FILED
AUG 06 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-564 / 92-558

IN RE THE MARRIAGE OF HAROLD KEMPF, JR., AND JO A. KEMPF

Upon the Petition of
HAROLD KEMPF, JR.,

000339

Petitioner-Appellee,

And Concerning
JO A. KEMPF, n/k/a JO A. LAWSON,

Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, C. H. Pelton, Judge.

The wife appeals the district court's modification of her dissolution decree which terminated her alimony and reduced the husband's child support obligation. **AFFIRMED AS MODIFIED.**

John T. Flynn of Brubaker, Flynn & Darland, P.C., Davenport, for appellant.

Mark J. Smith and Robert E. Weinberg of Wells, McNally & Bowman, Davenport, for appellee.

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

000340

HAYDEN, J.

Harold and Jo Kempf were married in 1971. They have one child, Angelina, born in October 1976. Harold and Jo were divorced on October 11, 1988. They agreed to joint legal custody of Angelina, with Jo having primary physical care. Jo was restored to her maiden name of Jo Lawson.

At the time of the dissolution, Harold was employed by Caterpillar Tractor, where he had net monthly income of about $2,801. The district court anticipated the Caterpillar plant in Mt. Joy, Iowa, was going to be closed soon and Harold would obtain other employment.

In 1988 Jo was attending Mary Crest College in Davenport. She expected to graduate in about one and one-half years with a degree in communication. The district court anticipated Jo would be able to earn at least $20,000 per year once she completed her degree. At the time of the dissolution Jo had back problems, asthma, an ulcer, and epilepsy. The court stated, "However, neither party sees any real possibility that she will be disabled."

The court ordered Harold to pay child support of $100 per week, which is $433 per month. Harold was also ordered to pay alimony of $433 per month for two years, $200 per month for three years, and then $100 per month for five years. Harold was also required to maintain medical and life insurance coverage so long as support or alimony was

required. In a posttrial motion, the court clarified this last provision to specify Harold was to provide coverage for both persons.

Jo filed a petition for modification on November 22, 1991. She sought an increase in the amount and duration of her alimony award. She also filed an application for an order to show cause. Jo claimed Harold was delinquent in his alimony payments by more than $5,000. She also stated he had failed to pay for her medical insurance premiums, which had cost her about $6,000.

Harold filed a counterpetition seeking a termination of his alimony payments and a reduction of his child support obligation.

In May 1989 Jo was diagnosed as having multiple sclerosis. She is presently unable to work. She has difficulty walking and difficulty with her eyesight. Jo receives social security benefits of $242 per month. Jo and Angelina live in a home owned by Marvin Steinhagen. At times Marvin also lives in the home, although he also has a residence in Aurora, Illinois. Jo pays the property taxes, which are about $50 per month, and the utilities, which are about $190 per month.

After the Caterpillar plant closed, Harold decided to go back to college at St. Ambrose University. He obtained a degree in December 1990. Harold began full-time employment at the Rock Island Arsenal in May 1991, where he earns about $22,921. Harold has net monthly income of about $1,319. Harold has remarried.

000342

The district court issued its order on March 6, 1992. The court denied Jo's request to increase the amount and duration of alimony. Instead, the court terminated Harold's alimony obligation. The court found there had been a material and substantial change in circumstances because Harold's income had decreased and Jo was supported by social security benefits and by sharing expenses with Marvin. The court concluded the change in circumstances required it to calculate Harold's child support obligation under the child support guidelines. Harold was ordered to pay child support of $80 per week, which is about $347 per month.

The court also found Harold was not in contempt for failure to pay alimony or medical insurance premiums. The court found Harold started making payments towards the alimony arrearage once he became employed full-time. The court ordered Harold to maintain medical insurance for Angelina. Jo appealed.

I. **Scope of Review.**

Our scope of review in dissolution cases is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

II. **Alimony.** 000343

Jo contends the district court should not have terminated the award of alimony. She believes she is entitled to an increase in the amount and the duration of the alimony award. Jo states there has been a substantial change in circumstances because she has been unable to earn $20,000 per year, as anticipated in the dissolution decree. Instead, she receives a total of $2,904 per year in social security benefits.

The district court found Jo's cohabitation with Marvin was a ground to terminate the award of alimony. However, both parties stated Jo had been living in Marvin's house since March 1988, before the dissolution decree. Thus, there has been no change in circumstances concerning Jo's residence. We also note the dissolution decree did not make the award of alimony terminable upon Jo's cohabitation. Under the terms of the decree, the award of alimony was to terminate after a specific term of years or upon Jo's death. We conclude Harold's alimony obligation should not be terminated.

We also consider Jo's request to increase the amount and duration of the award of alimony. Pursuant to Iowa Code section 598.21(8), a court of competent jurisdiction may subsequently modify a decree of dissolution where there has been a substantial change in circumstances. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991). To justify a modification, some material change must be shown

000344

in the circumstances of the parties, financially or otherwise, making it equitable that other or different terms be imposed. Id. The circumstances which have changed must be those which were not then within the contemplation of the court when the decree was entered. Id.

The dissolution court expected Jo to earn $20,000 per year. Jo is currently unable to work and receives $242 per month, or a total of about $2,904 per year in social security benefits. The dissolution court also expected Harold's net monthly income to remain about $2,801. Harold's net monthly income is currently $1,319. Clearly, the parties are not presently in the financial situation anticipated by the dissolution decree.

Although Jo's condition may not deteriorate, it is considered unlikely her condition will improve. She pays $50 per month for property taxes and $190 for utilities in lieu of a rent payment, which amounts to $240 per month. Jo and Angelina both testified Jo pays her own expenses, except Marvin occasionally buys groceries.

We conclude there has been a sufficient change in circumstances to allow us to modify the dissolution decree. We determine the award of alimony should be increased in duration, although not in amount. Under the terms of the dissolution decree, Harold must pay alimony of $200 per month until October 1993 and then $100 per month until October 1998. We modify the terms of the decree to

provide the alimony payments of $100 per month should not terminate in October 1998, but continue until the death of either Harold or Jo or upon Jo's remarriage.

III. Child Support.

Jo contends the district court should not have reduced Harold's child support obligation. The court noted Harold's net monthly income had decreased from $2,801 per month to $1,319 per month. The district court applied the child support guidelines and reduced Harold's obligation from $100 per week to $80 per week, or from $433 per month to $347 per month.

We have already found there has been a substantial change in circumstances. Therefore Harold's child support obligation may be modified to apply the present child support guidelines. See In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991). We affirm the district court on this issue.

IV. Contempt.

Jo claims the district court should have found Harold in contempt for failing to pay alimony and her medical insurance premiums. At the time of the modification Harold owed $2,550 in alimony.

All contempts are considered to be quasi-criminal in character, even when they arise from civil cases. Zimmermann v. Iowa Dist. Court, 480 N.W.2d 70, 74 (Iowa 1992). This quasi-criminal characteristic mandates proof of contempt be established beyond a reasonable doubt. Id.

000346

We affirm the district court's conclusion Jo failed to show beyond a reasonable doubt Harold's conduct was willful. Harold testified he did not have enough money to pay child support and alimony when he was a student. He kept current on his child support. Once Harold obtained a job he started paying towards the alimony arrearage.

Concerning the medical insurance premiums, we find the dissolution decree was ambiguous as to whether Harold should maintain insurance for just Angelina, or for Angelina and Jo. We conclude Harold should not be found in contempt of court. We affirm on this issue.

V. Trial Attorney Fees.

Jo contends the district court should have awarded her trial attorney fees. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). We determine the district court did not abuse its discretion here.

VI. Appellate Attorney Fees.

Jo also asks for attorney fees for this appeal. An award of attorney fees rests within the court's discretion and the parties' financial positions. Id. We determine Harold shall pay $500 towards Jo's appellate attorney fees.

VII. Summary.

We have determined Harold's alimony obligation should not terminate, contrary to the conclusion of the district court. Harold should pay alimony of $200 per month until October 1993. After October 1993, he should pay $100 per

000347

month until the death of either party or Jo's remarriage. We affirm district court on all other issues raised in this modification action. Costs of this appeal are assessed to Harold.

AFFIRMED AS MODIFIED.