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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-111 / 88-758

IN RE THE MARRIAGE OF ELIAS C. JACOBO AND JUDITH A. JACOBO

Upon the Petition of

ELIAS C. JACOBO,

Appellant,

And Concerning

JUDITH A. JACOBO,

Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Joseph C. Keefe, Judge.

Both parties have appealed the modification of their dissolution decree, requesting modification of various economic provisions. **AFFIRMED.**

Max E. Kirk of Ball, Kirk, Holm & Nardini, P.C., Waterloo, for petitioner-appellant/cross-appellee.

Jay P. Roberts and Kevin R. Rogers of Swisher & Cohrt, Waterloo, for respondent-appellee/cross-appellant.

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

HABHAB, J.

Appellant appeals from the district court's denial of his motion for modification of alimony. Appellee has cross-appealed; she seeks an increase in alimony, as well as an increase in child support.

The parties, Elias and Judith Jacobo, were married in 1974. One child was born to the marriage, a boy born in 1976. In addition, Elias adopted Judith's two children from a prior marriage.

Elias is a medical doctor in private practice; he earns over $200,000 per year. Judith is trained as a registered nurse but is unable to practice that profession due to health problems noted below. She works part-time as a nurse's aide and earns about $4000 per year.

The parties' marriage was dissolved in 1982. At the time of the 1982 decree, Judith had recently undergone surgery for a malignant brain tumor. Because of the tumor's location, not all of the cancerous material could be removed. At that time Judith was unable to care for herself and was considered likely to die within a year.

The 1982 dissolution decree placed the three children in Judith's custody. The decree also required Elias to pay child support of $134 per child per month and alimony of $2300 per month. In addition, the decree awarded Judith $80,000 as a division of property; this money was placed in a trust due to Judith's inability to manage her financial affairs at that time.

Contrary to expectations, Judith has survived since the dissolution decree. Her physical condition has improved to the point she can care for herself and live independently, although her employability is seriously limited. The consequences of her illness include short-term memory loss, physical weakness, impaired vision, probable loss of intellectual ability, and personality changes such as fearfulness and loss of confidence. She has tried several times to resume her career as a registered nurse, but she has lost each job due to her limited abilities. As noted above, she presently works part-time as a nurse's aid, earning about $4000 per year.

In 1985, in a stipulated modification of the dissolution decree, the youngest child was transferred to Elias' care. The oldest child is a college student, and the middle child continues to live with Judith.

In 1987 Elias petitioned for a modification of the economic provisions of the 1982 dissolution decree. Judith, in response, also requested a modification of the 1982 dissolution decree.

After a hearing, the district court increased Elias' child support obligation for the one child still living with Judith from $134 per month to $300 per month. (Support for the adult child attending college was left at $134 per month.) The court otherwise denied the modifications requested by each party.

I.

Our review is de novo. Iowa R. App. P. 4. The court retains the power to modify an alimony award of indefinite duration upon a showing of substantial change in circumstances which were not contemplated by the trial court at the time of the initial decree. In re Marriage of Marshall, 394 N.W.2d 392, 394 (Iowa 1986). Modification of the alimony award is justified only if the substantial change in circumstances equitably permits different terms to be foisted upon the parties. In re Marriage of Skiles, 419 N.W.2d 586, 588 (Iowa App. 1987); see Thayer v. Thayer, 286 N.W.2d 222, 223 (Iowa App. 1979). Such changes must be basically permanent, not transitory, in nature. See Skiles, 419 N.W.2d at 558. The trial court's knowledge at the time the award is made forms the basis for determining whether the requisite change in circumstances has transpired. See id.

Iowa Code section 598.22(8) (1989) provides in relevant part:

> The court may subsequently modify orders made under this section when there is a substantial change in circumstances. In determining whether there is a substantial change in circumstances, the court shall consider the following:
>
> a. Changes in the employment, earning capacity, income or resources of a party.
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> * * *
>
> e. Changes in the physical or emotional health of a party.

Judith's recovery from cancer, absent an ability to support herself, is insufficient grounds upon which to modify the award of alimony. Alimony is an allowance to the ex-spouse in lieu of the other ex-spouse's legal obligation of support. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981). A reduction in alimony would only be warranted here if Judith's income capacity had increased substantially. At the time of the dissolution, Judith was still receiving treatments for her cancer. Segments of her frontal and temporal lobes had been removed during the surgical procedure. Her prognosis was not bright. While she is now able to function by herself, the continued effects of the cancer have relegated her to part-time employment as a nurse's aide. This employment earned her but $4,017 in gross income in 1987.

We do not deem this moderate income, nor Judith's meager income capacity, to be a substantial change in circumstances warranting a reduction in alimony. See Tetreault v. Tetreault, 148 Vt. 448, 535 A.2d 779, 782 (1987). The party seeking a modification of an alimony award has the burden to show that there has been a substantial change in circumstances. See Skiles, 419 N.W.2d at 588. Elias has failed to meet his burden herein.

Similarly, Judith has failed to demonstrate a significant change in circumstances warranting an increase in alimony. Elias's salary, although quite handsome and

much greater than Judith's, has not increased significantly since the dissolution. Judith is now able to live on her own. Her gross income from all sources, including alimony, as shown on her 1987 income tax return was $41,139. Judith has failed to show a substantial change in circumstances.

II.

Judith also requests that her child support for Jennifer, an adult child attending college, be increased. Since Elias is obligated to pay Jennifer's college costs, we see no reason to disturb the amount of child support set by the trial court.

AFFIRMED.