

FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

MARY LOIS KAVANAUGH,	)	
Plaintiff-Appellant,	)	Filed November 19, 1979
vs.	)	
DANIEL J. KAVANAUGH,	)	230
Defendant-Appellee.	)	<u>2-62834</u>

Appeal from Polk District Court - Don L. Tidrick, Judge.

Plaintiff appeals trial court's refusal to cite defendant for contempt for failure to make payments as ordered by an order modifying their divorce decree. Reversed and Remanded.

Neiman, Neiman, Stone & Spellman, P.C., Des Moines, for plaintiff-appellant.

Alan A. Anderson, Des Moines, for defendant-appellee.

Submitted to Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Plaintiff, Mary L. Kavanaugh, appeals trial court's refusal to cite defendant, Daniel J. Kavanaugh, for contempt for failure to make payments as ordered by an order modifying their divorce decree. Plaintiff contends the payments are property division or child support payments, not alimony, and not subject to the remarriage termination provision of the original divorce decree. In the alternative, she argues that even if the payments are alimony they should not be automatically terminated because of her remarriage. We reverse the order of the trial court and remand this case for further proceedings in accordance with this decision.

Our review is de novo. Iowa R. App. P. 4. While we give weight to the findings of the trial court, we are not bound by them. Iowa R. App. P. 14(f)(7).

I.

When Mary and Daniel were divorced in 1968, the decree ordered they continue in joint ownership of their home and Daniel pay the \$250 per month house payments, the \$100 per month alimony, and the \$125 per month child support for each of the parties' two children. The decree provided that the \$100 per month alimony obligation terminated on Mary's remarriage or death. The \$250 per month house payments were to continue until Mary ceased to live in the house with the children. In 1971 the parties agreed to a modification of the decree whereby Mary became the sole owner of home and Daniel no longer had to make the monthly house payments, but that "beginning July 1, 1976, the defendant Daniel J. Kavanaugh shall pay \$150 additional alimony for a period of nine (9) years to August 1, 1985." Mary testified the modification became necessary because Daniel was having trouble with the Internal Revenue Service and they became afraid they would lose the house through attachment by the I.R.S. if it remained in his name, and that Daniel could no longer afford the payments. She testified further that the arrangement was designed to buy out Daniel's equity; once that was accomplished he was to resume the house payments in 1976 and continue them until their youngest daughter reached age 21 in 1985. Daniel insisted the payments be termed alimony for tax reasons.

The initiatory event of this case was Mary's remarriage in 1972. After that event, Daniel discontinued the house payments and has refused to resume them. Mary filed an

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application to show cause why Daniel should not be punished for contempt of court for failure to make the payments. Daniel filed a resistance to the application on the grounds that the payments were alimony and terminated by Mary's remarriage. The trial court ruled that Mary's remarriage terminated Daniel's obligation to make the payments; Mary is appealing that order.

II.

The issue presented is whether the remarriage of Mary terminated her right to the \$150 per month payments awarded to her in the Modification of Decree, entered June 28, 1971, which were to begin July 1, 1976 and continue to August 1, 1985. The determination of this issue turns on the nature of payments. If they are alimony, they were terminated. If the payments are not alimony, Daniel should be found in contempt for his failure to make the payments.

Our task then is to determine whether the contested payments are alimony or some combination of property division and child support. In interpreting the modification order, effect must be given to that which is clearly implied as well as to that which is expressed. Peters v. Peters, 214 N.W.2d 151, 157 (Iowa 1974). The determinative factor is the intention of the parties and the court as gathered from all parts of the order. In re Marriage of Woodward, 229 N.W.2d 274, 277-78 (Iowa 1975) (quoting Peters, 214 N.W.2d at 157). This intent can only be derived after considering the salient elements of alimony and property division.

The Supreme Court of Iowa in discussing alimony has stated:

The term "alimony" has always had a technical significance, and, while in modern times, there has been many definitions of "alimony" set out in the decisions of the courts, which differ more or less in details, they all agree that primarily alimony is an allowance to the wife from the husband for her support in a divorce action, in lieu of the legal obligation of the husband to support her

....
The doctrine of alimony is based on the common law obligation of the husband to support his wife, which obligation is not removed by her obtaining a divorce for his misconduct.

Knipfer v. Knipfer, 259 Iowa 347, 352-53, 144 N.W.2d 140, 143 (1966) (quoted in Woodward, 229 N.W.2d at 278).

"Division of property has for its basis the spouse's right to a just and equitable share of property accumulated by the parties as a result of their joint efforts during the

years of marriage to serve their mutual needs." Knipfer, 259 Iowa at 353, 154 N.W.2d at 143 (quoted in Woodward, 229 N.W.2d at 278).

The employment of the term "alimony" in the modification order is not conclusive; the substance of the arrangement not the form fixes its legal status. Woodward, 229 N.W.2d at 278. If an order constitutes a property settlement as distinguished from alimony, its character is not affected by the name given it. Id. We thus look to the totality of the circumstances to determine the nature of the payment; no single factor is controlling in determining whether a particular award constitutes alimony or property division. Id. at 279.

All relevant factors must be taken into consideration, including the extent and nature of the property accumulated by the parties which the court is called upon to distribute in a just and equitable manner, the provisions of the original decree terminating the marital relationship, as well as the guidelines set out in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), excluding consideration of reward or punishment on the basis of fault. In re Marriage of Winter, 223 N.W.2d 165, 169 (Iowa 1974).

Woodward, 229 N.W.2d at 279.

Our analysis is complicated by the fact that the parties by agreement arrived at the arrangement now in dispute. Daniel testified that the \$150 per month payments were intended to be alimony. Conversely, Mary testified the payments were a continuation of the house payments. Due to their vested interest, we deem their testimony on this point to be of limited usefulness. We turn to the terms of the original decree and the modification as more reliable indicia of whether or not the payments were alimony.

The original decree made a property division in its continuing the ownership of the house in both Mary and Daniel and directing Daniel to make the house payments for as long as Mary lived there with the children. After the children or Mary moved out, the house was then to be sold with the equity divided between the parties. The \$250 per month house payment was thus in the nature of a property allocation as well as providing child support. These payments increased the equity of the parties in the house and provided the children with a place to stay. The payments terminated on the children leaving the house, not the remarriage of Mary. The decree also provided for child support payments and alimony payments of \$100 per month, which were to terminate on Mary's remarriage.

The modification of this provision in 1971 was in effect a sale of Daniel's equity in the house to Mary in exchange for her foregoing the house payments for five years and accepting reduced payments for nine years, commencing July 1, 1976. These \$150 per month payments, like the earlier ones, were linked to the age of the younger child since they terminated when she reached 21 years of age, the same time the child support payments provided for in the original decree are to terminate, unless the child became self-supporting. There was no other mention of termination in this modification, especially termination due to Mary's remarriage. We consider it important that the settlement appears to a permanent one, for a fixed and determinable sum, and is in lieu of the wife's property division rights. See Knipfer, 259 Iowa at 354, 144 N.W.2d at 144. Since the payments have a fixed termination date that has no relation to Mary's need for maintenance and support, they lack the essential rationale of alimony--support.

After considering the terms of the original and modified decrees, the intent of the parties and the court, and the separate functions of alimony and property division, Woodward, 229 N.W.2d at 278, we conclude that the \$150 per month payments were to be part of the property division between the two parties, not alimony. We hold that Mary's remarriage did not terminate her right to the \$150 per month payments as such payments are not alimony and not subject to the remarriage termination provision of the original decree. We reverse the decision of the trial court and remand this case for a determination on whether Daniel should be held in contempt of court if he fails to make the required payments.

III.

In accordance with section 594.24, The Code 1979, we hold that Daniel shall pay the costs of this appeal and \$750 toward the attorney fees incurred by Mary in this action.

REVERSED AND REMANDED.

Oxberger, C. J., concurs in result.