification proceeding, the trial court entered the following order with respect to child support:

> For child support, payments shall be:
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> A. $350 per child per month as long as Petitioner has child support obligations for three children which is the situation at this time.
> B. $450 per child per month as long as Petitioner has child support obligations for two children.
> C. $550 per month as long as Petitioner has one child.
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> Said child support obligations shall continue for each child who does seek post high school education until that child becomes 18 years of age, or graduates from high school, whichever event last occurs. However, child support obligations as above provided shall continue for each child who seeks post high school education, making

reasonable progress and who qualifies for child support under the provisions of Section 598.1(2), the Code of Iowa. 313

In addition, the Petitioner shall be responsible and ordered to make payment to or in behalf of any child in post high school education for tuition, books, fees, transportation to, from, and while at school, student activity expense including fraternal or sorority of the child's choice, including related expenses to reasonably take advantage thereof, and any other reasonable expenses other than room and board incidental to such schooling. If the child away at school has a car, its operational expense and repair to keep in running condition shall be considered college or higher learning expense to Petitioner. The Court anticipates that a child may or may not reside at home and attend a local school and the child support has been considered as set at a level to allow Respondent to provide the room and board expense at home or away at college in any event. This entails and requires Respondent to maintain her facilities in a state of readiness for such eventuality and her support has been set to enable her to afford to do so.

Support payments for college purposes as required herein may be made to the children direct or in their behalf by Petitioner.

The record indicates that Fred has paid, in addition to child support as ordered, substantial sums directly to the children and their needs. He has assisted them in purchasing motor vehicles and in study overseas. The support in the original decree appears to be premised on the assumption of the parties at the time of dissolution that Phyllis would live in Iowa City and the children would matriculate there. This did not happen. Phyllis left Iowa City; the children went to college elsewhere; and Fred paid the majority of the children's college expenses in addition to the support ordered in the decree.

We find no support in the record for the trial court's modification of the college expense award. Nor do we find the college provisions made by the trial court to be in the best interest of the children. Fred has exhibited concern for and generosity toward his children since the dissolution. There is no evidence that he will ignore their needs. The trial court's order provides no guidelines or restrictions on the expenditures the children can charge to their father. The mere

fact that Fred has a large income is not sufficient by itself to warrant open-ended college payments. The children need to be aware of the principles of money management. We believe that the provision for post-high school eduction in the original decree providing that Fred pay for tuition, books and fees is sufficient and should not be disturbed. We therefore modify the trial court's order by eliminating that portion of the order imposing additional support requirements with regard to college expenses paid by Fred. In doing so we in no way discourage Fred from paying for these items and assume, based on his past record, that he may continue paying additional expenses as are in his children's best interests.

We affirm the trial court's award of increased monthly child support and reject Fred's argument that he owes his children only the standard of living they enjoyed as medical professor's children.

Iowa Code section 598.21(8) (1983) provides with reference to support orders:

> The court may subsequently modify orders made under his section where there is a substantial change in circumstances. The court contemplating a change in child support because of alleged change in circumstances shall consider each parent's earning capacity, economic circumstances and cost of living. [Emphasis added.]

Fred's children have a right to benefit from his increased earning capacity. We, therefore, will not disturb those portions of the court order awarding increased monthly child support payments.

III.

We next address the issue of retroactivity of payments. We must first determine the date of filing of the application for modification. The application seeking increases in child support, alimony and medical expenses was originally filed in Iowa on April 18, 1979. The application came on for hearing in Polk County, Iowa on February 20, 1980. Fred had filed in New Mexico, where Phyllis and the children were then living, an application for modification of custody.

Phyllis was concerned about having to hire a lawyer in both states. An order was subsequently filed in Polk County providing that, in the event the New Mexico court assumed jurisdicion of the child support, alimony and custody issues, the Polk County application would be dismissed. The New Mexico court assumed jurisdiction and assessed attorney fees against Fred. Phyllis dismissed her Polk County application without prejudice in April of 1979. Phyllis subsequently argued that the matter should be returned to Iowa because the New Mexico law did not provide for child support past age 18. The New Mexico court made a finding that it no longer had jurisdiction because the parties had agreed to return to Iowa.

On January 12, 1982, Phyllis filed an application to reinstate her April 18, 1979 application. The trial court reinstated the application. Fred argues there was no basis for reinstating the action and that the application should be considered as filed on the date Phyllis filed the application to reinstate. Phyllis argues that the Iowa court retained jurisdiction since the conditions and intent of the court order approving the dismissal were not met.

The Iowa Supreme Court, in Witt Mechanical Contractors, Inc. v. United Brotherhood of Carpenters, 237 N.W.2d 450, 451 (Iowa 1976), said:

> It is well settled a plaintiff has an absolute right to dismiss his cause of action at any time before final submission thereof to the jury, or the court when the trial is without a jury. The effect of such dismissal when defendant's pleadings are solely defensive is final and terminates the jurisdiction of the court thereof. (emphasis added).

Id.

The record is void of any evidence that Phyllis acted other than voluntarily and with advice of counsel. She sought the dismissal and the reinstatement. In Heironymus v. Heironymus, 64 Iowa 81, 83 (1884), the court held that the plaintiff, who had dismissed an action based on an agreement that dismissal should bar other suits on the claim, was held to have the burden of proof in impeaching the adjudication of dismissal.

Phyllis was represented by counsel at all junctures. The matter was

transferred to New Mexico to prevent her from having to obtain two attorneys. The New Mexico court accepted jurisdiction and ordered Fred to pay her attorney fees on modification. Such an award of fees would not have been proper under Iowa law. Phyllis dismissed her Iowa action without prejudice. She ultimately sought the return to Iowa.

When Phyllis dismissed her application, the trial court was without authority or jurisdiction to act on her application. There is no basis for her argument that jurisdiction was continuing. Her dismissal was without prejudice to file a new action which she subsequently did.

Phyllis claims that if we find that her application for modification was dismissed, that the ordering of reinstatement after dismissal is within the discretion of the trial court. We find no authority for this position and reject her argument. We find that the filing date of the application is January 12, 1982.

We must next determine when the amounts of increased child support and alimony should be payable. A parent's duty to pay increased child support as a result of a modification proceedings can be made retroactive to the date of the filing of the application. Wilcox v. Bradrick, 319 N.W.2d 216, 219 (Iowa 1982).

At the time of the filing of the application, Fred had realized a substantial increase in income. The increase of alimony for Phyllis shall commence on February 1, 1982. Any unpaid installments shall draw interest at the rate of 10% per annum until paid. The monthly increase of child support shall commence on February 1, 1982. Any unpaid installments shall draw interest at 10% per annum until paid.

AFFIRMED AS MODIFIED.