IN THE COURT OF APPEALS OF IOWA

No. 6-585 / 95-1274

IN RE THE MARRIAGE OF NORMA JEAN ENSIGN AND JAMES MARSHALL ENSIGN

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Upon the Petition of NORMA JEAN ENSIGN,

Petitioner-Appellee,

And Concerning JAMES MARSHALL ENSIGN,

Respondent-Appellant.

FILED
JAN 29 1997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Louisa County, R. David Fahey, Judge.

Respondent appeals from the district court's decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

James M. Ensign, Peoria, Illinois, pro se, for appellant.

Michael Siering of Metcalf, Conlon, Siering & Poock, P.C., Muscatine, for appellee.

Considered by Sackett, P.J., and Cady and Huitink, JJ.

SACKETT, P.J.

In this appeal, respondent-appellant James Marshall Ensign challenges the Iowa court's decision to take jurisdiction to dissolve his marriage to petitioner-appellee Norma Jean Ensign, divide their property, decide custody of their children, and order he pay child support. We affirm as modified.

James and Norma married March 12, 1986, and spent most of their married life in Illinois. James still lives in Illinois. Norma and the children have lived in Iowa since July 1993.

On February 28, 1994, in Peoria County, Illinois, there was filed what was termed a "Judgment for Legal Separation." It found Norma and James were legally separated and responsible for their own finances and indebtedness and held the other harmless from their individual liabilities. The parties were awarded joint custody of their three children, then ages seven, five, and three. Norma was given temporary custody.

James was ordered to pay $150 per month child support. The court found his support according to the statutory schedule would be $272 per month, but because James had custody of children ages fifteen and eleven, not shown to be born to this marriage, and received no support for those children, his support obligation was reduced. James was ordered to provide health care benefits. The order further provided:

> That the parties have resolved all issues of marital debt, and that such debts currently owed or incurred in the future shall remain their sole and exclusive responsibility;
>
> That the parties own no real property and have equitably divided their personal property between them. Any personal property remaining in each parties [sic] possession as of the date of this Order, shall be their sole and exclusive property with the exception of the 1983 GMC Conversion Van. The Petitioner has agreed to allow the Respondent full use of the GMC van and will also carry the insurance which equates to $23.74 per month. Should a dissolution of marriage be ensued the rights and possessions of each party are protected herein and Petitioner shall retain ownership of the 1983 GMC van and will provide to the Respondent a vehicle of equal value;
>
> That the Petitioner reserves the right to prosecute any action for dissolution of marriage which he has brought or may hereafter bring and defend any action which may be commenced by the Respondent;
>
> That each party shall be responsible for their own attorney's fees and costs in connection with this or any other action brought hereafter.

An order for the withholding of support was entered in Illinois on the same date and was to terminate on June 1, 2009.

In March 1994, Norma filed a petition in Iowa for dissolution of the marriage. On March 25, 1994, the Iowa court dismissed this action, finding the Illinois court had assumed jurisdiction and Norma had submitted to the jurisdiction of the Illinois court.

In September 1994, Norma again filed a petition for dissolution of marriage in Iowa.

On November 11, 1994, James and Norma appeared personally in court in Peoria County, Illinois, and the Illinois court found James failed to show grounds for modification of the February 28, 1994, judgment.

James filed a motion to dismiss Norma's petition in Iowa on January 6, 1995. The court ruled on it, finding Norma had stated under oath she was a resident of Iowa for one year. The court further found, though not an issue, that the requirement of Iowa Code chapter 598A, the "Uniform Child Custody Jurisdiction Act," had not been complied with.

In March 1995, James filed a second motion to dismiss. He challenged the Iowa court's jurisdiction to litigate the issues pending in Illinois. The court found Norma lived in Iowa when she filed the petition and met the residency requirements. The court further found the children had lived in Iowa since July 1993. The court further found Iowa was the state with the closest connection to the children and the family and it should assume jurisdiction.

On July 21, 1995, the Iowa court entered a decree of dissolution from which this appeal is taken. The Iowa court determined custody, divided property, and fixed child support.

James first contends the trial court should not have denied his request for a continuance after he discharged his attorney on the day of trial for what James termed a "conflict of interest."

We review a claim that the trial court should have granted a continuance for an abuse of discretion. *Countryman v. McMains*, 381 N.W.2d 638 (Iowa 1986). James has not shown the trial court abused its discretion. We affirm on this issue.

James next contends the Iowa court either did not have jurisdiction or should not have assumed jurisdiction when it entered the dissolution judgment.

The Iowa court had jurisdiction to dissolve the marriage. Norma alleged and proved she had been a resident of Iowa for over one year. Iowa Code section 598.6 (1995) provides:

> Except where the respondent is a resident of this state and is served by personal service, the petition for dissolution of marriage, in addition to setting forth the information required by section 598.5, must state that the petitioner has been for the last year a resident of the state, specifying the county in which the petitioner has resided, and the length of such residence therein after deducting all absences from the state; and that the maintenance of the residence has been in good faith and not for the purpose of obtaining a marriage dissolution only.

The Illinois judgment did not address the issue of a dissolution or divorce. The Judgment for Legal Separation does not preclude petitioner from seeking and obtaining a dissolution. *See In re Marriage of Kurtz*, 199 N.W.2d 312, 315 (Iowa 1972). We affirm the dissolution of the marriage.

The more difficult issues are whether the Iowa court had jurisdiction to address the issues of child support and property division, and whether Iowa is the most appropriate forum to decide child custody, and what preclusive effect the Illinois judgment had. These issues all were addressed and decided in the Judgment for Legal Separation issued by the Illinois court.

James contends the Iowa court did not have jurisdiction, and if it did, the Iowa court should not have assumed jurisdiction of the custody issue. James contends the

custody order entered in Iowa is contrary to the dictates of the Uniform Child Custody Jurisdiction Act to which both Iowa and Illinois subscribe.

The custody issue was decided by the Illinois court. The Iowa court, in an order not appealed from, determined the Illinois court had jurisdiction to enter the custody order. Iowa was not, therefore, making an initial custody determination. However, the decision of the Iowa court with reference to custody is substantially the same as the decision of the Illinois court. The Iowa court merely having recognized the custody decision of the Illinois court, we find James has no reason to challenge. We affirm on this issue.

The next question is whether the decision fixing child support and dividing property in Illinois precludes the Iowa court from relitigating these issues.

The Illinois judgment for child support was in effect when the Iowa action was filed. Again, the Illinois court's authority to enter the judgment was recognized by the Iowa court. The issue of child support was decided in the Illinois court. We agree with James that the Iowa court should not have treated child support as an original issue. We modify to strike the provision for child support, James being obligated for child support under the Illinois decree.

The third question is whether the Iowa court should have recognized the settlement of the property issues resolved in the separate maintenance decree. The issue of primary concern is pension rights.

The doctrine of res judicata is applicable to divorce and separate maintenance actions. *See Gerk v. Gerk*, 158 N.W.2d 656, 659 (Iowa 1968); *Peters v. Peters*, 249 Iowa 110, 115, 86 N.W.2d 206, 209 (1957). Issues litigated in the separate maintenance action thus can have preclusive effect. *Gerk*, 158 N.W.2d at 659; *but see Kurtz*, 199 N.W.2d at 315. The issue of property having been decided in Illinois, we agree with James that the Iowa court should not have relitigated the property division. We modify that portion of the dissolution decree to eliminate any division of property rights.

AFFIRMED AS MODIFIED.

Huitink, J., concurs; Cady, J., specially concurs.

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CADY, J. (concurring specially)

I concur in the result only.