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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARYLN A. COUCHMAN AND J. R. COUCHMAN

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Upon the Petition of)
MARYLN A. COUCHMAN (now Croy),)
Petitioner-Appellant,) Filed August 26, 1987
And Concerning)
J. R. COUCHMAN,) 7-171 / 86-1193
Respondent-Appellee.)

Appeal from the Iowa District Court for Appanoose County (No. CD 105-0481), Dan F. Morrison, Judge.

Petitioner wife appeals from a district court ruling which terminated her alimony effective the date of her remarriage. **AFFIRMED.**

John A. Pabst of Clements, Pothoven, Pabst & Stravers, Albia, for petitioner-appellant.

Peter S. Cannon and Russell J. Hansen of Connolly, O'Malley, Lillis, Hansen & Olson, Des Moines, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson and Hayden, JJ., but considered en banc.

DONIELSON, J.

Petitioner wife appeals from a district court ruling which terminated her alimony effective the date of her remarriage. Petitioner argues that the trial court did not have subject matter jurisdiction because respondent filed an application for order rather than a petition to modify. Petitioner contends there were extraordinary circumstances to continue her alimony payments after her remarriage; that is, the alimony payments should be treated as property settlement payments to continue until petitioner's death. Petitioner further contends that the trial court erred in making the order for termination of alimony retroactive to her remarriage. We affirm.

The marriage of the petitioner, Maryln A. Couchman, and the respondent, J R Couchman, was dissolved on October 26, 1981, after 15 years of marriage. In its decree, drafted by petitioner, the court ordered:

> 24. J. R. Couchman shall pay to his wife for her support and maintenance, the sum of $1,500.00 per month, on the first calendar day of each month, commencing from the date of the filing of this decree. Such payments shall continue until the death of Maryln A. Couchman.
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> Maryln A. Couchman acknowledges that the provisions herein contained for her support and maintenance are reasonable and adequate in view of the circumstances of the party [sic] and her income from her own efforts and property.
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> * * *
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> 30. Maryln A. Couchman is hereby given a lien upon the property of J. R. Couchman for security for the payment of the support granted in this decree in the amount of $180,000.00.

Maryln remarried in 1985. Later that year J.R. filed an "Application for Order Concerning Decree of Dissolution of Marriage" to terminate Maryln's alimony. Trial was held in June 1986. The trial court terminated Maryln's alimony effective the date of her remarriage and ordered the lien on J.R.'s property released.

Maryln had received three alimony payments after her remarriage. Maryln now appeals from the trial court's ruling.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

We first address Maryln's concern that the trial court did not have subject matter jurisdiction because a petition to modify was not filed. Instead, an application for order was filed. J.R. argues that subject matter jurisdiction was not challenged at the trial court level. Lack of subject matter jurisdiction may be raised at any time. Pierce v. Pierce, 287 N.W.2d 879, 881-82 (Iowa 1980). Iowa Code section 598.2 (1985) states: "The district court has original jurisdiction of the subject matter of this [dissolution of marriage] chapter." Alimony is an issue involved in dissolution of marriage cases, pursuant to Iowa Code section 598.21 (1985), and, as such, the trial court has subject matter jurisdiction, regardless of what J.R. captioned his request. Iowa Code section 598.21(8) (1985) vests authority in the court to "subsequently modify orders [for disposition and support] made under this section when there is a substantial change in circumstances." Furthermore, our supreme court recently has stated that the district court has authority to "hear and determine cases involving alimony and modification of alimony awards." In re Marriage of Marshall, 394 N.W.2d 392, 394 (1986). Therefore, we find the trial court did retain subject matter jurisdiction of this case.

We next address Maryln's argument that there were extraordinary circumstances to continue her alimony payments after her remarriage. Both Maryln and J.R. rely on the case of In re Marriage of Shima, 360 N.W.2d 827 (Iowa 1985), which states the following proposition:

> The general rule in Iowa, and elsewhere, is that while the subsequent remarriage of a spouse does not result in automatic termination of an alimony obligation, it shifts the burden to the recipient to show that extraordinary circumstances exist which require the continuation of the alimony payments.

Id. at 828. Shima involved a case wherein the original decree awarded alimony for a set term, ten years and one month, said payments to cease if petitioner wife died within that time. Petitioner wife remarried, and the respondent husband applied for a modification to terminate alimony payments. Petitioner argued the alimony payments were really a substitute for a property settlement, thereby constituting extraordinary circumstances. The court held that extraordinary circumstances needed to exist at the time the petition for modification was filed, not the time the original decree was entered. Id. at 829. The court stated that examples of extraordinary circumstances included an annulled second marriage, invalidity of a second marriage, inability of the subsequent spouse to furnish support, death of a subsequent spouse, and dissolution of a second marriage. Id. at 828. The Shima court held that petitioner's argument alleging her alimony payments were really property settlement payments did not constitute extraordinary circumstances. Id. at 829.

Maryln argues that extraordinary circumstances existed in this case at the time the original decree was filed. She contends the marital assets which included a family farm corporation and veterinarian practice could not be equitably divided and that the $1,500.00 per month payment to her was to adequately compensate her for her contribution to the marriage in the form of a property settlement. We find otherwise. First, the Shima case states that extraordinary circumstances need to arise subsequent to the dissolution decree. The extraordinary circumstances Maryln is alleging arose at the time the original decree was entered. Second, the decree states the $1,500.00 is for "support and maintenance." There are other provisions referring to the property division and child

support obligations. Maryln's attorney drafted the decree. We find the decree meant "support and maintenance" to mean alimony, not a property settlement. Maryln's attorney was in a position to make certain there would be no misunderstanding as to the nature of the $1,500.00 payments if indeed it was in the nature of a property settlement. He failed to do so. Third, the parties treated the payments of $1,500.00 per month as alimony for purposes of filing income tax returns. Thus, we find no merit in Maryln's argument that there were extraordinary circumstances involved to warrant continuation of alimony after her remarriage.

Because we hold there was no alimony obligation to Maryln upon her remarriage, we need not address Maryln's argument that the trial court erred in making the order concerning alimony payments retroactive to the date of her remarriage. J.R. had paid Maryln three payments of $1,500.00 each between January 12, 1985, the date of Maryln's remarriage, and July 24, 1986, the date of the trial court's decision. We find there was no obligation on the part of J.R. to pay the three payments of $1,500.00 to Maryln after her remarriage.

Accordingly, we affirm the trial court in all aspects. Because there has been no showing of extraordinary circumstances by Maryln to demonstrate why alimony should be continued after her remarriage, we find that J.R.'s alimony payments to Maryln ceased as of the date of her remarriage.

AFFIRMED.

All judges concur, except Sackett, J., and Oxberger, C.J., who specially concur.

SACKETT, J. (specially concurring)

In October 1981 these parties' 15-year marriage was dissolved. During the course of the marriage Maryln worked outside the home while J.R. completed his veterinary education. There were children born to the marriage who are currently in her custody and care.

In 1981 the parties had a net worth of over $700,000. Maryln received a residence valued at $60,000, some furniture and a car. She was also awarded payments of $1,500 per month for life. Those payments were secured by a lien against J.R.'s property. While there are no fixed percentages for division of the assets of a marriage, most divisions divide the property nearly equally. See In re Marriage of Griffin, 356 N.W.2d 606, 609 (Iowa App. 1984); In re Marriage of Stewart, 356 N.W.2d 611, 613 (Iowa App. 1984). Had there been an equal division of the $700,000, Maryln should have received an additional $300,000 in assets. The interest on that amount at 10 percent would exceed the amount J.R. would have paid her annually.

Taxwise the payment was treated as alimony. J.R. deducted the payments. Maryln paid tax on them. J.R. had a substantial income from his veterinarian practice and such an arrangement freed dollars from taxes to be utilized by the parties for family support. The settlement allowed J.R. to maintain the business assets, and in considering the alimony and property award together, supposedly allowed Maryln to leave the marriage with economic security to provide for herself and to assist with the support of the children of the parties in her custody.

In 1985 Maryln remarried. The trial court ordered and this court affirms the termination of her alimony on the date of remarriage. I agree that the majority has correctly applied the dictates of the Iowa Supreme Court and in terminating her alimony has given no consideration to the fact the $1,500 per month alimony was a payment made to her because her husband, at the time

of the dissolution, received about $640,000 of the parties' then net worth and she received about $60,000. See In re Marriage of Shima, 360 N.W.2d 827 (Iowa 1985) The court can only consider circumstances which exist at the time of the petition for modification, not at the time of the original decree. Shima, 360 N W.2d at 829.

Although it is in accord with the dictates of the Iowa court, I have problems finding the equity in such a holding.

Why should remarriage terminate Maryln's right to payments made in exchange for marital sacrifices and property rights? The fact alimony was to terminate on remarriage is based on an outdated sexual stereotype that a woman's place was in the home and unless she received alimony until she found a new spouse she would be a burden to society. This traditional concept needs to be reexamined in today's society where men and women are both employed outside the home and we no longer look at alimony as just support but may use it to balance economic inequities that resulted in the property division.

I concur with the majority.

Oxberger, C.J., joins this special concurrence.