

IN THE COURT OF APPEALS OF IOWA

No. 9-976 / 09-0656
Filed February 24, 2010

IN RE THE MARRIAGE OF REX W. WEITZELL AND DEANNA K. WEITZELL

Upon the Petition of
REX W. WEITZELL,
Petitioner-Appellant,

And Concerning
DEANNA K. WEITZELL,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano (temporary order), Arthur E. Gamble (order on jurisdiction), Judges.

Appeal from a temporary order and an order on jurisdiction. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

William Kelly of Davis Brown Law Firm, Des Moines, for appellant.

Harvey Harrison of Harrison & Dietz-Kilen, P.L.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

Rex W. Weitzell appeals from a temporary fee order and an order on a motion concerning an alleged violation of an asset preservation order. We affirm in part, reverse in part, and remand.

BACKGROUND AND PROCEEDINGS. Rex W. Weitzell and Deanna K. Weitzell were engaged in protracted divorce proceedings when Deanna died on March 8, 2009. Nine days later, because of Deanna's death the district court on its own motion¹ dismissed the dissolution action. On February 10, 2009, prior to Deanna's death the district court had entered a ruling that provided, among other things, that Rex "shall within 30 days pay \$25,000 to Respondent [Deanna] as temporary attorney fees and suit money, to allow Respondent [Deanna] to prosecute this action." On February 20, 2009, Rex filed an Iowa Rule of Civil Procedure 1.904(2) motion challenging the attorney fee award. On March 24, 2009, after having dismissed the case the district court determined a previously scheduled hearing set for April 1, 2009, should take place to determine whether the court had jurisdiction to "[r]ule on a pending Iowa Rul. Civ. Proc. 1.904(2) motion."

On April 1, 2009, Rex filed a motion for declaratory judgment in the dissolution action, asking that a deed executed by Deanna purporting to change ownership in the parties personal residence from Rex and Deanna as joint tenants to tenants in common be found to be in violation of an earlier asset preservation order and that the deed be deemed to be void.

¹ Judge Romano issued the temporary order and the order dismissing the dissolution action.

On April 1, 2009, the district court found due to Deanna's death it had no jurisdiction to "take action on the matters incidental to the marriage because the marriage has ended." The court also found it had no jurisdiction to consider Rex's rule 1.904(2) motion or his application to show cause or for declaratory judgment as the dissolution had been dismissed.²

On April 28, 2009, Rex appealed from all rulings adverse to him in the proceedings including, but not limited to, the order entered requiring him to pay Deanna \$25,000 in attorney fees.

ORDER ON TEMPORARY ATTORNEY FEES. Rex contends that the order for temporary attorney fees is a final judgment and appealable as a matter of right and we have jurisdiction to review it. Deanna's brief concedes that "the Order awarding attorney fees stands as a final Order, and Deanna's death is not a bar to an appeal of the order." We agree that a temporary attorney fee award in a dissolution is a final judgment and is appealable as a matter of right. See *In re Marriage of Winegard*, 257 N.W.2d 609, 614 (Iowa 1977). The attorney fee award is a property right that was determined and reduced to judgment prior to Deanna's death. Therefore her death was not a bar to the district court addressing it on Rex's motion. See *Graham v. Graham*, 227 Iowa 223, 227, 288 N.W. 78, 80 (1939) (denying an appellee's motion to dismiss an appeal). There the appellant had died subsequent to a district court decree in which the court cancelled a deed and notes and gave appellant certain household goods. The court said, citing *Oliver v. Oliver*, 216 Iowa 57, 58, 248 N.W. 233, 234 (1938):

² Judge Gamble issued this order on jurisdiction.

“The decree of divorce in this case involves property rights, therefore, the death of one of the parties is not a bar to retrial, upon appeal, of the issues involved in the divorce itself.” *Graham*, 227 Iowa at 227, 288 N.W. at 80.

The district court erred in finding that Deanna’s death deprived it of jurisdiction to address the rule 1.904(2) motion challenging the attorney fee award. We reverse and remand to the district court to consider the motion. We do not retain jurisdiction.

DECLARATORY JUDGMENT. Rex contends that the district court should have addressed his motion for a declaratory judgment asking the district court to find the quit claim deed executed by Deanna transferring property in joint tenancy to tenants in common in what he claims was violation of an asset preservation order. The motion was filed subsequent to Deanna’s death. Unlike the order fixing attorney fees discussed above, here there was no judgment entered establishing property rights prior to Deanna’s death.

The death of a party to a dissolution of marriage action abates the dissolution proceeding. *In re Estate of Peck*, 497 N.W.2d 889, 890-91 (Iowa 1993); *Oliver*, 216 Iowa at 58, 248 N.W. at 234. That is because death ends the marital relationship. *Peck*, 497 N.W.2d at 890-91. The parties’ rights are determined on the basis of the relationship as it existed at the time one of the parties died. *Id.* at 891; *see also Jahnke v. Jahnke*, 526 N.W.2d 159, 161 (Iowa 1994). The district court correctly ruled it did not have jurisdiction to address the motion. We affirm that finding and dismiss this claim without prejudice.

APPELLATE ATTORNEY FEES. The attorney filing the appellee's brief asks for appellate attorney fees contending there are no assets available to him for payment of fees, no estate has been opened for Deanna, and a defense of the appeal was essential. He cites no authority for awarding attorney fees under these circumstances and we deny the request.

Costs on appeal are taxed to appellant.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Doyle, J., concurs; Danilson, J. dissents in part.

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

I respectfully dissent in part and concur in part. I concur in all respects except to the remand to district court to consider Rex's motion to amend or enlarge. A rule 1.904(2) motion is not properly used to raise new issues or new facts. *In re Marriage of Bolick*, 539 N.W.2d 357,361 (Iowa 1995). The proper approach to raise this new fact is by motion and evidence that demonstrates a substantial change of circumstances since the entry of the temporary order pursuant to Iowa Code section 598.11(2). Because Deanna's death would constitute a new fact, remanding this action back to district court will be of no avail and will further delay the disposition of this issue. I would proceed to review the temporary attorney fee award, as did the court in a factually similar case in *McDonald v. McDonald*, 621 A.2d 604, 606 (Pa. Super. 1993).