IN THE COURT OF APPEALS OF IOWA

No. 8-628 / 08-0418
Filed September 17, 2008

IN RE THE MARRIAGE OF BARBARA C. POWELL AND JOHN THOMSEN POWELL

Upon the Petition of
BARBARA C. POWELL,
Petitioner-Appellee,

And Concerning
JOHN THOMSEN POWELL,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

John Thomsen Powell appeals from the district court's denial of his petition to modify the spousal support, child support, and uncovered medical expenses provisions of the decree dissolving his marriage to Barbara Powell. **REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.**

Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

Catherine C. Dietz-Kilen, Des Moines, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

John Thomsen Powell (Thom) appeals from the district court's denial of his petition to modify the spousal support, child support, and uncovered medical expenses provisions of the decree dissolving his marriage to Barbara Powell. We affirm in part, affirm in part as modified, reverse in part, and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

Thom and Barbara Powell were divorced in May 2005. They have two minor children together, Brandon, born in December 1991, and Kelsey, born in September 1993. In the stipulated dissolution decree, the children were placed in the physical care of Barbara. Thom was ordered to pay child support to Barbara in the amount of $1500 per month.[1] He was also ordered to maintain medical insurance for the minor children and to pay a portion of the children's uncovered medical expenses. Finally, he was ordered to pay Barbara $2100 per month in spousal support, beginning June 1, 2005, and continuing for forty-eight months, at which time his obligation would be reduced to $1000 per month for an additional forty-eight months, or until "Barbara's remarriage, cohabitation with an unrelated male, or the death of either party."

When the parties divorced, Thom was employed as an organizational excellence leader at Meredith Corporation. His starting salary at Meredith in 2004 was $115,000. He also earned discretionary annual bonuses, which

[1] In setting Thom's child support obligation, the parties agreed to attribute an "annual alimony [income] of $25,200 to Barbara and an annual salary of $115,000 to Thom, less alimony payments of $25,200."

resulted in a gross annual income of $141,563 in 2004, $146,804 in 2005, and $145,581 in 2006. He maintained medical insurance for the parties' children through his employer-provided plan at Meredith.

On March 30, 2007, Thom, along with sixty other employees, lost his job at Meredith due to downsizing by the company. He shortly thereafter filed a petition to modify the dissolution decree, asserting that as a result of a substantial change in circumstances his child support obligation should be reduced, the medical insurance provisions of the decree should be modified, and his spousal support obligation should be terminated or substantially reduced. At trial on his petition he relied on his loss of his employment at Meredith and resulting reduction in income, as well as a claim that Barbara was cohabiting with an unrelated male.

Thom's petition to modify the dissolution decree came before the district court for trial in November 2007. At the time of the modification trial, Thom was fifty-one years old and in good health. He has a bachelor's degree in business administration and a master's degree in management science. He has over twenty-eight years of work experience in "education, development and [human resource] leadership." After he lost his job at Meredith, he began an extensive job search, making "over 300 contacts to fellow human resource professionals and training and development professionals in town." Unfortunately, he was unable to secure a job at the same level of income he enjoyed at Meredith. He eventually accepted a position in August 2007 at Career Resources Group (CRG) as vice president of leadership consulting for $68,000 per year plus

possible bonuses and sales commissions. CRG does not offer a medical insurance plan to its employees.

Barbara was forty-nine years old and in good health at the time of the modification hearing. After she graduated from high school in 1976, she began working at a bank where she remained employed until 1989. She was earning $33,567 per year when she left her position as manager of retail banking for that bank in 1989. She stayed at home with the parties' children for the remainder of her marriage to Thom. She took "a few college courses" when she worked at the bank but has had no other post-secondary education. After the parties' dissolution, Barbara obtained a job with the Des Moines Public Schools earning approximately $13,000 annually. She works close to forty hours per week during the school year, and she does not work during the summer. Barbara's employer provides her with medical insurance for herself and her children at no cost to her.

Following the close of the parties' evidence, the district court denied Thom's petition to modify in a ruling from the bench. The court determined there was not a substantial change in circumstances justifying a modification of either his spousal or child support obligations. The court rejected Thom's claims that Barbara was cohabiting with her boyfriend and that his reduced income was permanent in nature.

In a written ruling entered in December 2007, the district court explained Thom had not proved a substantial change in circumstances justifying modification of his spousal and child support obligations because, "based upon [his] education, skills and experience . . . he is capable of continuing to earn at an

annual rate of at least $115,000." In a subsequent nunc pro tunc order, the court further stated "that using the former income of [Thom] in calculating child support is required to meet the needs of the children and to do justice between the parties." The court dismissed Thom's petition to modify and ordered him to pay $10,000 towards Barbara's trial attorney fees.

Thom filed a motion to amend or enlarge the district court's ruling pursuant to Iowa Rule of Civil Procedure 1.904(2). The court entered an amended ruling in February 2008, modifying the medical insurance provision of the dissolution decree by requiring Barbara to maintain medical insurance for the parties' children under certain circumstances and denying Thom's request to modify the percentage he pays for the children's uncovered medical expenses.

Thom appeals. He claims the district court erred in denying his petition to modify the spousal support, child support, and uncovered medical expenses provisions of the parties' dissolution decree. He further claims the court abused its discretion in ordering him to pay Barbara's trial attorney fees. Both he and Barbara seek an award of 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 (2007) ("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. 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).

III. MERITS.

Child, spousal, or medical support provisions of a dissolution decree may be modified when there has been "a substantial change in circumstances." Iowa Code § 598.21C(1).

> A party seeking modification of a dissolution decree must establish by a preponderance of the evidence that 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). Such changes must also be more or less permanent or continuous, not temporary. *In re Marriage of Van Doren*, 474 N.W.2d 583, 586 (Iowa Ct. App. 1991). In determining whether there has been a substantial change in circumstances, section 598.21C(1) directs the court to consider a number of specifically listed factors. The relevant factors in this case are: (1) changes in the employment, earning capacity, income, or resources of a party; (2) remarriage of a party; and (3) possible support of a party by another person. Iowa Code § 598.21C(1)(a), (g), (h). With these principles in mind, we turn to Thom's claims that the district court erred in refusing to modify his spousal, child, and medical support obligations.

A. Spousal Support.

Thom claims the district court erred in refusing to terminate or reduce his spousal support obligation because (1) Barbara was cohabiting with her boyfriend; (2) his change in employment, earning capacity, and income was substantial and permanent; and (3) Barbara no longer needs spousal support. We will address each argument in turn.

"[T]he ultimate issue in a modification action should be whether the recipient spouse has a continuing need for support despite the changed circumstances." *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). Cohabitation can affect the recipient spouse's need for support and is therefore a factor to consider in determining whether there has been a substantial change in circumstances warranting modification. *Id.* at 703. The burden of proving cohabitation rests with the party making the claim. *Id.* This is so even where the parties' dissolution decree, as here, provides that a spousal support obligation shall terminate upon cohabitation. *See In re Marriage of Wendell*, 581 N.W.2d 197, 200 (Iowa Ct. App. 1998) (stating it is inappropriate to use cohabitation as an event to automatically terminate spousal support in an original dissolution decree).

Cohabitation is evidenced by: "(1) an unrelated person of the opposite sex living or residing in the dwelling house of the former spouse, (2) living together in the manner of husband and wife, and (3) unrestricted access to the home." *Ales*, 592 N.W.2d at 702 n.1. A "key element" of cohabitation, unrestricted access to

the home, is missing in this case. *See In re Marriage of Harvey*, 466 N.W.2d 916, 917 (Iowa 1991).

Barbara admitted at the modification trial that her boyfriend, David Bowden, stayed at her house at least three to four nights per week.[2] However, both she and Bowden denied that they were living with one another. Bowden maintained a separate residence and did not contribute to any of the expenses of Barbara's residence. He did not have a key to her house or the freedom to enter it except when Barbara was present or at her invitation. Aside from a few articles of clothing, he did not keep any of his possessions at her house. Based on this evidence, we agree with the district court that Thom did not meet his burden of establishing cohabitation. *Cf. In re Marriage of Gibson*, 320 N.W.2d 822, 824 (Iowa 1982) (finding no cohabitation under similar circumstances) *with Harvey*, 466 N.W.2d at 918 (finding cohabitation where boyfriend had complete and unlimited access to recipient spouse's home whether she was present or not). We therefore affirm that portion of the court's ruling denying Thom's request to terminate his spousal support obligation based on Barbara's alleged cohabitation.

We turn next to Thom's argument that the district court erred in refusing to decrease his spousal support obligation due to his change in employment, which resulted in a reduced income and earning capacity. The district court determined that despite the change in Thom's employment and income, he had not shown a

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[2] Despite this testimony at trial, we note that in an earlier deposition Barbara stated Bowden stayed at her house "more often than not," estimating he had slept at her house nine out of the ten previous nights.

substantial change in circumstances justifying a reduction of his spousal support obligation because his reduced income and earning capacity were not permanent. Upon our de novo review of the record, we conclude otherwise.

Thom testified that he was "paid well above market" at Meredith. Before accepting the position at Meredith, he was employed as a director of performance and talent management for a corporation based out of New Jersey. Thom testified that he earned more in that position than others in similar positions in Iowa due to the higher cost of living in New Jersey. He was able to use that salary as leverage to gain a "geographical differential" in negotiating his "extraordinary income" at Meredith. Unfortunately, according to Thom, "there are very few positions like that in Des Moines, none of which were open when [he] was seeking employment" after his termination from Meredith.

During the four months when he was searching for employment, Thom testified the highest annual salary he discovered for a position in his field in this area was $82,000. He "pursued that opportunity with vigor," but was not chosen for the position. He contacted over 300 acquaintances and evaluated several job opportunities before determining that the position with CRG was his best option financially. Although he was "initially offered a base salary of $50,000 a year" at CRG, he was "able to negotiate an increase of that base salary to $68,000 a year, which is virtually unheard of in consulting." Thom is also eligible for discretionary bonuses and sales commissions. However, at the time of the modification trial, he had not received any bonuses or commissions. There was

also evidence that in the preceding five years, CRG had only paid one bonus of $1337.50 and one commission of $1344.94.

Based on the foregoing evidence, which Barbara did not refute, we disagree with the district court's determination that due to Thom's "[e]ducation, skills and experience . . . he is capable of continuing to earn at an annual rate of at least $115,000." There is nothing in the record establishing that Thom can realistically be employed at the same high level of income he enjoyed at Meredith. Instead, the record shows that Thom accepted the position at CRG with the lower, though still substantial, salary only after he attempted but was unable to find employment at his previous level of income.

We additionally observe that Thom lost his high paying job at Meredith through no fault of his own. This is not a situation where an obligor has intentionally reduced his or her income to avoid support obligations. *See Walters*, 575 N.W.2d at 741-42 (listing cases where modification of support obligation was not appropriate due to obligor's voluntary reduction in earning capacity). Rather, the facts here are more similar to those cases where our courts have found an obligor's decreased income to be a substantial and permanent change in circumstances warranting modification of the support obligation. *See id.* at 741 (citing cases where modification of support obligation was appropriate due to obligor's involuntary reduction in earning capacity).

We conclude the changes in Thom's employment, earning capacity, income, and resources constitute a substantial and more or less permanent change in circumstances warranting a reduction in his spousal support obligation.

Thom is now, through no choice or fault on his part, earning slightly less than one-half of the income upon which his spousal support obligation is based. Enforcing the original dissolution decree in this case would "place an insurmountable burden" on Thom. *See id.* at 743. His current monthly spousal and child support obligations leave him little money for his own living expenses. Since losing his job at Meredith, he has had to borrow $3000 per month from his father in order to meet his support obligations. *See id.* at 741 (stating the court should consider whether continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice). The amount of relief to which Thom is entitled must, however, be tempered by Barbara's continuing need for support despite the change in circumstances. *See Ales*, 592 N.W.2d at 702.

We reject Thom's argument that Barbara no longer needs spousal support "because she has inflated her expenses, she has [the] ability to work at full-time . . . and she is able to save $400 each month based upon her part-time income and Thom's alimony." Barbara earns only about $13,000 per year through her employment with Des Moines Public Schools where she works close to forty hours per week during the school year. Although the district court found that the monthly expenses claimed by Barbara were overstated,[3] and we find they are substantially overstated, the evidence shows that she continues to need some amount of spousal support to maintain the standard of living she enjoyed during

[3] Barbara claimed she had approximately $6000 per month in personal expenses at the time of the modification trial. However, in the financial affidavit she filed in the dissolution proceedings two years earlier, she claimed only $3740 in monthly expenses.

the parties' marriage. *See In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa Ct. App. 1983) (stating that in determining the appropriateness of alimony we consider, "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other").[4] We accordingly conclude Thom's spousal support obligation should be reduced to $1100 per month beginning July 1, 2007, and thereafter to $600 per month for the final forty-eight months provided for in the parties' decree.

We must next determine whether Thom's child and medical support obligations should likewise be modified based on the more or less permanent changes in his employment, earning capacity, income, and resources.

B. Child Support and Uncovered Medical Expenses.

In denying Thom's request to modify his child support obligation, the district court stated it "reviewed the average annual income on a five-year basis of [Thom]. . . . When those matters are averaged, there is not a substantial, material change in income." Thom claims the court erred in basing its refusal to modify his child support obligation on his average income over the five years preceding the modification. He argues the court should have instead determined whether his child support obligation should be modified based on the salary he was actually earning at the time of the modification trial. We agree.

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[4] Although Barbara was out of the job market from 1989 until the fall of 2005, based on her prior work experience and income, as well as the fact she is currently employed less than full time, we find she has an earning capacity significantly higher than her current income.

Notwithstanding the factors and principles applicable to modifications of support obligations in general, Iowa Code section 598.21C(2)(a) additionally provides that "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. . . ." "Before applying the guidelines there needs to be a determination of the net monthly income of the custodial and noncustodial parent." *In re Marriage of Hagerla*, 698 N.W.2d 329, 331 (Iowa Ct. App. 2005). In cases where a parent is self-employed or has a fluctuating income, we have recognized that "it is generally best to use an average of income from a period that accurately reflects the fluctuations in income." *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa Ct. App. 1992). Such a situation is not presented by this case.

Thom was not self-employed at the time of the modification trial. Nor did his income fluctuate. His annual salary at the time of the modification trial was $68,000. Although he was eligible for discretionary bonuses and commissions in addition to his base salary, he had yet to receive any such additional income. Moreover, the evidence established that such bonuses and commissions were speculative at best given that in the preceding five years his employer had only paid one bonus and one commission. *See In re Marriage of McCurnin*, 681 N.W.2d 322, 328 (Iowa 2004) ("All income that is not anomalous, uncertain, or speculative should be included for the purpose of determining a child support obligation."). We conclude there was no factual support in the record for the district court to determine Thom's net monthly income by averaging his income

for the past five years. Nor was there any substantial basis in the record for the court to use an earning capacity rather than Thom's actual earnings in denying his request to modify his child support obligation.

"In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). But, before the court utilizes earning capacity rather than actual earnings, a finding must be made that if actual earnings were used, a substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *Id.* In its February 2008 nunc pro tunc order, the district court stated that "using the former income of [Thom] in calculating child support is required to meet the needs of the children and to do justice between the parties." We do not agree.

As we previously detailed, Thom's loss of employment was involuntary. He diligently searched for and secured the highest paying job he could locate in the Des Moines area soon after his termination from Meredith. Unfortunately, that job paid less than half what he was earning at Meredith before his dismissal from the company, and only three-fourths of the amount on which his child support obligation was based. Thom's testimony, which was not contradicted by Barbara, established that he could not obtain employment in Iowa that would provide him with a level of salary comparable to that which he enjoyed at Meredith. Under these circumstances, we do not believe that use of Thom's earning capacity rather than his actual earnings was proper. *Cf. id.* at 803-04 (finding use of earning capacity appropriate where obligor voluntarily removed

himself from the job market and did not establish he was unable to secure employment at a level of income comparable to his previous employment).[5]

We therefore determine, based on Thom's actual income at the time of the modification trial, that he established a substantial and more or less permanent change in circumstances justifying a reduction in his child support obligation. This change in circumstances also necessitates reconsideration of the percentage he was ordered to pay in the original dissolution decree for the children's uncovered medical expenses. *See* Iowa Ct. R. 9.12 ("Uncovered medical expenses . . . shall be paid by the parents in proportion to their respective net incomes."). We find it appropriate to remand this matter to the district court for calculation of Thom's child support obligation and uncovered medical expenses contribution consistent with our opinion herein. *See In re Marriage of Bergfeld*, 465 N.W.2d 865, 871 (Iowa 1991) (remanding to district court for determination of child support obligation).[6]

C. Attorney Fees.

Thom next claims the district court erred in awarding Barbara $10,000 in trial court attorney fees. Iowa Code section 598.36 provides that in a modification proceeding, the court may award attorney fees to the prevailing

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[5] We do note that the parties' dissolution decree requires them to exchange copies of their income tax returns each year. Thus, Barbara will be alerted to any increases in Thom's income that might occur in the future. *See In re Marriage of Rietz*, 585 N.W.2d 226, 230 (Iowa 1998) (stating an obligee "always has the right to file an application to modify should [the obligor's] income increase in the future").

[6] We recognize the court's discretion, upon remand, to address the question of whether Thom should continue to be allowed a deduction for alimony paid in calculating his net income for child support purposes. *See In re Marriage of Lalone*, 469 N.W.2d 695, 696-97 (Iowa 1991).

party in an amount deemed reasonable by the court. An award of attorney fees in such instances lies within the discretion of the trial court. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). Whether attorney fees should be awarded depends on the respective abilities of the parties to pay. *Id.* In addition, the fees must be fair and reasonable. *Id.* Thom argues he should have prevailed at trial and thus pursuant to section 598.36 Barbara should not have been awarded attorney fees. He further argues the fees awarded by the district court in this case were not fair and reasonable.

This modification proceeding, which began in April 2007 and came before the district court for a two-day trial by November of that year, presented the relatively limited and related economic issues of whether Thom's spousal and child support obligations should be modified. Further, we agree that Thom should have prevailed in large part, by having his alimony and child support obligations reduced. We conclude that under the circumstances of this case the district court's award of $10,000 in trial attorney fees was not fair and reasonable.[7]

However, Barbara did prevail in resisting Thom's claim that his spousal support obligation should be terminated due to cohabitation. Thom also has a

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[7] In deciding requests for appellate attorney fees, and in reviewing questions concerning trial attorney fees, we do not fix the fees to which the requesting party is entitled for the services of that party's attorney, but instead respectively determine or review only the amount, if any, that the other party should be required to pay. *See In re Marriage of Beard*, 243 N.W.2d 565, 567 (Iowa 1976) (appellate attorney fees); *In re Marriage of Erickson*, 228 N.W.2d 57, 59 (Iowa 1975) (appellate attorney fees); *In re Marriage of Beeh*, 214 N.W.2d 170, 176 (Iowa 1974) (appellate attorney fees); *Conkling v. Conkling*, 185 N.W.2d 777, 787 (Iowa 1971) (trial and appellate attorney fees).

greater ability to pay than Barbara, based on his substantially higher income. We therefore reduce the district court's award of trial attorney fees to $4000. For the same reasons, we deny Thom's request for appellate attorney fees and award Barbara $1000 in appellate attorney fees. *See In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006) (stating the factors to be considered in determining whether to award appellate attorney fees include the needs of the party requesting the award, the other party's ability to pay, and the relative merits of the appeal).

IV. CONCLUSION.

Based upon our de novo review, we affirm the district court's denial of Thom's request to terminate his spousal support obligation due to Barbara's alleged cohabitation. However, we reverse the court's denial of his requests to reduce his spousal, child, and medical support obligations. The changes in Thom's employment, earning capacity, income, and resources constitute a substantial and more or less permanent change in circumstances warranting a reduction in his support obligations.

We accordingly reduce Thom's spousal support obligation to Barbara to $1100 per month for the twenty-four months beginning July 1, 2007, and to $600 per month for the forty-eight months thereafter. We remand this matter to the district court for calculation of Thom's child support obligation and uncovered medical expenses contribution consistent with our opinion herein. Finally, we reduce the amount of trial attorney fees awarded to Barbara to $4000, and award

her $1000 in appellate attorney fees. The costs of the appeal are to be divided equally between the parties.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.