

IN THE COURT OF APPEALS OF IOWA

No. 8-187 / 07-1521
Filed June 25, 2008

**IN RE THE MARRIAGE OF TAMARA CAMPION MILLER AND RANDY
MERTON MILLER**

**Upon the Petition of
TAMARA CAMPION MILLER,
n/k/a/ TAMARA J. CAMPION**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
RANDY MERTON MILLER,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Johnson County, Amanda
Potterfield, Judge.

Randy Miller appeals, and Tamara Miller cross-appeals, from the district
court's modification of the alimony provisions of the decree dissolving their
marriage. **AFFIRMED AS MODIFIED AND REMANDED.**

Alison Werner Smith of Hayek, Brown, Moreland & Hayek, L.L.P., Iowa
City, for appellant.

Stephen B. Jackson, Jr., Cedar Rapids, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

MILLER, J.

Randy M. Miller appeals from the district court's modification of the alimony provisions of the decree dissolving his marriage to Tamara Miller, n/k/a Tamara Champion. Tamara cross-appeals and requests an award of appellate attorney fees. We affirm as modified and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

Randy and Tamara were divorced in April 2001. They have one minor child, Aspen, born February 7, 1996. In the dissolution decree the district court placed physical care of Aspen with Randy. Tamara was ordered to pay child support to Randy of \$368 per month. Randy was ordered to pay alimony to Tamara in the amount of \$2,000 per month for twenty-four months.

On appeal from the decree, this court increased Randy's spousal support obligation to \$3,000 per month for a period of five years, or sixty months. We also stated Randy was allowed "to subtract spousal support from his gross income, for so long as he is required to pay spousal support." *In re Marriage of Miller*, No. 01-0964 (Iowa Ct. App. Sept. 11, 2002). On further review by order, our supreme court modified the amount of child support Tamara owed Randy to \$322.82 per month.

Tamara filed a petition for modification on February 2, 2006, seeking an extension of Randy's alimony payments, and later filed an amendment requesting modification of her child support obligation. Her award of spousal support as determined on appeal from the original decree expired on May 1, 2006. Trial was held in May 2007 on the issues of alimony and child support.

At the time of the modification hearing Tamara was forty-six years of age and employed as sales director for the west coast division of Euro Hair USA. At Tamara's request the district court reopened the record and received an affidavit from Tamara concerning a change in her employment status. The court noted in its subsequent ruling that shortly after the hearing she lost her job with Euro Hair USA. Randy was forty-eight years old at the time of the hearing and working as a commercial realtor.

At the time of the entry of the original decree, Tamara apparently had a job lined up to do field marketing work for Phillip Morris. However, the job fell through and she never actually started that position. Tamara moved to Colorado in 2002 to seek employment. During a visit back to Iowa City in the fall of 2002 Tamara was arrested and later convicted for operating while intoxicated (OWI). In the spring of 2003 she again returned to Iowa City to help move her mother into a residential center for the treatment of Alzheimer's disease. During this time Tamara was charged with domestic assault causing injury, involving Randy. In September 2004 Tamara was back in Iowa City once again for a custody hearing and was again arrested for OWI. She was also charged with child endangerment because Aspen was in the car with her at the time. After her second OWI conviction, Tamara entered a thirty-day, in-patient substance abuse program in California. She remained in California in a woman's sober living network until she returned to Colorado in approximately March of 2005.

At the modification hearing Tamara testified that once she returned to Colorado she began an extensive search for employment in the fields in which she had previous experience, including esthetics, merchandising, and marketing. However, she stated she continually ran into problems obtaining a job due to her prior criminal convictions and alcoholism. As set forth above, Tamara eventually got the job with Euro Hair USA but lost that job shortly after the modification hearing. At the modification hearing Tamara offered the testimony of Dr. Bill Asenjo to support her contention that finding a job in any of the fields in which she had experience was very difficult. Dr. Asenjo conducted an analysis of Tamara's work prospects and supported her testimony on the subject. Tamara testified she believed her best employment opportunity, based on her background of alcohol issues, her current sobriety, and the encouragement of others in the recovery community, would be as a certified alcohol counselor. She stated it would take her eighteen months to get a "Level Three Certification" and that she believed she would be employed "the next day" in Colorado with such a certification.

The district court issued a written ruling on Tamara's petition for modification on August 7, 2007. The court concluded Tamara had experienced a sufficient unanticipated and material change of circumstances to justify a continuation of spousal support from Randy at \$3,000 per month for an additional twenty months. In so concluding the district court concluded that Tamara's difficulties with employment, alcoholism, and criminal actions since

the original decree failed to justify an extension of alimony because her alcoholism was apparent to the court in the original decree.

However, the district court further ruled

that one aspect of the Decree which represented a concrete expectation of the parties and the court was the provision that proceeds of the sale of the marital home and the condominium first be applied to reimbursement for [Tamara's] investment in those properties from her inheritance.

The decree shows she was to receive the first \$55,000 in equity from the sale of those properties, with the balance to be divided equally between the parties. In fact, she received no net money from the sale of those properties. The marital home sold at a loss, and Tamara was in fact required to invest, directly and indirectly, another approximately \$33,000 in the home to pay the deficit. She then realized only a net \$33,000 to \$34,000 on the sale of the condominium, an amount that only offset the additional amounts she had to expend to complete the sale of the marital home. Accordingly, the district court determined Tamara had proved that the loss of the \$55,000 reimbursement contemplated by the decree was an "unanticipated change in her resources."

The district court also modified the amount of child support Tamara owed to Randy for Aspen. The court assumed a \$20,000 gross annual income for Tamara plus alimony of \$36,000. It used a \$102,000 gross annual income for Randy and permitted him a reduction of \$4,944 annually for health insurance premiums. The court did not deduct Randy's alimony payments from his gross income in determining the parties' incomes for the purpose of calculating Tamara's child support obligation, as this court had specifically ordered in its

decision on appeal from the original decree. As a result, the court ordered Tamara to pay monthly child support obligation of \$578.00.

Each party filed a Rule of Civil Procedure 1.904(2) motion. Tamara requested that the court order a reduction in her child support obligation upon the expiration of the extended alimony payments ordered by the court. Randy requested that the court re-determine the amount of child support he was to receive, contending \$668.43 per month was the correct amount because his \$3,000 monthly alimony obligation should be allowed as a deduction from his gross income for purposes of calculating Tamara's child support obligation.

The court granted Tamara's motion, finding that absent a material change in financial circumstances, her monthly child support payments should decrease to \$249 per month beginning April 1, 2009. The court denied Randy's motion concluding,

The court further finds, in its discretion, that deviating from the child-support guidelines in this case is not necessary to do justice between the parties, nor to provide for the needs of their child. . . . Although the Iowa appellate courts have approved a deviation from the guidelines by deducting alimony payments from the income of the child-support obligor, the court finds no precedent for reducing the income of the child-support recipient.

Randy appeals, contending the district court erred in extending the duration and amount of his alimony obligation. He further contends that if an award of additional alimony stands, he should be entitled to deduct his alimony payments from his gross income for purposes of calculating Tamara's child support obligation. Tamara cross-appeals, arguing the alimony should have been extended for a full forty-two months, not just the twenty months ordered by

the district court. She also requests Randy be required to pay \$3,000 toward her appellate attorney fees.

II. SCOPE AND STANDARDS OF REVIEW.

This action for modification of a dissolution of marriage decree is an equity case. See Iowa Code § 598.3 (Supp. 2005) (“An action for dissolution of marriage shall be by equitable proceedings. . . .”); *Id.* § 598.21C (providing for modification of orders for disposition and support when there is a substantial change in circumstances). Our review is thus de novo. Iowa R. App. P. 6.4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases have little precedential value, except to provide a framework for analysis, and we must base our decision on the particular facts and circumstances before us. *Id.*

III. MERITS.

Modification of a dissolution decree is governed by Iowa Code section 589.21C. “Modification of the alimony provisions of a dissolution decree is justified only if there has been some material and substantial change in circumstances of the parties, financially or otherwise, making it equitable that other terms be imposed.” *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991). The party seeking the modification must prove the change in circumstances by a preponderance of the evidence. *In re Marriage*

of *Rietz*, 585 N.W.2d 226, 229 (Iowa 1998); *Van Doren*, 474 N.W.2d at 586. “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.” *Van Doren*, 474 N.W.2d at 586 (citing *In re Marriage of Full*, 255 N.W.2d 153, 159 (Iowa 1977)). Such changes also must be more or less permanent or continuous, not temporary. *Id.* In determining whether there has been a substantial change in circumstances the court is to consider numerous factors, including any changes in the employment, earning capacity, income, or resources of a party, changes in the medical expenses of a party, and changes in the physical, mental, or emotional health of a party. Iowa Code § 598.21C(1)(a), (c), (e).

A. Extension of Alimony.

We agree with the district court that the loss of the \$55,000 reimbursement of her inheritance investment was an unanticipated, material, and permanent change in Tamara’s resources, and that it was not in the contemplation of the district court when entering the original decree. It appears from the record that at the time of the entry of the decree both the parties and the court expected the proceeds of the sale of the marital properties would allow Tamara to recoup that investment without fail. It clearly did not.

In ruling on Tamara’s modification petition the district court concluded,

[Tamara] has proven that the loss of the \$55,000 reimbursement was an unanticipated change in her resources, which was exacerbated by the worsening of her alcoholism and the medical expenses that consumed her other liquid assets. . . .

[Tamara] is not responsible for the loss of the reimbursement of her inheritance. [Tamara] needs additional alimony and Randy's financial success makes it fair for him to assist her. Further, a short term of additional spousal support will serve the purpose of rehabilitative alimony by allowing [Tamara] to complete the courses for her certifications, which will allow her to work as an alcohol and substance abuse counselor and to become self-sufficient. Randy can and should pay additional alimony to compensate for [Tamara's] loss of \$55,000 plus reasonable interest during these last six years.

Randy will pay extended alimony payments of \$3,000 per month beginning August 1, 2007, and continuing for 20 months thereafter.

We agree with these findings and conclusions of the district court on this issue and adopt them as our own.

However, we respectfully disagree with the district court's view that the degree and magnitude of the problems that resulted from Tamara's alcoholism were in the contemplation of the district court at the time of the original decree. Although in the original decree the court noted that Tamara had been guilty of some public offenses and that it believed she had an alcohol abuse problem, we do not believe it was within the court's contemplation that her problem would lead to her multiple alcohol-related criminal convictions, that she would have to submit to in-patient alcohol treatment, or the impact these facts would have on her ability to find employment and on her financial situation in general. Therefore, we conclude Tamara's multiple criminal convictions, her in-patient alcohol treatment, and the expenses and impact on her ability to obtain employment, do amount to substantial and material changes in circumstances, as provided in section 598.21C, which were not in the contemplation of the trial court when the original decree was entered.

We conclude that the unanticipated, substantial, and material change in Tamara's resources due to her inability to recoup the \$55,000 investment she made from her inheritance, as well as the unanticipated, substantial, and material change in circumstances caused by her alcoholism, as set forth in detail above, make it equitable to allow Tamara an additional twenty months of rehabilitative alimony, in the amount ordered by the district court, in order to allow her to complete the required courses to become a certified alcohol counselor and thereby reach the ultimate goal of rehabilitative alimony, becoming self-supporting. See *In re Marriage of Wessels*, 542 N.W.2d 486, 489 (Iowa 1995) (stating that purpose for rehabilitative alimony is to help create opportunity and incentive for economically dependent spouse to become self-supporting). The district court's extension of Randy's alimony obligation for an additional twenty months is equitable and supported by the specific facts and circumstances of this case.

In her cross-appeal Tamara argues these changes in circumstances discussed above in fact warrant an extension of alimony for forty-two months, instead of the twenty months ordered by the district court. We disagree. Tamara testified it would take her eighteen months to reach her goal of becoming a "Level Three" certified alcohol counselor and that she would be immediately employable thereafter. For this and all the reasons set forth above, we conclude the district court's award to Tamara of an additional twenty months of alimony at \$3,000 per month is more than sufficient to allow her to become self-sufficient.

B. Calculation of Child Support.

Randy next argues the district court erred in not allowing him to continue to deduct his alimony payments from his gross income for purposes of calculating Tamara's child support obligation. As set forth above, in modifying Tamara's child support obligation the court assumed a \$20,000 gross annual income for Tamara plus annual alimony of \$36,000, and \$102,000 gross annual income for Randy with a \$4,944 annual deduction to him for health care premiums. Randy asserted in his Iowa Rule of Civil Procedure 1.904(2) motion that the court should have deducted his \$3,000 monthly alimony obligation from his gross income for purposes of calculating Tamara's child support obligation, and in doing so the correct amount of Tamara's monthly child support, based on the child support guidelines, should be \$668.43. The court denied his motion.

This court, in its decision on appeal from the original decree, stated that in calculating Tamara's child support obligation Randy was to be allowed "to subtract spousal support from his gross income, for so long as he is required to pay spousal support." *In re Marriage of Miller*, No. 01-0964 (Iowa Ct. App. Sept. 11, 2002). This provision was then in place and being applied from the time procedendo was issued in that matter on December 6, 2002, until the time of the district court's rulings on Tamara's petition for modification and the parties' rule 1.904(2) motions in August of 2007.

Initially, we note that neither Tamara's petition for modification and amendment thereto, nor anything else in those portions of the record presented

on appeal, expressly or by necessary implication sought modification to disallow the deduction of alimony payments from Randy's income. More importantly, at the time of the modification hearing Randy had changed professions since the time of the decree and his income as determined by the district court was approximately \$25,000 less than it had been at the time of the original decree and appeal therefrom. Thus, we believe that if it was equitable to allow him this deduction at the time of the original decree when his income was in fact substantially higher than it is now, it would be clearly inequitable to now deprive him of that deduction.

Accordingly, on our de novo review, we conclude it would be inequitable not to allow Randy to continue to deduct his alimony payments from his income for purposes of calculating Tamara's child support. The district court should not have modified the decree to do so. We modify the court's ruling on this issue and remand to the district court with instructions to amend its child support order by allowing deduction of Randy's alimony payments from his gross income in calculating Tamara's child support obligation.

C. Appellate Attorney Fees.

Tamara requests an award of \$3,000 in appellate attorney fees. Such an award rests in this court's discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal. *Id.* Here, Randy was successful in part and unsuccessful in part on his appeal. Tamara was unsuccessful on her cross-appeal. Considering the

parties' incomes, including the amount of additional alimony Tamara is receiving, and all other relevant factors, we award Tamara \$1,000 in appellate attorney fees.

IV. CONCLUSION.

Based on our de novo review, and for reasons set forth above, we affirm the extension of Randy's alimony obligation for an additional twenty months. We also affirm the extension at the amount of \$3,000 per month, finding that amount remains fair and equitable. We conclude it would be inequitable to deprive Randy of the deduction of his alimony payments in calculating Tamara's child support obligation, modify the ruling of the district court on this issue, and remand to the district court with instructions to amend its child support order by allowing the deduction. Tamara is awarded \$1,000 in appellate attorney fees. Costs on appeal are taxed two-thirds to Tamara and one-third to Randy.

AFFIRMED AS MODIFIED AND REMANDED.