

IN THE COURT OF APPEALS OF IOWA

No. 2-1164 / 12-0912
Filed February 13, 2013

**IN RE THE MARRIAGE OF KENNETH R. MICHAEL
AND MELISSA J. MICHAEL**

**Upon the Petition of
KENNETH R. MICHAEL,**
Petitioner-Appellant/ Cross-Appellee,

**And Concerning
MELISSA J. MICHAEL,**
Respondent-Appellee/ Cross-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Andrea J. Dryer, Judge.

A former husband appeals, and his former wife cross-appeals, a district court's order modifying their spousal support arrangement. **AFFIRMED IN PART, REVERSED IN PART.**

Steven H. Lytle of Nyemaster Goode, P.C., Des Moines, for appellant.

Ashley Tollakson of Hartung & Schroeder, Des Moines, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Tabor, JJ.

VOGEL, J.

Kenneth Michael appeals the district court decision denying his request to immediately terminate or significantly reduce his spousal support obligation to his former wife, Melissa Michael. Melissa-cross appeals, arguing the district court erred by determining the support should terminate when Kenneth turns sixty-seven. Because we agree with Melissa there has not been a substantial change not contemplated by the decretal court, we reverse the early termination of spousal support. We affirm the district court in finding Kenneth need no longer pay Melissa's health insurance premium.

I. Background Facts and Proceedings

This appeal shines a light on the difficulty our courts face, when reviewing the terms of a dissolution decree after many years—if not decades—have passed, since former spouses have gone their separate ways and made new lives for themselves. To that end, the legislature and our case law have developed sound principles that guide our resolution when reviewing these situations.

The twenty-three year marriage of Kenneth and Melissa was dissolved by a stipulated decree in 1994. The decree provided Kenneth would pay spousal support in the amount of \$450 per week for fifty-two weeks and then thirty-three percent of Kenneth's gross salary until such time as Melissa dies, remarries, or cohabits. Kenneth was also to provide medical insurance coverage for Melissa so long as he was obligated to pay spousal support. At the time of dissolution, Kenneth's salary was \$47,000. Melissa was not employed outside the home,

having been a homemaker throughout the marriage. Kenneth received all of his pension benefits accumulated during the marriage.

In 1998, Kenneth sought a modification of the spousal support provision. By that time, Melissa was employed at Principal Mutual Life Insurance Company with an annual salary of \$17,551. Kenneth was remarried with an annual salary of approximately \$78,000 plus significant bonuses. The district court, while finding various changes in the status and employment of the parties, denied Kenneth's petition. While the case was pending on appeal, the parties stipulated to a modification of spousal support setting the amount at a fixed rate of \$480 per week until such time as Melissa remarries, dies, or cohabits. The medical insurance was not litigated nor was it mentioned in the stipulation.

In July 2011, Kenneth again filed a petition to modify the decree, requesting his spousal support obligation be terminated or significantly reduced. At the time of the hearing, Melissa was sixty-two years old and Kenneth was sixty-one years old. Melissa still worked at the same company she did during the 1998 modification, now called Principal Financial Group. Since the 1998 modification, Melissa's pension benefits vested and she, due to her and her employer's contributions, accumulated approximately \$190,000 in retirement funds. With Kenneth's support payments of \$24,960, and Melissa's W-2 wages of \$29,201, plus \$333 in interest and dividend income, she had a reportable income of \$54,494 in 2010.

Kenneth claims to be not as fortunate. In 2008, the company he worked for during the dissolution was sold twice, and in February 2011, Kenneth's employment was terminated. Kenneth earned approximately \$111,000 in 2010.

After his termination, Kenneth went to work for Venture Corporation, at an annual salary of \$85,020.¹ Kenneth has approximately \$90,614 in retirement funds. In 2010, Kenneth and his wife had a combined income of \$154,213. From this, \$26,575 was deducted as Melissa's spousal support, leaving \$127,638 as their adjusted gross income.² While Melissa has relatively little debt, Kenneth has approximately \$44,000 in credit card debt, as well as an approximately \$144,000 encumbrance on his newly purchased condominium.

The district court granted Kenneth's petition to modify and held:

The changes in Melissa's income, the amount of time that she has held employment with a large Fortune 500 financial services company, and the pension and other resources that will be available to her upon retirement are circumstances not within the contemplation of the court at the time the original decree or subsequent modification was entered and are more or less permanent. For seventeen years Kenneth has provided weekly support to Melissa that has helped her build equity in her home and savings for the future. As the parties approach retirement age, the court finds that requiring Kenneth to make weekly support payments to Melissa until her death is inequitable because of the nature and amount of benefits that will be available to Melissa upon her retirement that Kenneth's employer does not provide.

The district court determined it was equitable for Kenneth to continue to pay \$480 per week to Melissa, but only until he reaches age sixty-seven or until Melissa dies or remarries. It also found Kenneth should no longer be required to maintain medical insurance coverage for Melissa, and each party should be responsible

¹ Kenneth's total gross income in 2011 was \$90,719.

² Kenneth's 2010 form 1040 combines both his and his wife Barbara's income on line 7, "wages and salaries." Barbara's form W-2 for 2010 shows her wages as \$43,531. There is a discrepancy in the amount of alimony paid on Kenneth's form 1040 and the amount reported as income on Melissa's, which may be due to the inclusion of the health insurance premium.

for his or her own attorney fees and one-half the court costs. This appeal and cross-appeal follow.

II. Standard of Review

We review this case de novo. *In re Marriage of Morris*, 810 N.W.2d 880, 885 (Iowa 2012); see also *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006) (“A proceeding to modify or implement a marriage dissolution decree subsequent to its entry is triable in equity and reviewed de novo on appeal.”). “The trial court nevertheless has reasonable discretion in passing upon the advisability or necessity of a dissolution decree provision.” *In re Marriage of Wessels*, 542 N.W.2d 486, 490 (Iowa 1995). On appeal we will not disturb the trial court’s conclusion unless there has been a failure to do equity. *Id.*

III. Spousal Support

A party seeking modification of a dissolution decree must establish by a preponderance of the evidence there has been a substantial change in the circumstances of the parties since the entry of the decree or of any subsequent intervening proceeding that considered the situation of the parties upon application for the same relief. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). Other well-established principles govern modification: (1) not every change in circumstances is sufficient; (2) it must appear that the continued enforcement of the decree would, as a result of the changed circumstances, result in positive wrong or injustice; (3) the change in circumstances must be permanent or continuous rather than temporary; and (4) the change in circumstances must not have been within the contemplation of the district court when the original decree was entered. *Id.*, see also Iowa Code § 598.21C

(2011). The district court has reasonable discretion in determining whether modification is warranted, and we will not disturb that discretion unless there is a failure to do equity. *Id.*

In the original stipulated decree from 1994 and the 1998 stipulation, the spousal support was set as traditional or permanent alimony. This type of alimony is awarded to allow a spouse to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage and is payable for life or for so long as a dependent spouse is incapable of self-support. *In re Marriage of Grady–Woods*, 577 N.W.2d 851, 854 (Iowa Ct. App.1998). Kenneth sets forth three main reasons why the spousal support should be modified, including changes in his health, his debt load (in conjunction with a comparison of his and Melissa’s income), his change in employment, and their relative retirement benefits.

A. Health

Kenneth makes a lengthy argument his, and his current wife’s, health problems and medical expenses are a substantial change warranting modification. See Iowa Code §§ 598.21C(1)(c), (e) (providing a substantial change in medical expenses, and/or physical, mental, or emotion health can warrant modification). However, we note when an initial decree is entered, it is done so with a view that reasonable and ordinary changes may be likely to occur, including medical problems associated with the aging process. *In re Marriage of Skiles*, 419 N.W.2d 586, 589 (Iowa Ct. App. 1987).

We agree with the district court Kenneth has not established by a preponderance of the evidence his and his current wife’s health problems are a

substantial changes in circumstances, particularly in that some of the health problems, such as Kenneth's back problems, existed at the time of dissolution. Moreover, a general decline in health due to aging is not an unforeseen, substantial change. See *id.* Melissa too has had some medical problems associated with the aging process, including osteoarthritis, which has limited some of her activities. Both Kenneth and his current wife testified they plan on continuing to work and can go about their normal activities despite their health concerns. The medical expenses Kenneth details cover routine care and are also not a substantial change in circumstances.

However, the district court did find a substantial change warranting the termination of Kenneth's requirement to pay for or maintain medical insurance coverage for Melissa. This provision was not contested in the 1998 petition for modification nor was it addressed in the couple's subsequent stipulated modification. We therefore must look to the original decree in determining substantial change. At the time of the original decree, Melissa had been a homemaker for over twenty-years and her future access to health insurance was uncertain. Her employment has been stable for many years, with health insurance coverage as an employment benefit. We agree with the district court the availability of insurance through her employer is a substantial change, such that Kenneth should no longer be required to pay for Melissa's insurance.

B. Current Income and Debt

Kenneth next argues his current debt load, and Melissa's increased income support a modification of his spousal support. See Iowa Code § 598.21C(1)(a) (providing a substantial change in employment, earning

capacity, income, or resources of a party can warrant modification). A party requesting modification must prove the change in financial situation is permanent rather than a temporary fluctuation. *In re Marriage of Rietz*, 585 N.W.2d 226, 230 (Iowa 1998). Moreover, the change in circumstances must not have been within the contemplation of the trial court at the time of the decree or last modification. *Id.* In determining whether there has been a substantial change in circumstances, we are to consider changes in the employment, earning capacity, income, or resources of a party. Iowa Code § 598.21C(1)(a).

At the time of the 1998 modification, Melissa had been employed at Principal for approximately three years. It was within the 1998 trial court's contemplation she would continue to be employed with normal salary increases. The 2011 modification court found her continued employment was a substantial change; we disagree. She had not changed employment since the last modification, nor are the gradual raises she received unreasonable or unexpected.

While Kenneth's employer has changed since the 1998 modification, we agree with the district court he did not prove any income decrease would be permanent as opposed to a short-term change attributable to the change in employment. Kenneth points to Melissa's income as nearly doubling since the 1998 modification, but so have Kenneth and his wife's incomes. See *in re Marriage of Dawson*, 467 N.W.2d 271, 276 (Iowa 1991) (holding a payor's new spouse's income is not used to support the former spouse, but the new spouse's income is relevant to the overall financial condition of the payor). Kenneth has

not proved any earnings dip in 2011 is anything other than a temporary adjustment to his new company.

Moreover, Kenneth focuses on his debt load preventing him from continuing to pay spousal support. Kenneth testified he had about \$40,000 in outstanding debt at the time of the original dissolution. He further testified he currently has about \$44,000 in outstanding debt in addition to a mortgage on his new home. His debt load has not substantially changed since the original dissolution and modification. Kenneth's financial decisions, including purchasing a new home and taking on a substantial mortgage, are not a substantial change in circumstances warranting modification.

C. Retirement

In terminating the spousal support when Kenneth turns age sixty-seven, rather than until Melissa's death or remarriage, the district court focused on Melissa's successful retirement preparation. Kenneth argues the termination at age sixty-seven is appropriate because, as his retirement years approach, he will not be able to retire unless the spousal support is adjusted or terminated now so he can begin to increase his retirement savings, pay down debt, and yet enjoy a reasonable standard of living. On her cross-appeal, Melissa argues the early termination is inappropriate because there has not been any substantial change and Kenneth's lack of retirement savings is the product of his own poor lifestyle choices, for which she should not be punished.

Our courts have long held "when a person's inability to pay alimony . . . is self-inflicted or voluntary, it will not constitute a ground for reduction of future payments." *Ellis v. Ellis*, 262 N.W.2d 265, 268 (Iowa 1978). In 2010, Melissa's

total income, including her wages and support payments, was \$54,494. That same year, Kenneth and his wife had a combined income, after subtracting the amount of support paid to Melissa, of \$127,638. Kenneth and his wife as a couple earned over double what Melissa earned as a single person. The discrepancy in Kenneth and Melissa's retirement savings that exists now is not because of a substantial change in circumstance, rather, that discrepancy has developed over the last fourteen years since the last modification when both parties had approximately equal financial resources allowing them both to save for retirement. Kenneth blames his inability to save for retirement on his support obligation; however, as Melissa notes, Kenneth's lifestyle choices and financial habits have resulted in his current situation. Kenneth testified that although he was awarded all of his pension benefits in the 1994 decree, he chose to cash in those benefits to pay down outstanding debt, make a down payment on a new house, and pay attorney fees. He has depleted his own retirement. It is not equitable to now blame Melissa for Kenneth's poor financial planning or to punish Melissa for making more prudent choices.

The district court's order terminating the spousal support is inequitable both because there has been a lack of substantial change not in contemplation since the 1998 modification, and any discrepancy in retirement savings and debt obligations are wholly self-inflicted by Kenneth and do not constitute good grounds for a reduction in payment. The modification court, in 1998, understood the two different financial paths Kenneth and Melissa were taking, and yet found no substantial change of circumstances not contemplated in the original decree. We see little change in the passage of nearly two decades other than what would

have been contemplated by the decretal court. For these reasons, we reverse the district court's termination of spousal support.³

IV. Attorney Fees

Kenneth claims the district court's denial of his request for attorney fees was inequitable and unreasonable because he (1) was the prevailing party, and (2) the district court failed to accurately consider his ability to pay. An allowance of attorney fees depends on the financial condition of the parties and their relative ability to pay. See *Locke v. Locke*, 263 N.W.2d 694, 696 (Iowa 1978). "The trial court has considerable discretion" when determining whether to award attorney fees, and we will not overturn an award without the complaining party showing the trial court abused its discretion. *In re Marriage of Goodwin*, 606 N.W.2d 315, 324 (Iowa 2000). We find the district court did not abuse its discretion in ordering the parties pay their own attorney fees. Both parties are now requesting appellate attorney fees. Based on both parties' ability to pay, we decline their requests to shift fees and each party is responsible for his or her own attorneys' fees.

V. Conclusion

Because we find there has been a substantial change since the last time the insurance provision was litigated—the original dissolution—we affirm the district court's decision terminating Kenneth's obligation to provide insurance for Melissa. However, we find there has been no substantial change since the last time the support provision was litigated—the 1998 modification. The district

³ In his brief, Kenneth requests Melissa be ordered to repay him the amount of alimony payments she has received since May 8, 2012. Since we find the alimony amount was appropriate, we do not need to address the merits of Kenneth's request.

court's decision terminating the spousal support when Kenneth reaches sixty-seven is inequitable because Kenneth's failure to adequately save for retirement while Melissa has been successful in doing so does not warrant modification. Costs on appeal are assessed to Kenneth.

AFFIRMED IN PART, REVERSED IN PART.