

FILED

APR 23 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF CAROL ANNE SCHROEDER AND JEROME JOSEPH SCHROEDER

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Upon the Petition of)

CAROL ANNE SCHROEDER,)

Petitioner-Appellee,)

Filed April 23, 1986

And Concerning)

JEROME JOSEPH SCHROEDER,)

Respondent-Appellant.)

5-717
85-737

Appeal from the Iowa District Court for Dubuque County (DM 4866) - L.
John Degnan, Judge.

Respondent husband appeals from the provisions of the decree dissolving
the parties' marriage. **AFFIRMED.**

Mary M. Schumacher of Roth & Schumacher, Dubuque, Iowa, for respondent-
appellant.

Robert L. Sudmeier of Fuerste, Carew, Coyle, Juergens & Sudmeier,
Dubuque, Iowa, for petitioner-appellee.

Considered by Oxberger, C.J., Hayden, and Sackett, JJ.

HAYDEN, J.

Respondent husband appeals from the provisions of the decree dissolving the parties' marriage. He contends the trial court erred: (1) in failing to order the parties to participate in conciliation pursuant to Iowa Code section 598.16; (2) in ordering respondent to pay alimony to petitioner in the amount of \$600 per month for seventy-two consecutive months; and (3) in inequitably dividing the parties' assets and debts. We affirm.

Carol and Jerome Schroeder were married for 24 years. At the time of trial they were 41 years old and 47 years old, respectively. The parties have three children, all of whom are adults.

Jerome is employed at John Deere Dubuque Works and earns a gross income of \$620 per week. He has vested pension rights of \$400 per month with the potential of increasing to over \$900 per month. Carol never completed high school, but has held a variety of part-time jobs. Most recently, she was selling insurance and earning \$7,000 per year.

The trial court ordered Jerome to pay Carol alimony of \$600 per month for 72 consecutive months. As his share of the parties' property, Jerome was awarded the parties' 1985 Plymouth Horizen subject to indebtedness, various items of personal property, John Deere stock, his pension, and a credit union account. He was required to assume responsibility for all the parties' debts with the exception of the mortgage encumbering the family residence. Carol received a Chevrolet automobile, the remaining personal property, and the family residence subject to indebtedness. This appeal followed.

I.

The first issue before this court concerns conciliation procedures.

The dissolution petition filed by Carol on March 7, 1984, states at paragraph 19 "That the appointment of a conciliator pursuant to the provisions of

Chapter 598.16 of the Code of Iowa would not preserve the marriage." Jerry's answer to paragraph 19 was a denial and affirmatively stated that "It is felt by the Respondent that conciliation would preserve the marriage." In the prayer for relief, Jerry asked the court "to continue this action until conciliation has been experienced by both parties to try and preserve the bonds of matrimony."

Almost one year later, Carol filed a trial certificate which stated in relevant part:

2A. Petitioner's attorney has spoken with respondent's attorney, who agrees to waive the time period for filing any response for resistance hereto. Accordingly, Petitioner's attorney has contacted the court administrator and has tentatively set aside the morning of March 21, 1985 at 9:30 A.M. for trial of this matter. Respondent's attorney has agreed to that date.

The factual accuracy of this statement was never controverted. On March 13, 1985, Jerry filed a Resistance to Trial and, for the first time, specifically requested the appointment of a conciliator. He requested a continuance of the hearing so that conciliation could be attempted. The trial court entered an order overruling Jerry's Resistance. The court also denied Jerry's subsequent "Motion to Reconsider Application for Conciliation" and his oral motion for continuance.

Jerry now argues that the trial court erred in failing to order the parties to participate in conciliation procedures. We disagree.

Iowa Code section 598.16 provides in part:

Upon the application of the petitioner in the petition or by the respondent in the responsive pleading thereto or, within twenty days of appointment, of an attorney appointed under section 598.12, the court shall require the parties to participate in conciliation efforts for a period of sixty days from the issuance of an order setting forth the conciliation procedures and the conciliator.

At any time upon its own motion or upon the application of a party the court may require the parties to participate in conciliation efforts for sixty days or less following the issuance of such an order. (Emphasis added.)

Pursuant to these provisions, conciliation procedures are only mandatory when there is a timely application in the petition, the answer, or a separate pleading. The court has the discretion to deny any subsequent application.

In the present case, neither the petition nor the answer contained an application for conciliation. The references in Jerome's answer cannot be construed as a request for the appointment of a conciliator. We find that the first actual request was embodied in Jerome's Resistance to Trial, filed eight days prior to trial and over a year after the petition was filed. We cannot go so far as to declare the trial court abused its discretion in denying this request.

The purpose in enacting section 598.16 of the Code was to foster viable marriage relationships and minimize the problem of hasty divorces. See In re Marriage of Penny, 203 N.W.2d 380, 381 (Iowa 1983); In re Marriage of Boyd, 200 N.W.2d 845, 851 (Iowa 1972). We would be hard pressed to find that this purpose would be served in the present case by requiring conciliation procedures. This is not a situation which could be characterized as a hasty divorce. Over a year lapsed between the filing of the petition and the trial. During this time, the parties, especially Carol, attempted conciliation. It is apparent from the record that Carol finally realized that Jerome was not going to overcome his insatiable appetite for gambling and that his promises to quit gambling were hollow and meaningless.

We find, as the trial court did, that little would be achieved by ordering conciliation procedures at this juncture. Accordingly, we affirm the court's decision in this regard.

II.

The remaining issues concern the provisions of the dissolution decree. Jerome argues that the award of alimony was excessive and that the property division was inequitable.

The criteria to be considered in awarding alimony have been codified in Iowa Code section 598.21(3) (1985). Section 598.21(1) governs the division of property.

We have analyzed Jerome's claims in light of these sections and determine that the decree is equitable in all respects.

AFFIRMED.

Oxberger, C.J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

Respondent contends the trial court was in error in failing to order the parties to participate in conciliation procedures. I agree.

Conciliation or marriage counseling as it is frequently called is provided for under Iowa Code section 598.16. Conciliation became a part of Iowa Law in July of 1970 when Iowa enacted a no-fault dissolution of marriage act replacing its prior divorce statutes requiring a showing of fault to terminate a marital relationship. Currently section 598.16 provides as follows:

A majority of the judges in any judicial district, with the co-operation of any county board of social welfare in such district, may establish a domestic relations division of the district court of the county where such board is located. Said division shall offer counseling and related services to persons before such court.

Upon the application of the petitioner in the petition or by the respondent in the responsive pleading thereto or, within twenty days of appointment, of an attorney appointed under section 598.12, the court shall require the parties to participate in conciliation efforts for a period of sixty days from the issuance of an order setting forth the conciliation procedure and the conciliator.

At any time upon its own motion or upon the application of a party the court may require the parties to participate in conciliation efforts for sixty days or less following the issuance of such an order.

Every order for conciliation shall require the conciliator to file a written report by a date certain which shall state the conciliation procedures undertaken and such other matters as may have been required by the court. The report shall be a part of the record unless otherwise ordered by the court. Such conciliation procedure may include, but is not limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community health centers, physicians and clergy.

The costs of conciliation procedures shall be paid in full or in part by the parties and taxed as court costs; however, if the court determines that the parties will be unable to pay the costs without prejudicing their financial ability to provide themselves and any minor children with economic necessities, the costs may be paid in full or in part by the county.

Persons providing counseling and other services pursuant to this section are not court employees, but are subject to court supervision.

Iowa Code §598.16 (1983).

The original statute¹ was amended to substantially its present form in 1976. The 1976 version added language requiring the parties to make application for conciliation whereas the prior law required a waiver by the court of conciliation. Since 1970 few cases on conciliation issues have reached the appellate courts. See In re Marriage of Hobart, 375 N.W.2d 290 (Iowa App. 1985); In re Marriage of Smith, 207 N.W.2d 548 (Iowa 1973); In re Marriage of Tucker, 213 N.W.2d 498 (Iowa 1973); In re Marriage of Penney, 203 N.W.2d 380 (Iowa 1973); In re Marriage of Boyd, 200 N.W.2d 845 (Iowa 1972); In re Marriage of Collins, 200 N.W.2d 886 (Iowa 1972); In re Marriage of Hanna, 179 N.W.2d 503, 506-07 (Iowa 1970).

This had been predicted.

[W]ill the Iowa Supreme Court have an opportunity to decide questions regarding conciliation? A determination that a conciliation procedure was inadequate, made nine months to a year after a decree has been entered, may be little comfort, and vacation of the decree and a remand for further conciliation may be a senseless exercise in futility.

Peters, J., Iowa Reform of Marriage Termination, 20 Drake L. Rev. 211, 219 (1971).

The legislative history of section 598.16 tells us the legislative purpose in enacting conciliation was to foster viable marriage relationships and minimize the problem of hasty divorces. See In re Marriage of Penny, 203 N.W.2d 380, 381 (Iowa 1973); In re Marriage of Boyd, 200 N.W.2d 845, 851 (Iowa 1972).

It is our obligation to construe a statute with the view of carrying out an obvious legislative purpose if fairly possible. See In re Marriage of Boyd, 200 N.W.2d 845, 851 (Iowa 1972). Obviously our legislature did not want marriages terminated hastily.

¹ Divorce and Marriage Annulment Act, Ch. 1266, 1970 Iowa Acts 380.

There understandably are problems in attempting to judicially force persons to engage in counseling. "What then is to be the conciliation procedure, and who is to be the conciliator? The statute answers neither part of this question." Iowa Reform of Marriage Termination, supra at 217.

CONCILIATION REQUEST

Did Jerome Request Conciliation?

Carol filed a petition for dissolution of marriage in March of 1984.

Jerome answered Carol's petition on March 26, 1984. In his answer we find the following language: "[I]t is felt by respondent that conciliation would preserve the marriage." And in his prayer he asked the court "to continue this action until conciliation has been experienced by both parties to try and preserve the bonds of matrimony."

The majority contends this language in Jerome's answer did not trigger a request for conciliation under section 598.12.

I find the language clearly alerts Carol and the court to the fact Jerome wants conciliation and believes the marriage can be saved. I would construe his answer to request conciliation. In doing so I have also considered the parties' actions after the filing of the dissolution petition.

Neither party took any action in the dissolution until late February of 1985 when Carol briefly moved from the family residence and hired a new attorney who entered his appearance on March 5, 1985. On March 6, 1985, Carol's new attorney filed a certificate of readiness for trial. In the certificate he stated he had spoken to Jerome's attorney who agreed to waive the time period to resist the certificate. The certificate also indicated a trial date had been set for March 21, 1985, and Jerome's attorney had agreed to the date. Jerome's attorney later stated he agreed to the date only if it were satisfactory with

Jerome. The majority omits this fact from their opinion. Carol argues we should consider the alleged agreement set forth in the trial certificate. I refuse to do so. There is no evidence there was such an agreement. And, particularly when subsequent actions indicate the contrary.

On March 13, 1985, Jerome resisted the certificate of readiness for trial and requested the appointment of a conciliator. Carol objected to the resistance and request for conciliation. The trial court overruled Jerome's resistance on March 12, 1985.

The parties then went back together and Carol considered postponing the trial date. On March 20, 1985, Jerome filed a motion to ask the court to reconsider his application for conciliation.²

At the time of trial on March 22, 1985, Jerome again made a motion for continuance and conciliation. These motions were again overruled.

After Carol filed her petition for dissolution in March of 1984 she moved from the family residence. She returned a month later. She was still living there at the time of trial in 1985.

What happened is not uncommon. Carol filed a dissolution petition and then the parties reconciled. The dissolution petition was left on file. Neither sought to pursue their remedies under the dissolution statute. The action could be eventually dismissed or rescued without the necessity of refiling should matters not go well.

Dissolutions are a unique kind of litigation. They are unlike other causes where it is generally in a person's best interest to push for trial. When the parties are attempting to make the marriage work there is no basis to pursue remedies.

² After trial but prior to the filing of a decree, the trial court ruled on this motion and set aside the order overruling the resistance to trial and request for conciliation and set a time for the parties and their attorneys to meet with the court and determine a mutually agreeable conciliator. The court set aside the order providing for a meeting.

Jerome made known in his answer his wish for conciliation. Conciliation obviously was not then pursued because within thirty days of the filing of her petition Carol and Jerome once again commenced living together as husband and wife. When Jerome was made aware some eleven months later that Carol desired to have a hearing on her dissolution petition, he immediately presented the court with his request for conciliation.

I would at that point find the trial court was required to appoint a conciliator. Section 598.16 provides:

Upon application . . . by the respondent in the responsive pleading . . . the court shall require the parties to participate in conciliation efforts. . . . [emphasis added].

I distinguish In re Marriage of Ried, 212 N.W.2d 391, 393 (Iowa 1973) where:

. . . a mere allegation in respondent's answer to the effect the marriage has not failed, coupled with an expression of belief it can be preserved, may not be construed to constitute a statutorily qualified conciliation waiver objection.

The factual situation here makes conciliation particularly appropriate. This was a long-term marriage, there was virtually no separation prior to the dissolution hearing. The two parties both expressed hesitancy about finalizing the dissolution action shortly before trial. They were rushed to the court house within three weeks of the time Carol decided to activate a dissolution action that had been dormant for eleven months. During the 11-month period the parties maintained a marital relationship. Up to a time several days before trial Carol was unsure about the dissolution. These are obviously the people the legislature was concerned about when the conciliation statute was enacted to minimize the problems of hasty divorces.

I would reverse and remand for conciliation.