IN THE COURT OF APPEALS OF IOWA

No. 3-066 / 12-1023
Filed March 13, 2013

**IN RE THE MARRIAGE OF TRAVIS SISSON
AND ALFRONIA SISSON**

**Upon the Petition of
TRAVIS SISSON,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
ALFRONIA SISSON,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Travis Sisson appeals, and Alfronia Sisson cross-appeals, from the district court's order modifying the spousal support provisions, and denying Travis's application to modify the custody provision, of the parties' dissolution decree. **AFFIRMED ON APPEAL; AFFIRMED ON CROSS-APPEAL.**

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

Eric Borseth of Borseth Law Office, Altoona, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

VAITHESWARAN, P.J.

Travis Sisson appeals the denial of his application to modify the custody provision of the decree dissolving his marriage to Alfronia Sisson. Travis also appeals, and Alfronia cross-appeals, the court's ruling on Alfronia's application to modify the financial provisions of the decree.

I. Background Facts and Proceedings

Travis and Alfronia Sisson married in 1997 and divorced eleven years later. Under the terms of a stipulated decree, the parents were to have "virtually equal parenting time" of their child, born in 1998. The district court ordered Travis to pay child support of $1020 per month. The court also ordered him to pay spousal support of $1500 per month for eighteen months and $500 per month for the next seventy-four months.

Two and one-half years after the dissolution decree was filed, Travis applied to modify the physical care arrangement. He raised a number of grounds, including the child's faltering grades. Alfronia counterclaimed for a modification of the decree's financial provisions. She cited her recent diagnosis of terminal blood cancer that required "routine and continuous treatment" and a resulting decrease in her earnings and earning capacity.

Following a hearing, the district court dismissed Travis's application to modify physical care and granted Alfronia's application to modify the financial provisions of the decree. The court ordered Travis to pay Alfronia spousal support of $2100 per month until the death of either party. The court additionally ordered Travis to pay one-half of Alfronia's uninsured medical expenses "related

to her cancer and its treatment." The court characterized these payments as supplemental alimony. Travis appealed and Alfronia cross-appealed.

II. Modification of Physical Care

A party seeking to modify a physical care arrangement must establish a material and substantial change of circumstances. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Travis contends "Alfronia's illness" and the child's "significant needs, particularly academic" amount to that substantial change. The district court disagreed. With respect to Alfronia's illness, the court stated:

> Alfronia's health condition . . . is not substantial enough to change her ability to take care of [the child], a fourteen-year-old young lady. [Alfronia's physician] testified that Alfronia has two to five good years left before her physical condition deteriorates to the point that she would be unable to take care of herself and her daughter. [The child's counselor] testified that Alfronia and [the child] share a strong bond and it would be a serious mistake to reduce [the child's] time with her mother. [The child] wants to keep equal time with her parents. [The counselor] believes that reducing [her] time with Alfronia, when she is going through the changes associated with her cancer, would have lifelong negative consequences for [the child].
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> There is no evidence providing that Alfronia's care of [the child] has deteriorated in any way. It will probably change in the next three to four years, but by then [the child] will be nearing adulthood and simply needs love and support rather than daily care. It will be more important as the cancer progresses for [the child] to spend more quality time with her mother, not less. Travis has therefore failed to meet his burden of proof that there has been a substantial change in circumstances that would warrant a modification of the custodial provisions . . . .

On our de novo review of the record, we agree with this reasoning.

Turning to the child's academic performance, the record reflects that she had been struggling for several years. Indeed, Travis conceded her grades began deteriorating when the couple was still married. At that time, he said he

did not do much to address the slippage because "that wasn't my department." Following the dissolution, he took steps to hire tutors but agreed that, even though the child made significant strides with them, that progress did not translate into progress at school. While Travis asserts that the child's grades remained stagnant because her mother was not providing "hands-on" assistance with homework, he acknowledged he had the child for three out of five school days per week.

On our de novo review, we are persuaded that uneven homework assistance was the least of the issues this teenager faced. In addition to the trauma of the divorce, the child had to deal with her mother's terminal illness, her father's remarriage, and in-fighting between the parents. Through it all, the child's psychologist testified she remained "warm," "happy," "insightful" and "very open to trying to understand the larger picture." We conclude the child's academic performance was not a substantial change of circumstances.

We affirm the district court's denial of Travis's application to modify the physical care arrangement.

III. Modification of Spousal Support

Travis next contends the district court acted inequitably in increasing his spousal support obligation. He asserts "Alfronia had the ability to support herself through work," had "substantial retirement benefits she could access," had health insurance, and "ignore[d] the opportunity to educate herself, improve herself, and increase her earning capacity."

Modification of the spousal support provisions of a 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 district court provided a detailed statement of reasons supporting a modification:

> In this case the parties anticipated that Alfronia would be increasing her earnings ability through further education or experience in the work place. The parties agreed that Alfronia's earning expectation at the time the decree was entered would be $40,000 per year.
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> Because of the onset of tremors and her illness, Alfronia declined to pursue the educational option and instead returned to retail sales where she had management experience prior to the marriage. She secured a position and, according to her current supervisor, is a hard worker and would have a bright future within the company. [However,] [i]t appears her future earnings expectation at the most will be $20,000 to $23,712 due to the cancer.
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> . . .
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> [Alfronia's physician] describes Alfronia's journey through this disease as slowly destroying her vital organs. He says that she can look forward to another two to five years of relatively good health if she takes advantage of all the treatment options available to her. . . . There is no doubt that this disease will eventually debilitate Alfronia. There is no doubt that she will eventually be unable to maintain employment and will incur significant medical expenses.
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> . . . In this case, Alfronia's disease has permanently limited her earnings potential and will eventually eliminate her earnings altogether. Alfronia has met her burden of proof that there has been a substantial change in circumstances that is more or less permanent and was not contemplated by the Court at the time the decree was entered. Her cancer diagnosis of multiple myeloma is that substantial change, as it affects her ability to earn for the remainder of her limited life expectancy.
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> Alfronia's earnings of $20,000 per year would result in a monthly gross of $1667. Her current monthly living expenses run approximately $5294.95. Based on those figures, her monthly need after subtracting her earnings is $3628 per month. Alfronia does receive child support of $1020 per month.
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> Travis's earnings of at least $236,100 per year plus benefits, plus his wife's salary, who works for him, leaves him in a significantly superior position. He is easily able to pay additional alimony. His net monthly income per the child support guidelines

> (. . .) is approximately $13,208 per month. Travis has the ability to contribute to Alfronia's needs at this time. The equities require that he do so.
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> [The child] will be graduating from high school in four years, when Travis's child support obligation to Alfronia will end. This child support obligation will end at about the same time Alfronia's ability to earn will decrease and her expenses will increase. Her current medical expenses have already increased due to her chemotherapy treatments. The cost of chemotherapy after insurance is approximately $750 per month. These expenses will only increase as the cancer progression accelerates.
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> In considering the appropriate amount of alimony herein, in addition to the previous factors, the Court has also considered the significant amount of assets [Travis] still has as a result of the original dissolution herein.

The court concluded that equity required an increase in alimony to $2100 per month retroactive to May 1, 2011, until the death of either party. Under the particular circumstances of this case, and for the reasons stated by the district court, we agree with this conclusion. *See In re Marriage of Wessels*, 542 N.W.2d 586, 488 (Iowa 1995) (noting wife's life after the dissolution went "into a drastic downward spiral" justifying modification of rehabilitative alimony award to make it permanent).

We also find evidentiary support for the district court's order requiring Travis to help defray a portion of Alfronia's uninsured medical expenses. *See* Iowa Code § 598.21C(1)(c) (2011) (providing for modifications if there are "changes in the medical expenses of a party"); *Wessels*, 542 N.W.2d at 491 ("[A] trial court has the power to order medical support . . . ."). Contrary to Travis's assertion, Alfronia did not live lavishly. Approximately forty percent of her expenses related to her home. Another significant portion related to health care. For example, she listed $149 per month for drugs, prescription, and medicine, $334.08 per month for her health insurance premium, and $597.92 per month for

medical and chiropractic care. This included a $45 copayment for each of four doctor visits per month. At the time of the modification hearing, the doctor had placed her on a financial plan that required a payment of $745 per month for six months. No one could have anticipated the magnitude of these uncovered medical expenses when the decree was filed.

We recognize that Alfronia may have other avenues to obtain coverage of her uncovered medical expenses as the disease progresses. Notably, the district court took this factor into account, stating Alfronia would need to "invoke any other health insurance coverage that is or may become available to her and is financially reasonable . . . ." And, because the court characterized the payments as alimony, Travis was able to deduct them for tax purposes. For these reasons, the additional obligation was not as onerous as Travis asserts.

On cross-appeal, Alfronia requests an increase in Travis's spousal support obligation "to $3800 per month until Travis's child support obligation stops and then $4800 per month until the death of either party." As discussed, we are convinced the court did equity in increasing Travis's alimony obligation to $2100 per month and by requiring him to pay a portion of Alfronia's uncovered medical expenses. We see no equitable reason to disturb that ruling. *See Wessels*, 542 N.W.2d at 490.

IV. Attorney Fees

An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). Alfronia contends the district court abused its discretion in failing to award her

trial attorney fees. She seeks an order requiring Travis to reimburse her for the $24,165 in trial attorney fees she incurred.

In denying Alfronia's request for attorney fees, the district court reasoned:

> Travis earns approximately $236,000 per year and Alfronia should earn approximately $20,000 per year. Both parties receive and maintain significant assets as a result of the dissolution originally granted herein and as reflected in the Court's findings. On balance, in view of the financial circumstances of each of the parties, and the ruling of the Court herein, the Court finds each party shall be responsible for their own attorney fees.

The district court increased Alfronia's spousal support award, minimizing the extent to which she would have to tap the property settlement to meet her monthly expenses. For that reason, we conclude the court did not abuse its discretion in declining Alfronia's request for trial attorney fees.

Alfronia seeks an award of $6125 in appellate attorney fees. As she prevailed in Travis's appeal, we award her $3000. Costs are taxed equally between the parties.

AFFIRMED ON APPEAL; AFFIRMED ON CROSS-APPEAL.