FILED
MAY 30 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KATHRYN E. MOREL & RICHARD J. MOREL

Upon the Petition of)
KATHRYN E. MOREL,) Filed May 30, 1980
Petitioner-Appellant,)
And Concerning,)
RICHARD J. MOREL,) 0-90 / 2-63627
Respondent-Appellee.)

Appeal from Cerro Gordo District Court - B. C. Sullivan, Judge.

Petitioner appeals trial court order seeking to implement provisions of appellate modification of dissolution decree. - Vacated in part and remanded.

Anna I. Shinkle, of Tesdell, Rydell, Hall & Shinkle, Des Moines, for petitioner-appellant.

R. Michael Sweesy, Mason City, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner, Kathryn E. Morel, appeals trial court order seeking to implement provisions of appellate modification of the decree dissolving her marriage to respondent, Richard J. Morel. We vacate in part and remand with instructions.

The marriage of Kathryn and Richard was dissolved by trial court decree entered July 15, 1977. That decree was affirmed as modified by this court in In re Marriage of Morel, No. 2-60963 (Iowa Ct. App., filed December 21, 1978). On remand, the trial court purported to adopt the modifications of this court and Kathryn appeals the supplemental ruling of the trial court, entered May 3, 1979, on her motion to reconsider. Our review of her claims is de novo. Iowa R. App. P. 4.

I. Initially, we must consider the jurisdiction problem raised by the procedural setting of this case. Kathryn's notice of appeal was filed on June 1, 1979, more than thirty days after the February 23, 1979 order. Thus, her appeal is untimely under Iowa R. App. P. 5(a) unless we find the time for appeal was tolled by her motion to reconsider. See Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 471 (Iowa 1978); Hogan v. Chesterman, 279 N.W.2d 12, 14 (Iowa 1979). To make that finding, we must determine whether her motion to reconsider qualifies as an Iowa R. Civ. P. 179(b) motion to enlarge or amend and, if so, whether that motion was timely filed as required by rule 179(b) and Iowa R. Civ. P. 247.

Kathryn's motion to reconsider sought clarification and amendment of the trial court's February 23, 1979 order. We believe under the holding of Kagin's Numismatic Auctions, Inc. v. Criswell, 284 N.W.2d 224, 226 (Iowa 1979) Kathryn's motion to reconsider constitutes a rule 179(b) motion.

Having determined Kathryn's motion to reconsider constituted a rule 179(b) motion, we must decide if it was timely. Motions under rule 179(b) must be filed within ten days of the time the verdict, report, or decision is filed. See Iowa R. Civ. P. 247. The supplemental order here was filed February 23, 1979. Although the written motion to reconsider was not filed until March 26, 1979, more than ten days beyond entry of the supplemental order, Kathryn's attorney presented the court an oral motion to reconsider on February 28, 1979 and she did so with the knowledge and approval of opposing counsel. According to an affidavit of the parties' respective counsel, the trial judge

then indicated he would allow the motion to reconsider and he set the matter for hearing. Just as the judicial act of rendering judgment may be distinguished from the ministerial act of entering judgment, see State v. Harbour, 240 Iowa 705, 711, 37 N.W.2d 290, 294 (1949), we think filing a motion with the court may be distinguished from placing it in the court record by the clerk of court. Here, Kathryn's oral motion to reconsider was entertained by the trial court on February 28, 1979, and pronouncement on it was made by the trial judge at that time. Even though the ministerial act of filing the motion with the clerk did not occur until March 26, 1979, we find the legal act of filing it with the court occurred February 28, 1979. This conclusion is supported by the fact the trial court entered a written order on the motion to reconsider. In order to have jurisdiction over the matter, the trial court had to find the motion to reconsider was timely. By ruling on the motion, the court impliedly ruled it had jurisdiction and furthermore impliedly found the oral motion was effectively filed and timely.

We find the motion to reconsider, which qualified as a rule 179(b) motion, was effectively filed February 28, 1979 and therefore was timely. Since the rule 179(b) motion was timely, time for appeal ran from the date of the ruling on the motion. See Kagin's Numismatic Auctions, Inc., 284 N.W.2d at 226. Kathryn's notice of appeal was filed within thirty days of that ruling and accordingly, appellate jurisdiction was preserved.

II. This court modified the original dissolution decree of the parties by increasing Kathryn's alimony award to $1000 per month from $500 per month and by awarding her an additional $25,000 in the property settlement, thereby increasing the award to $200,000. Our modification also altered the terms of the property award installment payment schedule. After procedendo was issued, the trial court entered an order in an attempt to implement our modificaitons. This order was then modified May 3, 1979, by the trial court ruling on Kathryn's reconsideration motion. Kathryn asserts the trial court order, as it now stands, incorrectly denied her interest on the unpaid property division balance, incorrectly determined the time when interest would begin, and incorrectly ordered interest to accrue at less than the statutory rate. We agree.

The trial court awarded Kathryn interest only on the property division installments after they became due. Thus, during the time her share of the assets remain in

custody of Richard she receives no benefit from them. We find that denies her an equitable return for the delay she has incurred in receiving her share of the marital estate. Our previous opinion specifically awarded Kathryn six percent annual interest on the unpaid balance of the property award. Yet, the trial court did not enter such an award and we hold it erred by limiting interest to unpaid installments. On remand, the trial court shall enter provisions allowing interest at six percent per annum on the unpaid portion of the $200,000 total property division award. Interest on the balance shall be determined from the date of the original decree, July 25, 1977. The interest on the unpaid balance shall be paid semi-annually. Additionally, interest on any installments due but unpaid shall accrue from the due date at the statutory rate, currently seven percent. See section 535.3, The Code 1979. Our modification of the alimony, to $1000 per month, shall be retroactive to the date of the original decree, July 25, 1977. Richard shall receive credit for alimony payments advanced. However, he also shall pay interest at the statutory rate for the alimony due but unpaid. Unpaid alimony awards in the future also shall bear interest at the statutory rate from the date they become due.

Kathryn has applied for attorney fees incurred on appeal. Without determining the amount that may be charged, we order Richard pay $600 toward Kathryn's appellate attorney fees. He shall also be taxed costs of this appeal.

We vacate the trial court's modified supplemental order in so far as it is inconsistent with this opinion and remand for entry of provisions.

VACATED IN PART AND REMANDED.