IN THE COURT OF APPEALS OF IOWA

No. 2-073 / 91-545

IN RE THE MARRIAGE OF MARY ELIZABETH RAWLS AND JOHN ELDRIDGE RAWLS

FILED
APR 28 1992
CLERK SUPREME COURT

Upon the Petition of

MARY ELIZABETH RAWLS, n/k/a MARY ELIZABETH BRASWELL,

Appellant,

770

And Concerning

JOHN ELDRIDGE RAWLS,

Appellee.

Appeal from the Iowa District Court for Wapello County, Phillip R. Collett, Judge.

The wife appeals from the district court's ruling denying her application for a declaratory judgment and modification of the parties' dissolution decree. **AFFIRMED.**

Leslie Babich of Babich, Bennett & Nickerson, Des Moines, for appellant.

Allan C. Orsborn of Keith, Orsborn, Bauerle, Milani & Neary, Ottumwa, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

OXBERGER, C.J.

Mary Elizabeth Braswell (Betsy) and John Eldridge Rawls (Dr. Rawls) were married on July 5, 1952. The parties had five children. Dr. Rawls was born in June 1928 and Betsy was born in February 1932. On December 27, 1983, a dissolution decree was entered dissolving the parties' marriage. The decree granted custody of the parties' one remaining minor child, Molly, born September 16, 1967, to Betsy and required Dr. Rawls to pay $600 per month for child support. He made the last child support payment in April or May of 1989 when Molly completed college. Since Molly is no longer a minor, custody and child support are not issues of this appeal.

During the marriage, the parties enjoyed an upper middle class lifestyle. Dr. Rawls was a physician in Ottumwa where he had a general family practice. During the marriage, Betsy was primarily a homemaker. Betsy sometimes assisted Dr. Rawls in his medical practice by acting as a receptionist, bookkeeper, and assistant nurse when necessary, and by entertaining socially.

About the time of the parties' dissolution decree, it became general knowledge within the Ottumwa community that Dr. Rawls was homosexual. At the time of the dissolution in 1983, Dr. Rawls' adjusted gross income was approximately $35,000. After the dissolution, Dr. Rawls' medical practice diminished. In early 1988, Dr. Rawls closed his

Ottumwa office and began working locum tenens, substituting on a temporary basis for other physicians who were ill, on leave, vacation, or absent from their practice for other reasons. His annual adjusted gross income during 1988 and 1989 was $4,487 and $26,692 respectively. Dr. Rawls continued to work locum tenens until February 1990 when he became medical director of an addiction treatment center in New York City, earning $85,000 per year. In September 1990, his salary was increased to $95,000 per year.

Approximately eight years prior to the parties' dissolution, Betsy began a small sole proprietorship needlework business in Ottumwa. This business produced little or no income and served as a tax shelter. This business failed approximately two and one-half years after the parties' dissolution. After Molly left home to attend college, Betsy moved to Dallas/Fort Worth, Texas to live with another daughter. She attended college in Texas and obtained an undergraduate degree in counseling. Betsy now resides in the Dallas/Fort Worth area and is employed as a family crisis counselor. She earns approximately $18,000 per year and receives a net monthly income, excluding alimony, of $1,222.

The dissolution decree required Dr. Rawls to pay alimony in the amount of $900 per month from August 1, 1983, through July 31, 1988. As of August 1, 1988, the decree required Dr. Rawls to pay alimony in the amount of

$800 per month until Betsy's sixty-second birthday or her remarriage, whichever should occur first. The decree further provided that the amount of alimony could be increased or decreased on a percentage basis, depending upon Dr. Rawls' adjusted gross income. The decree's alimony provisions are the primary basis of this appeal.

On April 18, 1990, Betsy filed an application for declaratory judgment and modification of the parties' dissolution decree. She contended Dr. Rawls had lowered his alimony obligation by voluntarily reducing his income since August 1988. Betsy asked the district court to enter a declaratory judgment action declaring the amount of Dr. Rawls' alimony arrearages owed to her. Betsy also alleged there had been a substantial change of circumstances warranting modification of the dissolution decree. She specifically requested that her alimony be increased to $1,250 per month and continued until she reaches the age of sixty-five. On March 11, 1991, the district court denied Betsy's petition for declaratory judgment and modification. The court found Dr. Rawls had not voluntarily or intentionally reduced his income so as to avoid his alimony payment, and there had not been a substantial change of circumstances since the original dissolution decree to warrant modification of the amount of alimony. Betsy appealed from this ruling.

On appeal, Betsy contends the district court erred in failing to find Dr. Rawls had voluntarily reduced his income in order to lower his alimony obligation to her. She contends Dr. Rawls closed his medical practice and began working locum tenens positions in 1988, which was the same year his alimony payments could increase or decrease on a percentage basis pursuant to the dissolution decree. She maintains that immediately after August 1, 1988, her alimony payments decreased substantially and Dr. Rawls did not pursue opportunities which would have enabled him to earn a higher salary and pay more alimony.

Betsy also contends there has been a substantial change of circumstances warranting an increase in the amount of alimony. She asserts that she anticipated a greater earning potential at the time of the decree but her needlework business subsequently failed. She also argues she did not anticipate she would have to return to college in order to obtain employment. She maintains her current salary of $18,000 as a counselor is $2000 less than she anticipated earning at the time of the dissolution decree. She also argues the cost of living in the Dallas/Fort Worth, Texas area is greater than in the Ottumwa, Iowa area. Finally, Betsy argues Dr. Rawls' salary has increased substantially due to his present employment and the termination of his $600 per month child support obligation for the parties' daughter, Molly. Betsy asks for a fixed amount of alimony of at least $1,200 per month.

Betsy also claims the district court erred in failing to award her reasonable attorney fees she incurred during the modification proceedings. Betsy also asks for a reasonable award of appellate attorney fees.

STANDARD OF REVIEW: We review de novo. Iowa R. App. P. 4. A modification operates prospectively, not retrospectively, and does not authorize the court to divest the parties of rights accrued under the original decree. In Re Marriage of Carlson, 338 N.W.2d 136, 139 (Iowa 1983).

Betsy filed her application to modify the decree on April 18, 1990. The court is not authorized to modify the decree prior to April 18, 1990. We, therefore, do not consider any circumstances prior to April 18, 1990 in reviewing whether there has been a change of circumstances justifying a modification.

DECLARATORY JUDGMENT: Betsy seeks a declaratory judgment to determine the amount of John's alimony arrearages owed to Betsy. She claimed that since August 1988 until recently (April 18, 1990 date of application), John had voluntarily lowered his income.

On November 17, 1989, Betsy filed an application for order to show cause, alleging the same claims of the voluntarily reduced income. On March 30, 1990, the trial court denied the order stating:

> The record presented does not show any willful violation of the Decree nor any intentional reduction in the respondent's income for the purposes of reducing alimony payments. Neither party appealed this ruling.

We find the doctrine of claim preclusion applies where no appeal was made. The law in this area is well settled:

> Res judicata as claim preclusion applies when a litigant has brought an action, an adjudication has occurred, and the litigant is thereafter foreclosed from further litigation on the claim. An adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination. A party must litigate all matters growing out of its claim at one time rather than in separate actions.

State Ex Rel. Iowa DHS v. Mundie, 436 N.W.2d 60, 60-61 (Iowa 1989).

We find all the requirements for the application of the principle of res judicata apply to this issue. Therefore, we do not examine the issue of voluntary reduction of income raised in the application for declaratory judgment.

CHANGE IN CIRCUMSTANCES SINCE APRIL 18,1990.: Betsy asserts there has been a substantial change in circumstances which justifies an increase in alimony payments to her. Among her reasons, she notes inflation, increased cost of living in Dallas, Texas, that Dr. Rawls is no longer paying child support and now has an increased income. We find no merit in Betsy's arguments. It cannot be said these matters were not within the contemplation of the court at the time of the original decree.

Betsy challenges the district court's use of a "percent-of-gross" alimony formula in the dissolution decree. She argues such a formula has been ruled inappropriate and unlawful by the Iowa Supreme Court in In

re Marriage of Meeker, 272 N.W.2d 455 (Iowa 1978). In Meeker, the court reiterated disapproval of percentage-based support provisions. However, the court did not declare them unlawful.

The divorce decree in the present case was entered on December 27, 1983. No judicial appeal was made by either Betsy or John. An appeal now on this issue is untimely pursuant to Iowa R. App. P. 5. We find the percentage based support provision of the original decree to be a valid order of the court.

In order for a change in circumstance to justify a modification of a decree, the change must not have been within the contemplation of the trial court when the original decree was entered. See In Re Marriage of Masterson, 453 N.W.2d 650, 654 (Iowa App. 1990). We find, inherent in the concept of a "percent-of-gross" alimony formula is the contemplation that changes will occur in the earning capacity of the ex-spouse charged with alimony payments. We cannot say the change in Dr. Rawls earning capacity was not within the contemplation of the trial court when the decree was entered. A consideration of changed circumstances is triggered at the time of the application for modification. Betsy filed an application for modification on April 18, 1990. John had obtained by this time his present employment for the Addiction Research and Treatment Center in New York City. Betsy, under the

alimony formula of the decree, was benefiting from John's increased employment income. As we have said, we find such a change in circumstances was contemplated by the decree issuing court. A modification under the circumstances of this case is not warranted. We have considered all other issues presented and affirm the trial court.

Each party will pay his or her own attorney's fees. Costs are taxed to the appellant.

AFFIRMED.