

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KAY ANN SHIMA AND LARRY J. SHIMA

Upon the Petition of)

KAY ANN SHIMA,)

Petitioner-Appellant,)

And Concerning)

LARRY J. SHIMA,)

Respondent-Appellee.)

Filed September 6, 1984

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83-985

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Appeal from the Iowa District Court for Story County - William G. Klotzbach, Judge.

Petitioner wife appeals from a modification of the decree dissolving the parties' marriage, asserting that the trial court improperly terminated her alimony award solely on the basis of her remarriage, and requesting attorney fees on appeal. REVERSED.

Richard J. Lowther, Ames, for petitioner-appellant.

David W. Benson of Smith, Nutty, Sharp, Benson & John, Ames, for respondent-appellee.

Considered by Snell, P.J., and Schlegel and Sackett, JJ.

PER CURIAM

The 1980 decree dissolving the 20-year marriage of petitioner Kay Ann Shima and respondent Larry J. Shima ordered:

that [Larry] shall pay as alimony and support money to [Kay] . . . each . . . month . . . the sum of Two Hundred Dollars (\$200.00) for a period of ten years and one month after the date of this Decree. Said payment shall cease upon the death of [Kay] should the same occur within ten years and one month of the date of this Decree.

Larry was ordered to assume all of the parties' debts except for those owed to Kay's parents, which were charged to Kay. Each party kept the personal property in his or her possession; there were no other major assets.

In 1983, Larry applied for a modification of the decree. He asserted that his alimony obligation should be terminated because: (1) Kay had remarried, and (2) Kay's financial position had improved since the decree while his had deteriorated. Kay resisted the application, and a hearing was held. The trial court found: (1) that the \$200 monthly payment was alimony, not part of the property division as Kay had argued; and (2) that no extraordinary circumstances existed which would justify continuing the alimony after Kay's remarriage. The trial court therefore granted Larry's application for modification; it terminated Larry's alimony obligation as of the date of Kay's remarriage. Kay has appealed.

Our review is de novo; weight will be given to the findings of the trial court. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). A court may modify a dissolution decree "only when there has been a material and substantial change in circumstances since the date of the original decree" Id. at 158. The petitioner has the burden to establish this change of circumstances by a preponderance of the evidence when he is attempting to modify the alimony provisions of a decree. "The circumstances which have changed must be those which were not within the contemplation of the trial court when the original decree was entered" Id. at 159.

Kay has remarried since the dissolution. The supreme court has held:

[T]he remarriage of a woman whose previous marriage has been terminated in a dissolution of marriage proceeding does not of itself terminate her right to alimony but it does make out a prima facie case which requires the court to end it, in the absence of proof of some extraordinary circumstances justifying its continuance.

In re Marriage of Woodward, 229 N.W.2d 274, 280 (Iowa 1975).

Kay contends that the monthly payments were not alimony. Rather, they constituted an arrangement for payment of a property settlement, even though the provision was labelled "alimony and support money"; property settlement provisions cannot be modified in the absence of fraud, duress, coercion, mistake or other grounds as would justify the setting aside or changing a decree in any other case." Id. at 277.

The case of Knipfer v. Knipfer is helpful:

In determining whether the award here constitutes alimony or a property division, no single factor is controlling. The court must take into consideration all the relevant factors, including the provisions of the agreement between the parties, the circumstances under which the agreement was made, the nature and value of the property owned by and to be divided between the parties, the original divorce proceedings and the terms of the divorce decree sought to be modified. . . .

The doctrine of alimony is based upon the common law obligation of the husband to support his wife, which obligation is not removed by her obtaining a divorce for his misconduct. The matter of alimony is separate and distinct from a determination of property rights of the parties. . . . Division of property has for its basis the wife's right to a just and equitable share of that property which has been accumulated by the parties as the result of their joint efforts during the years of the marriage to serve their mutual needs. . . . In Iowa we recognize that a wife has an interest in the real property accumulated by the husband while the marriage relation exists.

Provisions made in a decree for a divorced wife do not all come within the category of alimony, at least insofar as that term envisions money which a former husband is to pay for her future support. In many cases, the settlement is an adjustment of property rights or is in lieu of dower. As such, the allowance may be considered a substitute for, or in lieu of, her rights in the husband's

property as distinguished from those rights of future support.

259 Iowa 347, 352-53, 144 N.W.2d 140, 143-44 (1966) (citations omitted).

There is very little evidence for us to use to determine whether the monthly payment provision was alimony or a property disposition. Both parties testified that the main purpose for making the payments run for ten years and one month was to allow Larry to deduct the monthly payments from his income tax. In examining that purpose, we find:

Section 215 of the Internal Revenue Code, 26 U.S.C. § 215, allows a deduction for payments made by a taxpayer to a former spouse if those payments are includible in the income of the recipient under section 71. 26 U.S.C. § 71. Section 71(a)(1) provides that payments are includible in the income of the recipient only if they are (1) periodic and (2) made in discharge of a legal obligation which, because of the marital or family relationship, is imposed by decree or written instrument incident to the divorce. 26 U.S.C. § 71.

"Section 71(a) applies only to payments made because of the marital or family relationship in recognition of the general obligation to support which is made specific by the decree, instrument, or agreement. . . ." Treas. Reg. 1.71-1(b)(4) (emphasis added). Periodic payments made in satisfaction of the recipient spouse's property rights do not come within § 71(a)(1). Treas. Reg. 1.71-1(c)(4).

Boucher v. Commissioner, 710 F.2d 507, 509 (9th Cir. 1983). Therefore, the sole issue on appeal is whether Larry's payments to Kay were in discharge of a legal obligation arising out of the marital relationship, and therefore deductible under section 215, or whether the payments were part of a property settlement and not deductible. See Riley v. Commissioner, 649 F.2d 768, 772 (10th Cir. 1981); Mills v. Commissioner, 442 F.2d 1149, 1151 (10th Cir. 1971).

The dominant factor in determining whether the payments were part of a property settlement or whether they constituted alimony is the intent of the parties. Phinney v. Mauk, 411 F.2d 1196, 1198 (5th Cir. 1969); Wright v. Commissioner, 543 F.2d 593, 598 (7th Cir. 1976). The courts have also looked to other objective factors as aids in determining such intent. Factors held to be indicative of property settlement payments are (1) the presence of a fixed sum, (2) the fact that the payments are not related to the husband's income, (3) the continuation of the payments

without regard to the remarriage or death of the wife, (4) the fact that the wife relinquished property interests in return for the payments, and (5) the fact that the husband's obligation to make the payments is secured.

Riley v. Commissioner, 649 F.2d at 772. As we examine these factors in the instant case, we keep in mind that "a husband's intentions relative to the payments made to an ex-wife do not affect their deductibility." Riley v. Commissioner, 649 F.2d at 773 (citing Moore v. United States, 449 F. Supp. 163 (N.D. Tex. 1978)). Furthermore, "[s]elf serving assertions must always be balanced against the surrounding circumstances." Id. (citing Williams v. Commissioner, 627 F.2d 1032 (10th Cir. 1980)).

Examining the record for an indication of the parties' intent, we find that Larry testified at the modification hearing that he always believed the payments constituted support. Kay testified that she always believed the payments were installments on a property division. The decree gives no indication of the purpose for the monthly payments other than "as alimony and support money." However:

In determining the primary question whether the financial provisions made for defendant in the decree constitute a property settlement or alimony, the trial court's employment of the term "alimony" is not conclusive. It is not what the arrangement is called but what it is that fixes its legal status. It is the substance not the form which is controlling. . . . If an order constitutes a property settlement as distinguished from alimony, its character is not affected by the name given it.

Knipfer v. Knipfer, 259 Iowa at 351, 144 N.W.2d at 142-43 (citations omitted). Furthermore, "[t]he fact the award was to be paid in installments rather than in a lump sum is immaterial." In re Marriage of Woodward, 229 N.W.2d at 278.

Studying the other relevant factors to aid our determination, we find no fixed sum in the dissolution decree which would have indicated a property settlement. However, it does not appear that the payments were related to Larry's income, because his income fluctuated so much during the parties' marriage; this fact would tend to indicate a property settlement.

A factor supporting the theory that the payments were installments on a property disposition is the absence of a clause terminating the payments on Kay's remarriage. Normally, the inclusion of such a term would have indicated the payments were alimony. On the other hand, the decree does require the payments to cease on Kay's death. This term suggests the payments were alimony rather than installments. The inclusion of a clause for termination upon death and the exclusion of a clause for termination on remarriage confederate to confuse us rather than to enlighten us.

Neither does the disposition of property in the dissolution decree guide us in our determination. The parties' property was divided according to who possessed it at the time of the decree, not according to its value. The debts appeared to be divided according to convenience of payment, Kay bound to about \$34,000 owed to her parents, Larry burdened with all of the remaining debts of the parties, apparently amounting to approximately \$48,000. Larry had an income; Kay had none and had not worked in twenty years, if ever. Although she had been to college, she apparently had no employable skills and had served in her married life as mother and homemaker. It seems likely that the parties might agree that Larry should send Kay monthly support payments. On the other hand, it appears the couple parted ways somewhat bitterly. Thus, it also is possible that they would want to end all ties in a property settlement repaying Kay, as she testified, for twenty years of service as homemaker. Because there were no assets from which to glean a lump sum payment, however, it would have been necessary to spread the amount over time. Extending it over ten years and calling it alimony allowed Larry to deduct the amount from his gross income for the purpose of federal income tax. See I.R.C. § 215 (1980).

It is not possible to tell from the dissolution decree whether Kay relinquished her property interests in return for the monthly payments, but because there was not much marital property in which to relinquish property

interests, we believe such relinquishment was not part of the arrangement. Nothing is said in the decree of Kay's interests in Larry's business ventures, so we assume she had none. Larry's obligation to make the monthly payments is not secured. Consideration of these factors leads us to believe that the monthly payments were not installment payments on a property settlement, but rather were alimony payments, as labelled.

However, even though we have determined that the monthly payments were meant as alimony, as the modification court held, we cannot uphold their termination. The dissolution decree apparently was the result of negotiations between the parties. Larry testified at the modification hearing that he told his attorney to include a statement in the stipulated agreement that the monthly payments would terminate upon Kay's remarriage. However, no statement regarding such a termination was included in the final decree. Larry's testimony indicates that the dissolution court's omission of a clause regarding termination of monthly payments on Kay's remarriage was a conscious deletion, not an inattentive mistake by the court. Furthermore, examination of the record discloses that Larry failed to prove a material or substantial change in either party's financial position. Thus, there has been no change in circumstances not within the contemplation of the trial court which will necessitate or justify a modification of the decree. See In re Marriage of Full, 255 N.W.2d at 159.

The \$200 per month payments are hereby reinstated. Larry must pay all those amounts not paid during the pendency of this appeal. Furthermore, Larry must pay all costs of this appeal. Pursuant to Iowa Code section 598.36 (1984), this court has the authority to award attorney fees to the prevailing party in a modification proceeding. Because this statute became effective July 1, 1984, the award applies only to those attorney fees accrued on appeal and not to those fees arising from the trial which was held prior to the effective date of the statute. While we do not make a determination of the amount of attorney fees due Kay's

attorney, we find that Larry should pay \$350 of those attorney fees.

REVERSED.