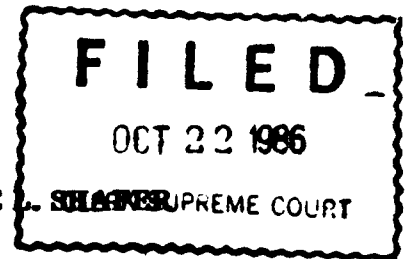


IN THE COURT OF APPEALS OF IOWA



IN RE THE MARRIAGE OF JERRY P. SHAFER AND ANNETTE L. SHAFER

Upon the Petition of	)	
JERRY P. SHAFER,	)	Filed October 22, 1986
Petitioner-Appellant,	)	
And Concerning	)	424
ANNETTE L. SHAFER,	)	$\frac{6-283}{86-141}$
Respondent-Appellee.	)	

Appeal from the Iowa District Court for Story County (3779) - Carl E. Peterson, Judge.

Petitioner husband appeals the denial of his application for modification of the decree dissolving the parties' marriage. **AFFIRMED AS MODIFIED.**

Dale Sharp of Smith, Nutty, Sharp, Benton & Jahn, Ames, Iowa, for petitioner-appellant.

Jere C. Maddux of Newbrough, Johnston, Brewer, Madux & Nadler, Ames, Iowa, for respondent-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ., but decided en banc.

SCHLEGEL, J.

Petitioner husband appeals the denial of his application for modification of the decree dissolving the parties' marriage. In the application, petitioner asked the trial court to terminate his alimony obligation because respondent wife had remarried. On appeal, petitioner asserts that the wife failed to prove that extraordinary circumstances exist which justify continuing alimony. Respondent wife requests attorney fees on appeal.

The marriage of petitioner Jerry P. Shafer and respondent Annette L. Shafer was dissolved in February 1985. The dissolution decree directed Jerry to pay Annette alimony of \$500 per month for 4 years and then \$650 per month for 4 more years. It provided that the alimony would terminate upon Annette's remarriage unless the remarriage occurred during the first 4 years, in which event the alimony would terminate at the end of those first 4 years.

In August 1985, Jerry applied for a modification of the dissolution decree. He asserted that Annette had remarried in July 1985 and that alimony should therefore terminate. Annette resisted Jerry's application for modification and a hearing was held. Afterward, the trial court entered an order denying the modification application. It refused to terminate alimony. Jerry has appealed the trial court's order.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Deck, 342 N.W.2d 892, 894 (Iowa Ct. App. 1983). While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7).

On July 14, 1986, this court was notified by respondent wife's attorney that the wife died July 9, 1986. Unless otherwise provided for, an award of alimony terminates on the death of either party. Sherrard v. Sherrard, 175 N.W.2d 411, 412 (Iowa 1970). Furthermore, in this case the original order for alimony, filed February 21, 1985, provided that alimony would terminate upon the death of either petitioner or respondent. Therefore, petitioner has no alimony obligations after July 9, 1986. We do find, however, that petitioner had the obligation to pay respondent alimony from the time of the original order until the date of her death. We affirm, as modified, the trial court's ruling.

Concerning the payment of alimony, the order of May 15, 1985, interpreting the original decree, said:

[I]t was the intention of the Court to provide that the remarriage of the respondent within forty-eight (48) months after the Decree would not affect the obligation of the petitioner to continue paying alimony during that time period. However, if respondent is married within that time period, alimony shall terminate forty-eight (48) months after the Decree. The respondent's marital status shall not affect her right to receive alimony for the first forty-eight (48) months after entry of the Decree.

Judge Peterson ordered that alimony should continue based upon the above ruling of Judge Baker that alimony would continue past any remarriage of the recipient if it occurred within the first four years. Judge Peterson noted that this decision was the law of the case since Jerry did not appeal the original dissolution decree. Judge Peterson's and Judge Baker's conclusions were appropriate since "all relevant factors must be taken into consideration" in determining whether a particular award constitutes alimony or property division. In re Marriage of Woodward, 229 N.W.2d 274, 278-79 (Iowa 1975).

We recognize that the remarriage of a woman whose previous marriage has been terminated in a dissolution proceeding does not of itself terminate alimony. In re Marriage of Orgren, 375 N.W.2d 710, 712 (Iowa Ct. App. 1985).

We also recognize that the continuation of alimony beyond remarriage is especially appropriate where its purpose is rehabilitative—to assist the spouse in obtaining further skills necessary to permit the spouse to undertake a self-supporting career. In re Marriage of Seidenfeld, 241 N.W.2d 881, 884 (Iowa 1976). We also believe that one of the bases of alimony is the recognition of the contributions made by one spouse to the other's advancement. In re Marriage of Janssen, 348 N.W.2d 251, 254 (Iowa 1984).

Jerry relies heavily on the case of In re Marriage of Woodward, 229 N.W.2d 274 (Iowa 1975), in arguing that it was improper for the trial courts to conclude that under no circumstances could Annette's remarriage terminate the alimony for the first forty-eight months after the decree. We do not agree. Woodward looked to the particular relevant circumstances of that case and concluded that the periodic payment was alimony in the sense of support and not part of a property division. Id. at 279. We believe, with Woodward, that a court's employment of the term "alimony" is not conclusive. Id. at 278. "It is not what the arrangement is called but what it is that fixes the legal status." Id.

When we look to the question of the trial court's intent in entering the dissolution decree requiring Jerry to pay \$500 per month for 4 years, we find that "alimony" was meant to cover a combination of factors. The court in its ruling looked to the property division on which the parties had settled, the need for Annette to return to school to obtain a job by which she could support herself, and the contribution Annette had made to the maintenance of the home and the raising of the children. In the amendment of the decree, Judge Baker made it clear that Annette's second husband was obligated to support Annette. Judge Baker was clearly not assessing Jerry for "support" in the traditional sense of assisting Annette to enjoy the same standard of living as she had previous to the dissolution. Judge Baker looked to the past roles in the relationship, the

property settlement, and the need to provide rehabilitative expenses to Annette when he locked in the forty-eight month provision. Judge Baker's decision reveals deliberate consideration of the possibility that Annette's marital status could change in the following four year period. Jerry has not shown that any substantial change in circumstances has occurred which would permit a modification of the dissolution decree.

We believe that Judge Peterson was correct in ordering the payment of alimony based on Judge Baker's ruling that alimony would continue past any remarriage of Annette if such marriage occurred within the first four years.

Since Annette died on July 9, 1986, her estate is entitled to payment of \$500 per month from February 21, 1985, the date of the original order for alimony, to the date of her death. Payment for this 16½ month period should result in Jerry paying Annette's estate \$8,250. It is so ordered. Jerry may pay any unpaid amount in monthly periodic payments of \$500 or in a lump sum.

In awarding attorney fees, this court considers the resources of the party requesting such fees, the ability of the other party to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. In re Marriage of Schober, 379 N.W.2d 46, 48 (Iowa Ct. App. 1985). The primary consideration in making an award of attorney fees is the resources of the parties. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa Ct. App. 1982). We affirm the trial court except that we modify the decree to terminate alimony as of the date of Annette's death.

After a thorough review of the record and resources of the parties, we find that Jerry should pay \$500 towards Annette's attorney fees and costs on this appeal.

AFFIRMED AS MODIFIED.

Oxberger, C.J., and Snell, J., concur; Sackett, J., specially concurs; Hayden, J., and Donielson, J., dissent.

SACKETT, J. (specially concurring)

I agree with the majority.

The decree Jerry is seeking to modify specifically and clearly provides:

Within the first forty-eight (48) months following the
filing of this decree, the remarriage of Annette shall
not affect the payment of alimony. . . .

The issue of remarriage within 48 months was clearly resolved by the prior decree. The alimony should only terminate on Annette's death. I would affirm the trial court and award Annette attorney fees of \$1,500 and tax court costs to Jerry.

HAYDEN, J. (dissenting)

I respectfully dissent.

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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. (Emphasis added.) In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). See In re Marriage of Woodward, 229 N.W.2d 274, 280 (Iowa 1975); Myers v. Myers, 195 N.W.2d 113, 114 (Iowa 1972). In the Woodward case, the Iowa Supreme Court quoted from a Nebraska case, which explained the rationale:

The basic principle that supports both views [that alimony is either automatically terminated or provides a prima facie case for termination] is that it is against public policy that a woman should have support or its equivalent during the same period from each of two men. On this issue, this court said: "Aside from positive unseemliness, it is illogical and unreasonable that she should have the equivalent of an obligation for support by way of alimony from a former husband and an obligation from the present husband for an adequate support at the same time. It is her privilege to abandon the provision made by the decree of the court for her support under sanctions of the law for another provision for maintenance which she will obtain by a second marriage..." Woodward, 229 N.W.2d at 279, quoting from Wolter v. Wolter, 183 Neb. 160, 164, 158 N.W.2d 616, 619 (1968). See generally Annot. 48 A.L.R.2d 270, 274-76 (1956).

In Shima, the wife contended that extraordinary circumstances existed because for eighteen years she had devoted her life to her husband, their children, and their home, and that she performed her job as a homemaker and did it well. The Iowa Supreme Court held that those factors may well have entered into the trial court's decisions on property settlement and alimony, they are not the sort of extraordinary circumstances envisioned by the rule. Such circumstances warranting a continuation of alimony from a prior marriage are those

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which exist at the time of the petition for modification, not at the time of the original decree. Shima, at 829.

It is clear that Jerry has made a prima facie case for the termination of the alimony upon showing Annette had remarried. Jerry is not required to show a substantial change in circumstances has occurred which would permit a modification of the dissolution decree. The burden of proof shifts to Annette, upon her remarriage, to show extraordinary circumstances exist to warrant a continuation of alimony, which she has failed to do. (Emphasis added.)

For these reasons I would reverse the trial court.

Donielson, J., joins this dissent.