

IN THE COURT OF APPEALS OF IOWA

No. 0-352 / 89-1862

FILED

AUG 30 1990

CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARGARET A. CHRISTIANSON AND
TERRY M. CHRISTIANSON

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Upon the Petition of
MARGARET A. CHRISTIANSON, n/k/a MARGARET A. LANGLEY,

Appellant,

And Concerning
TERRY M. CHRISTIANSON,

Appellee.

Appeal from the Iowa District Court for Woodbury
County, Dewie J. Gaul, Judge.

Appellant appeals a district court order modifying the
parties' decree of dissolution by terminating appellee's
alimony payments to her because of her remarriage and also
appeals the district court's dismissal of her application
to modify the decree to grant her primary physical care of
the three children. **AFFIRMED IN PART AND REVERSED IN PART.**

Patrick N. Murphy of Murphy & Dull, LeMars, for
appellant.

R. Scott Rhinehart of Richard Rhinehart & Associates,
Sioux City, for appellee.

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

HAYDEN, P.J.

Terry and Margaret Christiansen were married in 1972. They had three children: Harold was born in 1978, Leonard in 1980, and Elizabeth in 1982. The parties' marriage was dissolved by decree entered on September 13, 1988, by Judge Gaul. The decree awarded the parties joint legal custody of the children and primary physical care to Terry. The decree ordered Terry to pay Margaret rehabilitative alimony of \$100 per month for three years, which was not to be affected by remarriage. The decree did not order Margaret to pay child support.

Three and one-half months later, on December 29, 1988, Terry filed an application to modify the decree to: 1) terminate the alimony because Margaret had remarried; 2) require supervision of Margaret's visitation with the children; and 3) require Margaret to pay child support of \$200 per month. Margaret filed a cross-application to modify the decree to change the primary physical care of the children to her.

Following a trial, Judge Gaul terminated the alimony payments because of Margaret's remarriage and denied all other requests. Margaret appeals.

Margaret contends Judge Gaul should have recused himself because of his personal bias and prejudice against Margaret. She claims statements made by Judge Gaul in the original decree demonstrates his prejudice against her. Margaret also asserts her alimony should not have been

terminated because the original decree specifically provided the alimony would not be affected by any remarriage. She further contends there have been material changes in the circumstances to warrant a change in primary physical care.

Both parties request attorney fees for the modification proceedings and on appeal.

Our review of this case is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings of facts, but give them weight. Iowa R. App. P. 14(f)(7).

We first address Margaret's contention the judge should have recused himself from this case due to personal bias and prior knowledge of the case.

I. Disqualification of Trial Judge

Under Iowa Code section 606.1606(1), a judicial officer is disqualified from acting in a proceeding if the officer has a personal bias or prejudice concerning a party. Canon 3D(1)(a) of the Iowa Code of Judicial Conduct provides in part that a judge should recuse him/herself from a proceeding in which his/her impartiality might be reasonably questioned due to such bias or prejudice. Canon 3D(1)(a) serves as a broad standard by which every judge should determine, sua sponte, whether self-disqualification is necessary after an in-depth search of his or her own conscience. State v. Smith, 242 N.W.2d 320, 323 (Iowa 1976). In Smith the supreme court ruled only actual personal bias or prejudice, as distinguished from judicial

predilection, gives rise to a disqualifying factor. Id. at 324. Thus, evidence presented in a trial of a prior cause or definite views on the law create no personal bias since they do not stem from an extrajudicial source. Id.

The right to a change of judge is not an absolute one. The judge is entitled to consult his own mind, and he, perhaps better than anyone else, knows whether or not he can give a defendant on trial before him a fair and impartial trial in every way.

State v. Smith, 242 N.W.2d at 324 (citing State v. Gibson, 204 Iowa 1306, 1310, 214 N.W. 743, 745 (1927)).

We dismiss as groundless Margaret's contention the trial judge erred by not recusing himself. There is nothing on the record which supports Margaret's assertion of the trial judge's prejudice or improper attitude. Her main objection to the trial judge is he is the same judge who presided over the parties' dissolution proceedings. His findings were supportive of Terry's parenting abilities rather than hers.

The fact the trial court found against Margaret on a previous occasion in a related case is not grounds sufficient to require the recusal of the trial judge. See Smith, 242 N.W.2d at 324. None of his knowledge of the case comes from an extrajudicial source. The trial judge was not required to recuse himself from this case.

To hold otherwise would require a continuous replacement of judges like a relay team for any party which may litigate more than one case before the state's courts. Such a requirement would be unworkable and ridiculous.

II. Modification of Alimony 112

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been in the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

At the dissolution Margaret was awarded \$100 a month alimony for three years. The award was both rehabilitative and reimbursement alimony.

Rehabilitative alimony [is] a way of supporting an economically dependent spouse through a limited period of re-education or retraining following

divorce, thereby creating incentive and opportunity for the spouse to become self-supporting. . . .Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended, tempered by the goal of facilitating the economic independence of the ex-spouses. . . .As in the case of "traditional" alimony, payable for life or so long as a spouse is incapable of self-support, a change in status (e.g., remarriage) may alter the support picture and warrant a modification.

"Reimbursement" alimony, on the other hand, which is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other, should not be subject to modification or termination until full compensation is achieved. Similar to a property award, but based on future earning capacity rather than a division of tangible assets, it should be fixed at the time of the decree.

In re Marriage of Francis, 442 N.W.2d 59, 63 (Iowa 1989) (citations omitted); see also In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985).

The present award of alimony was for both purposes. Moreover, the dissolution decree specifically provides: "Such alimony, since it is . . . to enable her to be compensated for the years she was not in the job market, should not be affected by remarriage." This finding brings the alimony within the definition of reimbursement alimony. Accordingly, the trial court was without authority to modify the award of reimbursement alimony to Margaret.

We reverse the trial court on the issue of alimony and reinstate the original award of alimony contained in the dissolution decree. Terry is ordered to pay the alimony to the clerk of court in the amount provided by the decree.

Margaret is awarded a judgment against Terry for all alimony payments in arrears. Terry shall pay ten percent interest on alimony payments in arrears.

III. Change in Custody

Margaret appeals from the district court's denial of her application to change custody from Terry to herself.

To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983); see also In re Marriage of Weidner, 338 N.W.2d 351, 360 (Iowa 1983); In re Marriage of Gravatt, 371 N.W.2d 836, 838 (Iowa App. 1985).

We agree with the trial court Margaret has not met her heavy burden in this case. The parties have continued to fight and bicker over the children since the dissolution. Both sides appear equally to blame. Nothing in the record proves Margaret would administer more effectively than Terry to the children's well being. Nothing in the record suggests such a change would alleviate the squabbling between the parties and their relatives over the children.

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The children appear to be doing better since the dissolution. They are doing well in school, and adjusting to their new environment. Terry seems to be adequately attending to their needs. To remove the children from their customary surroundings and place them in a new town with a new step-father would be unduly disruptive, given the paucity of factors in favor of such a move.

We affirm the trial court's finding the children are to stay with Terry, the parent awarded primary physical care by the original decree.

IV. Attorney's Fees

Margaret also appeals from the trial court's denial of attorney fees at the modification hearing. The trial court may award attorney fees to the prevailing party in a modification proceeding. Iowa Code § 598.36 (1989). "Attorney fees are not recoverable as a matter of right, but rest within the court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them." In re Marriage of Phipps, 379 N.W.2d 26, 29 (Iowa App. 1985).

Terry has full financial obligation for the children's living expenses, including their medical and other expenses. He also has the \$100 per month alimony to Margaret for the next few years. His salary is not so substantial as to require him to pay Margaret's attorney fees in addition to his other current obligations.

Neither party has truly "prevailed" in this case. Although we have reversed the trial court on the alimony issue, we have affirmed its holding on change of custody.

Finally, both parties are responsible for the acrimony and bitterness which lead to the filing of this modification action. The best solution for both parties is to diligently care for their own responsibilities. They must put their past problems behind them and work together to ensure a decent upbringing for their offspring. That is the primary consideration of this court and should be the primary consideration for Terry and Margaret.

We affirm the trial court's holding each party was to pay his or her own attorney fees at trial.

Each party shall pay his or her own attorney fees on appeal.

Costs of this appeal are assessed one half to each party.

AFFIRMED IN PART AND REVERSED IN PART.

Sackett, J., concurs; Habhab, J. concurs in part and dissents in part.

HABHAB, J. (concurring in part and dissenting in part)

I concur with all parts of the majority opinion except Division II, to which I respectfully dissent.

Since this is a modification action, we turn to the court decree which dissolved the marriage. Under that decree, the court at paragraph five made the following findings:

The parties have been married over sixteen years. The petitioner has devoted those years mainly to her husband and children. She would like to take training at Western Iowa Technical College, and, while she is in good health and is only thirty-one years old, she should receive alimony to enable her to move from her role as wife and mother into the employment world. Such alimony, since it is to enable the petitioner to obtain training if she chooses and to enable her to be compensated for the years she was not in the job market, should not be affected by remarriage.

In the decretal portion of the decree at III, the trial court provided:

The respondent shall pay alimony to the clerk of this court for the petitioner in the amount of \$100 per month for three years, the first payment to be so paid on October 1, 1988, and a like payment to be so made on the first day of each month thereafter to and including the month of September, 1991.

The absence of the words "should not be affected by remarriage" is not of any significance, for when the decree is read as a whole it is apparent that the trial judge intended at the time of the entry of the decree that the alimony payments would not be affected by remarriage.

The application for modification asking for the elimination of alimony was filed less than four months after the dissolution decree, and the hearing on that application was held some thirteen months after the entry of the dissolution decree. We are fortunate in this case in that the judge who presided over the dissolution trial is the same judge who presided over the modification action. In his modification order, the court made the following finding:

The findings in the decree show that the alimony awarded petitioner was rehabilitative alimony rather than reimbursement alimony (see In re Marriage of Francis, 442 N.W.2d 59, 64 (Iowa 1989)), and no showing of extraordinary circumstances was made at the this hearing as to why said alimony should continue after November 10, 1988, the date the petitioner remarried.

I, too, would classify the award of alimony to the petitioner as rehabilitative alimony. Since it is rehabilitative alimony, it is subject to modification.

The discussion that follows does not relate to the majority opinion but is necessary to this dissent for it concerns the burden of proof in modification proceedings.

It is clear in Iowa that remarriage of a spouse whose previous marriage has been terminated in a dissolution of marriage proceeding does not of itself terminate the right to alimony. There is law to the effect that remarriage does make out a prima facie case for the termination of alimony. In re Marriage of Shima, 360 N.W.2d 827, 828 (Iowa 1985). I respectfully submit, however, that where a

provision in a decree provides that remarriage does not terminate alimony payments and where the alimony payments are rehabilitative in nature that the law announced in In re Marriage of Shima as to the creation of a prima facie case would not apply. Under the circumstances here, where the decree provides that remarriage will not affect alimony, I would apply those rules of law that ordinarily attach when a petition for modification is sought. Thus, I would cast the burden of proof on the party seeking modification to prove by a preponderance of the evidence those elements of modification that are now permanently embedded in the laws of this state. In this respect, the courts must look at the conditions existing at the time of the petition for modification.

I realize that under the rules of stare decisis I am bound to adhere to the decisions of the supreme court. But I do not believe that when I advocate shifting the burden of proof under these circumstances that I am in conflict with any of the supreme court decisions. When I review In re Marriage of Shima, 360 N.W.2d 827 (Iowa 1985), In re Marriage of Woodward, 229 N.W.2d 274, 280 (Iowa 1975), Myers v. Myers, 195 N.W.2d 113, 114 (Iowa 1972), I find that those decrees did not have a provision similar to the one at bar, i.e., remarriage does not terminate alimony. Thus, although I reach the same result as the trial judge, I do so not by virtue of the prima facie doctrine but under the ordinary rules of preponderance of the evidence.