IN THE COURT OF APPEALS OF IOWA

No. 9-183 / 08-0819
Filed April 8, 2009

IN RE THE MARRIAGE OF ELLIS SCOTT SMITH AND SHIRLEY ANN SMITH

Upon the Petition of
ELLIS SCOTT SMITH,
Petitioner-Appellant,

And Concerning
SHIRLEY ANN SMITH,
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

Petitioner appeals a modification order that increased his spousal support obligation. **AFFIRMED.**

Daniel L. Bray and Chad A. Kepros of Bray & Klockau, P.L.C., Iowa City, for appellant.

Frank J. Nidey and Rachel C.B. Antonuccio of Nidey, Peterson, Erdahl & Tindal, P.L.C., Cedar Rapids, for appellee.

Considered by Mahan, P.J., and Doyle, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

BEEGHLY, S.J.

I. Background Facts & Proceedings

A dissolution decree for Ellis and Shirley Smith was entered on May 30, 2001. The decree incorporated the parties' stipulation, which provided Shirley would receive about $480,945 in the property distribution, while Ellis received about $360,222. The stipulation also provided Shirley would receive alimony of $2850 per month until May 15, 2005, then $1666 per month until July 20, 2016, and then $650 per month until the death of Ellis or Shirley, which ever occurred first.

At the time of the dissolution, Ellis was employed as a vice president of Cummins Central Power, a position he still holds. His income in 2001 was about $80,000 per year, and in 2006 he earned $141,800, including bonuses. Ellis remarried after the dissolution. He is in good health.

Shirley was being treated for depression at the time of the dissolution. She was unemployed, but stated she intended to go back to school to become a registered nurse. Shirley took only one nursing class, and applied for only one job after the dissolution (she was not hired). Shirley traveled and spent time visiting her children. She moved to Arizona in 2004. She testified that her depression abated for a period of time, but returned in November 2004. Shirley resumed treatment for depression.

On December 22, 2005, Shirley filed an application for modification stating that Ellis's alimony obligation had decreased to $1666 on May 15, 2005, and asking to have that amount increased. She asserted her mental health had not

improved to the extent she could work full-time, her financial situation had deteriorated, and Ellis's financial situation had improved.

The district court found Shirley had not shown her mental health problems were unexpected because these problems were present at the dissolution proceedings. The court found that with continued counseling and medication Shirley would be capable of working on at least a part-time basis. The court determined Shirley needed to receive continuing mental health treatment, and her medication needs had increased. The court stated:

> The dissolution court could not have contemplated that the cost of Shirley's medical insurance, psychological counseling needs, and her medication needs would have changed significantly for the worse. As a result, Shirley faces the prospect of increasing medical/mental health bills and not receiving the treatment she requires because she does not have sufficient income to pay them. Shirley has shown a change of circumstances and should be entitled to limited relief to ensure that she is able to receive needed medical coverage, as well as needed medical and mental health care.

The court increased Ellis's spousal support obligation to $2500 per month beginning March 15, 2008, and continuing until July 20, 2016, when it will decrease to $650 per month as specified in the stipulation.

The court denied Ellis's motion filed pursuant to Iowa Code of Civil Procedure 1.904(2). Ellis appeals.

II. Standard of Review

This modification action was tried in equity, and our review is de novo. Iowa R. App. P. 6.4. In modification actions, the district court has reasonable discretion in determining whether to modify a dissolution decree, and that discretion will not be disturbed on appeal unless there is a failure to do equity. *In*

re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983); *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa Ct. App. 1987).

III. Merits

A. Ellis contends that the stipulation provides that there may not be any modification of the terms of the stipulation. He asserts the district court could not modify the amount of alimony Shirley receives. The stipulation states:

> The terms of this Stipulation constitute a full and complete settlement of all issues between the parties and constitutes the entire understanding of the parties. Each party has entered into said Stipulation voluntarily and after an opportunity to consult with counsel. The parties understand that no modification or waiver of any of the terms hereof shall be valid unless provided for in writing, signed and acknowledged by both parties and as approved by the court upon due and proper application.

The parties in a dissolution may stipulate, or the court may determine, that alimony is not modifiable. *See In re Marriage of Phares*, 500 N.W.2d 76, 79 (Iowa Ct. App. 1993); *In re Marriage of Aronow*, 480 N.W.2d 87, 89 (Iowa Ct. App. 1991). The provision in the parties' stipulation does not prohibit future modification of the terms of the decree, but instead states that a party may not unilaterally modify the stipulation. We conclude the stipulation does not prohibit a modification of alimony based upon a substantial change in circumstances.

B. Ellis claims Shirley has not shown a substantial change in circumstances sufficient to warrant a modification of the alimony provision of the dissolution decree. Ellis states Shirley was suffering from depression and was unemployed at the time of the dissolution proceedings, and she continued to suffer from depression and was unemployed at the time of the modification

hearing. He also claims there has been only a modest increase in her health care costs.

A dissolution decree may be modified if there has been a substantial change in circumstances since the entry of the decree, or any subsequent modification. *Vetternack*, 334 N.W.2d at 762. We also consider these principles in modification actions: (1) not every change in circumstances is sufficient; (2) it must appear that the continued enforcement of the decree would, as a result of changed circumstances, result in positive wrong or injustice; (3) the change in circumstances must be permanent, rather than temporary; and (4) the change must not have been within the contemplation of the court at the time of the decree. *In re Marriage of Maher*, 596 N.W.2d 561, 565 (Iowa 1999).

At the time of the dissolution proceedings Shirley was attending Kirkwood Community College and intended to become a registered nurse. Although she had been depressed, and received treatment for this condition, during the dissolution proceedings, she stated she had turned a corner and was feeling like her "old, happy-go-lucky self."

Dr. John Carlson, a family physician, gave a deposition regarding Shirley's condition at the time of the modification. He stated she had extreme depression and fibromyalgia. Dr. Carlson gave the medical opinion that Shirley was unable to work. He stated, "I think unless and until she responds to the degree of depression, the degree of fibromyalgia and the other factors we've mentioned, she will remain disabled." Dr. Carlson stated there was a twenty-five percent chance Shirley could hold a job within two years.

Dr. Carlson stated that on a scale of 100, Shirley's depression had been as high as ninety-four, and with medication and counseling that had reduced to ninety. He stated, "She's about as depressed as a person can get and still be alive." Dr. Carlson testified Shirley needed prescription medication for her depression, and additional appointments to monitor her medication. He also testified Shirley needed an increased number of visits with a clinical psychologist.

On our de novo review, we conclude Shirley has shown a substantial change in circumstances. Where at the time of the dissolution the parties believed Shirley would complete her education and become employed, Shirley now provided medical evidence that she was incapable of employment. Also, due to the increase in the severity of Shirley's depression, she needs increased medication and mental health care. We agree with the district court's statement, "there is no fairness in penalizing Ellis for Shirley's past irresponsibility and there is no fairness in rewarding Shirley for her irresponsibility. However, Shirley needs additional alimony to adequately care for her health needs and Ellis deserves finality in his obligation."

C. Ellis contends that under the doctrine of promissory estoppel Shirley should be estopped from seeking an increase in alimony. Ellis points out that Shirley received more of the marital assets at the time of the dissolution, and states this was done with the understanding that her alimony would decrease over time. Ellis states he relied on this agreement to his detriment, by receiving less marital assets. He also states it is not equitable to modify the dissolution

decree now because Shirley exhibited financial irresponsibility by failing to take steps to prepare for the decrease in alimony that was scheduled for 2005.

The elements of a claim of promissory estoppel are: (1) a clear and definite oral agreement; (2) proof that the plaintiff acted to his detriment in reliance on the agreement; and (3) a finding that the equities entitled plaintiff to relief. *In re Marriage of Harvey*, 523 N.W.2d 755, 756-57 (Iowa 1994). The district court concluded Ellis had not established his estoppel claim.[1]

Ellis has not shown a clear and definite oral agreement, or that he acted to his detriment in relying on the agreement. Although Ellis now states that the alimony provisions in the stipulation were made with the understanding that he was receiving less marital property in exchange for the gradual reduction in alimony, the stipulation does not state this. Furthermore, the stipulation specifically provides "[t]he terms of this Stipulation constitute a full and complete settlement of all issues between the parties and constitutes the entire understanding of the parties." We conclude Ellis has not established a claim of promissory estoppel.

D. Ellis asserts that if Shirley's alimony is increased, then his alimony obligation should terminate when he retires in 2017. He also asks the court to eliminate a provision in the stipulation that requires him to maintain life insurance with Shirley as the beneficiary until she reaches the age of sixty-five, in 2016.

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[1] The district court found the doctrine of equitable estoppel was not applicable in this case. The doctrine of equitable estoppel applies when there is a claim a party has made a false representation or concealed material facts. *Christy v. Miulli*, 692 N.W.2d 694, 702 (Iowa 2005). Where a party is claiming a reliance upon a promise, rather than a misrepresentation, the proper theory is promissory estoppel. *Harvey*, 523 N.W.2d at 756 (citing *Merrifield v. Troutner*, 269 N.W.2d 136, 137-38 (Iowa 1978)).

These issues were raised in Ellis's rule 1.904(2) motion, and were denied by the district court. We conclude Ellis has not shown equity requires that these changes be made to the decree.

IV. Attorney Fees

Shirley seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We determine Ellis should pay $1000 toward Shirley's appellate attorney fees.

We affirm the decision of the district court. Costs of this appeal are assessed to Ellis.

AFFIRMED.