

IN THE COURT OF APPEALS OF IOWA

No. 6-107 / 05-1108
Filed April 26, 2006

**IN RE THE MARRIAGE OF RICHARD MICHAEL SEXTON
AND TINA MARIE SEXTON**

**Upon the Petition of
RICHARD MICHAEL SEXTON,**
Petitioner-Appellee,

**And Concerning
TINA MARIE SEXTON
n/k/a TINA MARIE RUNDE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson,
Judge.

Tina Marie Sexton appeals from the modification of the dissolution decree
terminating spousal support and ordering the sale of the marital home.

AFFIRMED IN PART AND REVERSED IN PART.

Joseph Bitter of Bitter Law Offices, Dubuque, for appellant.

Jennifer Clemens-Conlon of Clemens, Walters, Conlon & Meyer, P.C.,
Dubuque, for appellee.

Heard by Mahan, P.J., Vaitheswaran, J. and Brown, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206
(2005).

BROWN, S.J.

In this appeal of a modification of a dissolution of marriage decree, we affirm the district court's elimination of appellee Richard Sexton's alimony obligation and reverse the district court's imposition of injunctive relief respecting the sale of the parties' former home.

I. *Background facts and proceedings.*

Tina and Richard Sexton were married on June 14, 1985. Richard filed for divorce on December 16, 2003. A dissolution decree was entered July 8, 2004. Tina was awarded \$462 a month in spousal support for eight years. As of May 10, 2004, Tina was without legal representation. The reason is unclear in the record. On June 8, 2004, a "Stipulation and Agreement" was filed and incorporated into the dissolution decree. Tina and Richard negotiated the terms of the Stipulation and Agreement. At the time the decree was entered, Tina was working part-time and receiving \$617 per month in social security benefits. She expressed interest in returning to school, but she had not registered for classes.

On January 24, 2005, Richard filed a motion claiming that Tina was in contempt of the decree because she failed to make mortgage payments on the house which was awarded to her in the decree. Additionally, he alleged that she failed to pay the real estate taxes on the house and that the mortgagee bank had initiated foreclosure proceedings which would adversely affect his credit rating. He also filed a petition to modify the terms of the property settlement in the decree, requesting that the house be sold to satisfy the unpaid mortgage. Richard alleged that a substantial change in circumstances occurred due to Tina's failure to pay mortgage payments and real estate taxes. On February 9,

2005, Tina filed a motion asking that Richard be held in contempt because he failed to make his monthly alimony payments. On February 18, 2005, Tina married Gary Runde. On February 28, 2005, Richard amended his petition and requested that spousal support be terminated because Tina was working and had not furthered her education. As of March 22, 2004, Tina was employed at the Greyhound Park and Casino making \$10.15 an hour, but she had recently moved to the day shift and was only making \$8.52 an hour. Tina no longer receives social security benefits.

On March 4, 2005, the court found that neither party was in contempt. After a trial on May 23, 2005, the court modified the decree, terminating spousal support and denying a modification of the property settlement, but enjoining Tina to sell the house awarded to her in the original decree.

On appeal, Tina makes the following arguments:

- I. The trial court should not have modified the stipulation and agreement providing for alimony, and the decree of dissolution adopting that stipulation by terminating the wife's spousal support.
 - II. (A) The court should not have granted the petition to modify the property settlement and (B) the court should not have converted a petition to modify a property settlement to an "application for injunctive relief."
- II. *Standard of Review.*

"Review in equity cases shall be de novo." Iowa R. App. P. 6.4; see *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). Although we are not bound by the district court's findings, we give them deference because the district court evaluated the parties with a firsthand view of their demeanor. *Daniels*, 568 N.W.2d at 54. "Prior cases have little precedential value; we must

base our decision primarily on the particular circumstances in this case.” *Id.*; see also *In re the Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. *Merits.*

A. Alimony. Generally in Iowa, although “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 extraordinary circumstances exist which require the continuation of alimony payments.” *In re Marriage of Cooper*, 451 N.W.2d 507, 509 (Iowa Ct. App. 1989) (citing *In re Marriage of Shima*, 360 N.W.2d 827, 828 (Iowa 1985)). Subsequent remarriage creates a prima facie case for the elimination of alimony. *Shima*, 360 N.W.2d at 829. However, “the continuation of alimony beyond remarriage is especially appropriate where its purpose is rehabilitative—to assist the payee in obtaining further education necessary to permit her to undertake a self-supporting career.” *Cooper*, 451 N.W.2d at 509; *In re Marriage of Seidenfeld*, 241 N.W.2d 881, 884 (Iowa 1976); *In re Marriage of Orgren*, 375 N.W.2d 710, 712 (Iowa Ct. App. 1985). “With the exception of rehabilitative alimony, there does not appear to be any general support for including a provision in a decree which mandates the continuation of permanent alimony beyond remarriage.” *Id.*

Tina argues she and Richard agreed that her spousal support would not terminate upon her remarriage. She maintains this agreement is evidenced by the fact that during her negotiations with Richard over spousal support, she did not agree to the proposed stipulation and agreement which was drafted stating her spousal support would terminate upon her remarriage. Regardless of how

the parties negotiated, ultimately, the decree is silent as to whether spousal support would terminate upon remarriage.

Tina further asserts that she still intends to go back to school. She has taken a pay cut and the first opportunity available to her to work the day shift so that she can take evening classes. Additionally, she testified that after the divorce in June of 2004, she suffered unanticipated health problems that resulted in a hysterectomy and her inability to work for eight to ten weeks.

We find that the following language in the original decree indicates Tina and Richard's agreement that Richard would pay her \$462 a month for eight years was linked to Tina's stated need for assistance to return to school.

[Tina] has requested temporary assistance from [Richard] in meeting her financial needs as she returns to school. The parties have reached a mutual agreement in settlement of this disputed claim.

The spousal support agreed upon was rehabilitative in nature. Tina has failed to enroll in classes or determine a course of study. Tina's new husband is employed making an income equal to her former spouse's. The trial court impliedly rejected finding an agreement to continue alimony in the event of remarriage, but even assuming there was such an agreement, it merged in the decree and is not binding on the court. *Shima*, 360 N.W.2d at 829.

Accordingly, we agree with the district court and find that Tina has not demonstrated the existence of the extraordinary circumstances that would justify continued spousal support. See *id.* (setting out examples where extraordinary circumstances have been found). Therefore, we affirm the trial court's finding on this issue.

B. Property. Tina argues that the trial court erred in requiring her to list the house for sale and that requiring her to sell the house is a modification of the property settlement agreement. Richard maintains that the trial court properly exercised its equitable powers of injunction and that Tina's failure to make the mortgage payments is adversely affecting his credit because the mortgage is still in both their names. At the time of the dissolution, Tina wanted the house and Richard did not. Tina has made four mortgage payments since the dissolution decree. Tina testified she has made two additional payments but her checks were returned to her by the mortgagee bank. Tina has testified that she has tried to refinance with two other companies but has been unsuccessful. Tina testified that the mortgagee has been uncooperative and refused to communicate with her.

This district court entered a mandatory injunction ordering the sale of the property stating it could not modify the original decree, but that it had the injunctive power to protect Richard from the harm that results from Tina's failure to make the mortgage payments. The district court is correct regarding modification; "our courts have consistently held that once property settlements are fixed they should not be disturbed." *In re Marriage of Knott*, 331 N.W.2d 135, 137 (Iowa 1983). The "property division of a dissolution decree is not subject to change upon a petition for modification absent extraordinary exceptions." *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980). These extraordinary exceptions include "fraud, duress, coercion, mistake or other grounds that would justify the setting aside or changing a decree." *Id.* at 468 (citing *Knipfer v. Knipfer*, 259 Iowa 347, 355-56, 144 N.W.2d 140, 144-45 (1966)).

In *Johnson v. Pattison*, 185 N.W.2d 790, 797 (Iowa 1971), the supreme court specified the following concerning the court's injunctive power:

Equity usually invokes its extraordinary injunctive power only when necessary to prevent irreparable harm or when the complaining party is otherwise without an effective remedy. If the injury is slight and an injunction would result in serious hardship or loss to defendant, courts have refused to enjoin, leaving the plaintiff to his claim for damages. Under this comparative injury doctrine, injunctions which are likely to cause greater injustice than they seek to prevent are properly refused.

Injunctive powers should be exercised only in extraordinary circumstances to "avoid irreparable harm and to afford relief when there is no adequate remedy at law." *Myers v. Caple*, 258 N.W.2d 301, 304-05 (Iowa 1977). The party seeking the injunction must show both a violation of his rights and that he will suffer substantial damage unless the injunction is granted. *Id.* at 305 (citing *Rosendahl Levy and/or Drainage Dist. v. Iowa State Highway Comm'n*, 171 N.W.2d 530, 537 (Iowa 1969)); *Schmitt v. Kirkpatrick*, 245 Iowa 971, 977, 63 N.W.2d 228, 231 (1954).

Here, Richard did not seek an injunction. He sought a modification of the property settlement. The court converted his request for modification into a petition for injunctive relief without notice or an opportunity to be heard. Richard has alleged that Tina has failed to comply with the original decree requiring her to hold him harmless from the payment of the mortgage. However, on March 7, 2005, the court failed to find that Tina was in contempt of the original decree. Additionally, the mandatory injunctive relief ordering the house to be sold is a modification of the property settlement, and we find that none of the

circumstances which would warrant a modification are present. We reverse the district court's order of the sale of the residence.

Each parties shall pay one-half of the costs on appeal.

AFFIRMED IN PART AND REVERSED IN PART.