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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DONNA L. KRUG AND RAYMOND KRUG

85

Upon the Petition of	)	
DONNA L. KRUG,	)	Filed September 25, 1984
Petitioner-Appellee,	)	
And Concerning	)	
RAYMOND KRUG,	)	4-228 83-1370
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Linn County - Thomas M. Horan, Judge.

Respondent husband appeals from the denial of his application for modification of the decree dissolving the parties' marriage. Respondent husband asserts that petitioner wife is cohabiting with another man, and this constitutes a substantial change of circumstances since the decree which warrants termination of her alimony award. AFFIRMED.

Wallace L. Taylor, Cedar Rapids, for respondent-appellant.

Kevin P. Shea of Shea, Spande & Shea, Cedar Rapids, for petitioner-appellee.

Considered en banc.

Respondent husband appeals from the denial of his application for modification of the decree dissolving the parties' marriage. Respondent husband asserts that petitioner wife's alleged cohabitation with another man constitutes a material and substantial change of circumstances rendering the original alimony award inequitable. We affirm.

In 1975, a decree was entered dissolving the marriage of Donna and Raymond Krug. The dissolution decree awarded Donna alimony of $50 per week terminable upon her remarriage or the death of either party. In December, 1978, Raymond filed an application to modify the decree. Reasons set forth to constitute a material change of circumstances included the allegation that Donna was cohabiting with various men. The court modified the visitation provisions of the decree, but ruled that respondent "failed to prove by preponderance of the evidence any change in circumstances such as to justify a modification of child custody or alimony or child support." The court did not specifically address whether Donna was, in fact, cohabiting with a man or the potential effect of this status on her financial condition.

In April, 1980, the respondent filed an application for modification seeking to delete the alimony provision of the decree. He alleged that petitioner cohabited with another man in her home, that he paid rent, shared other expenses, and attended social events with her. The court ruled that Raymond did not prove that Donna had entered into a common-law marriage and that he "failed to prove by a preponderance of the evidence that the change in circumstances upon which he relies is material and substantial and more or less permanent and continuous in nature, not within the knowledge or contemplation of the court when the marriage dissolution decree was entered or when the last application to modify decree of dissolution was ruled on on January 9, 1979."

Respondent then filed a motion with the court pursuant to Iowa R. Civ.

P. 179(b) to enlarge the amended findings and conclusions in the following particulars: 1) to find that petitioner is cohabiting with a man; 2) to find as a matter of law that cohabitation of one who is receiving alimony with another is sufficient grounds to justify termination of alimony; 3) to state why the court found respondent had not proved a material and substantial change since the initial decree; or 4) to state why respondent had not proved a material and substantial change since the date of the last modification ruling; and 5) to find that petitioner's relationship with the other man is more or less permanent and continuous in nature. The court overruled the motion, and respondent appealed.

The court of appeals found that the trial court had not addressed the issue of cohabitation, an issue which potentially would affect Donna's need for support. Accordingly, the trial court decision was reversed and the case was remanded for the taking of additional evidence on the issue. On remand, the trial court determined that evidence did not establish cohabitation and Donna was receiving minimal, if any, financial assistance from another man. In the court's view, Raymond had not shown a sufficient change of circumstances to justify a reduction or elimination of alimony. Respondent then instituted this appeal and petitioner subsequently filed an application for allowance of attorney fees.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4; In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). Two issues are raised on appeal: 1) whether cohabitation justifies termination of alimony payments, and 2) whether there was sufficient cause to show that Donna was cohabiting with one Harry Hoover.

As petitioner indicated in her brief, this court discussed the effect of cohabitation on alimony payments in respondent's first appeal on this modification action. In re Marriage of Krug, No. 2-67377 (Iowa Ct. App. filed Dec. 29, 1982). We recognized that the issue of cohabitation may affect the need for support. Id. slip op. at 3. In reaching this conclusion, we stated:

> We do not mean to suggest that if petitioner is found to be cohabiting with a man, then the alimony payments should be automatically terminated. We only mean that petitioner's financial status and need for support may be substantially altered by the addition of another person with whom petitioner may share many household expenses.

Id. (emphasis in original). Our opinion on this matter remains unchanged. A finding of cohabitation does not in and of itself justify termination of alimony payments. This is not to say that such a condition cannot be set forth in the decree. If this is done, then support payments would automatically terminate upon a finding of cohabitation. See In re Marriage of Gibson, 320 N.W.2d 822, 823-24 (Iowa 1982). In the case before this court, however, the decree contains no reference to cohabitation or its effect on support payments. Because of this, our inquiry cannot end with a determination of whether the elements of cohabitation are met. Rather, we must also determine whether Donna's financial status and need for support have been substantially changed by her association with Harry Hoover. The person seeking modification of the alimony provisions of the dissolution decree has the burden to prove a change of circumstances by a preponderance of the evidence. In re Marriage of Full, 255 N.W.2d 153, 159 (Iowa 1977); Thayer v. Thayer, 286 N.W.2d 223, 225 (Iowa Ct. App. 1979). After reviewing the record, we agree with the trial court that this burden has not been met.

Initially, we conclude that the record does not support a finding that Donna was cohabiting with Harry Hoover. In order to establish cohabitation, it is necessary to show not only that a person is living or residing with someone of the opposite sex, but also the existence of a sexual relationship. In re Marriage of Gibson, 320 N.W.2d at 824. As respondent points out, Mr. Hoover shared a house with Donna from 1977 through 1981. While Donna initially claimed that Mr. Hoover merely rented a room, evidence disclosed that he had access to the entire house. Thus, the first element of cohabitation is met. Yet, the record falls short of

establishing the second element of cohabitation, namely, the existence of a sexual relationship. Certainly, the evidence reflects that Donna and Mr. Hoover spent time together and displayed some affection for each other. However, we are unwilling to infer the existence of a sexual relationship from these facts.

Furthermore, we cannot agree with respondent's argument that Gibson does not require this second element. In Gibson, the court specifically stated, "We take it from the ordinary meaning of the term . . . that a sexual relationship was part of the intended definition." Id. at 824. Thus, for purposes of modifying or terminating the alimony provisions, we recognize that there is a difference between a platonic relationship, such as a room-renting situation, and cohabitation. Pursuant to Gibson, cohabitation necessarily requires the additional element of a sexual relationship. Precisely what constitutes a sexual relationship is not raised here. Accordingly, it will not be decided at this time. Needless to say, however, this court is cognizant of the difficulties presented when persons are living together and it appears that alimony is being used to support or partially support someone other than the ex-spouse. This can best be handled by a careful consideration of the facts and circumstances by the trial judge, as was done in this particular situation.

In light of the record and test set forth in Gibson, we conclude that the elements of cohabitation have not been met. We do not reach our decision easily because the second element is quite obviously a difficult item of proof. Yet this is what has been determined to be the law of the state. Accordingly, we affirm the trial court's decision in this respect.

Additionally, we agree with the trial court that Donna's association with Harry Hoover did not substantially alter her financial condition. The record reflects that Harry Hoover's financial contribution was at best minimal. From late 1977 through mid-1981 he rented a room from the petitioner at the rate of $50 per month. Actual payments of rent, however, were sporadic. Mr. Hoover also

allowed Donna to use his automobile and occasionally bought groceries. This financial assistance does not constitute a substantial change in circumstances which would necessitate a reduction or elimination of alimony. Accordingly, we affirm the trial court decision.

Petitioner has filed an application for allowance of attorney fees pursuant to Iowa Code section 598.36 (1984). 1984 Iowa Legis. Serv. No. 4 at 201 (West). The new section, effective July 1, 1984, specifically allows a court to award attorney fees to the prevailing party in a proceeding to modify an order or decree. Petitioner was the prevailing party in this action. The proceedings for which attorney fees are being requested occurred before section 598.36 was in effect. Generally, to determine if the legislative change is to apply prospectively or retrospectively, we look to legislative intent. If none is evident from the statute, we look at the language of the act, the evil to be remedied, and whether there was a previously existing statute governing the mischief which the new act is meant to remedy. State ex rel. Turner v. Limbrecht, 246 N.W.2d 330, 333 (Iowa 1976). However, when a statute is remedial or procedural, it is given retrospective application. State ex rel. Buchler v. Vinsand, 318 N.W.2d 208, 210 (Iowa 1982).

We hold that awarding of attorney fees is a remedial matter. Guidelines for determining when a statute is substantive, procedural, or remedial are found at State ex rel. Turner v. Limbrecht, 246 N.W.2d 330 (Iowa 1976). There, the court found substantive law to be that "which creates, defines, and regulates rights." Id. at 332 (citations omitted). Procedural law is "the practice, method, procedure, or legal machinery by which the substantive law is enforced or made effective." Id. A remedial statute is, "One that intends to afford a private remedy to a person injured by the wrongful act. That is designed to correct an existing law, redress an existing grievance. . . . giving a party a mode of remedy for a wrong, where he had none, or a different one before. . . . which not only remedies defects in the common law but defects in civil jurisprudence generally." Id.

Using these definitions, it is evident that awarding attorneys fees is a remedial action. Both remedial and procedural statutes are to apply both prospectively and retroactively. State ex rel. Buchler v. Vinsand, 318 N.W. 2d 208, 210 (Iowa 1982). The statute does not create or regulate a right. Rather, it affords a remedy in the form of attorneys fees to the successful party in a modification action. It extends our present law allowing attorneys fees in dissolution actions and expands the existing remedies.

This conclusion is borne out by other references made by the courts. Attorneys fees have been defined as awards to be treated in the nature of costs rather than as an element of damages. Maday v. Elview-Stewart Systems Co., 324 N.W.2d 467, 469 (Iowa 1982). The Iowa courts have long noted that the costs of an action involve "rule(s) of practice" and that changes in such statutes on rules of practice apply to all cases pending when the change occurred. Meigs v. Parke, 1 Iowa 499, 502, 1 Morris 378, 380 (1844)(cited with approval at Smith v. Korf, Diehl, Clayton & Cleverly, 302 N.W.2d 137 (Iowa 1981)).

The provision allowing attorney fees to be awarded in a modification proceeding is then to be given retrospective effect. However, the question of awarding attorney fees in a modification action is not so urgent a situation to require it apply to this trial. We believe the change in the law could not have been anticipated and that equity requires we leave the parties as they expected to be at trial. We decline to award trial court attorney fees to the petitioner but award appellate attorney fees in the amount of $600. In setting this amount, we do not suggest this is the proper charge for representation in this appeal; we only determine Raymond's contribution.

AFFIRMED.

All judges concur, except Donielson, J., who concurs in part and dissents in part, and Snell, J., who specially concurs.

DONIELSON, J. (concurring in part, dissenting in part)

I concur with the majority's opinion that the elements of cohabitation have not been met and circumstances do not justify a reduction or elimination of alimony.

I dissent, however, from the determination with respect to attorney fees. Iowa Code section 598.36 specifically allows a court to award attorney fees to the prevailing party in a proceeding to modify on order or decree. The majority indicates that trial court attorney fees should only be allowed under this section when the trial occurs after the July 1, 1984 effective date. I cannot agree. I am convinced the statute should be applied to allow attorney fees from the date any pending action is filed.

The general rule is that a statute is presumed to operate only prospectively absent clear legislative intent to the contrary. Iowa Code § 4.5 (1984). Yet, the supreme court has specifically recognized:

> Remedial and procedural statutes do not come within the legal concept of retrospectivity. That term is relevant only to statutes that create or take away vested rights. . . . Thus, notwithstanding section 4.5, the court has applied remedial and procedural statutes to proceedings pending on the effective date of the enactment.

State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 210 (Iowa 1982).

I am of the opinion that section 598.36 is strictly procedural or remedial in nature, since it does not create or divest a substantive right. Because of this, it should be considered applicable to proceedings pending on its effective date of July 1, 1984, regardless of whether a trial has taken place.

SNELL, J. (specially concurring)

Although I concur in the result, I believe that the majority is incorrect in classifying attorney's fees as remedial in nature.

Attorney fees may be considered an element of damages to be determined by the factfinder or taxed as costs by the trial court. See Maday v. Elview-Stewart Systems Co., 324 N.W.2d 467, 469 (Iowa 1982). The Iowa Supreme Court has determined that attorney fees in a modification of a divorce decree are, with few exceptions, taxed as costs. Id.

Citing to the definition set forth in Black's Law Dictionary, Fourth Ed., the Iowa Supreme Court has defined a remedial statute as:

> One that intends to afford a private remedy to a person injured by the wrongful act. That is designed to correct an existing law, redress an existing grievance, * * *.
>
> A statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before. * * *
>
> A remedial statute is one which not only remedies defects in the common law but defects in civil jurisprudence generally.

Schmitt v. Jenkins Truck Lines, Inc., 260 Iowa 556, 560-61, 149 N.W.2d 789, 791 (Iowa 1967).

Black's Law Dictionary, Fourth Ed., defines "costs" as follows:

> A pecuniary allowance, made to the successful party, (and recoverable from the losing party,) for his expenses in prosecuting or defending a suit or a distinct proceeding within a suit.

Black's Law Dictionary 415 (rev. 4th ed. 1968).

A reading of these two definitions indicates that a statute allowing the court to tax costs is distinct from a remedial statute. A remedial statute is one providing "the means or method whereby causes of action may be effectuated, wrongs be redressed and relief obtained is remedial." Schmitt v. Jenkins Truck Lines, Inc., 260 Iowa at 561, 149 N.W.2d at 792. Remedial statutes provide the injured party with a remedy against the wrongful party such as the right to

recover damages. See Id. "Costs" on the other hand are "sums ordinarily taxable for expense incurred in an action as provided by statute." Woodbury County v. Anderson, 164 N.W.2d 129, 133 (1969) (citing City of Ottumwa v. Taylor, 251 Iowa 618, 621, 102 N.W.2d 376, 378 (1960)).

Attorney fees are not ordinarily allowable unless authorized by statute. Addy v. Addy, 240 Iowa 255, 266, 36 N.W.2d 352, 359 (1949). The statute authorizing attorney fees to be taxed in divorce modification cases became effective on July 1, 1984. The trial court order in this case had already been entered and therefore this statute would not apply to any claim for attorney fees arising from that proceeding. Attorney fees should be allowed here for appellate services.