

FILED

MAR 20 1984

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SANDRA K. LAMPE,

)

Plaintiff-Appellant,

)

Filed March 20, 1984

vs.

)

**DOUGLAS A. PRIME, C. O. PRIME and
LAURELL PRIME,**

)

4-06
2-69538

Defendants-Appellees.

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Appeal from the Iowa District Court for Humboldt County - Louie F.
Beisser, Judge.

Plaintiff appeals from trial court's judgment dismissing her petition seeking either a division of the rents formerly received by defendants on a house and proceeds from the sale of the house or the defendant's purchase of the plaintiff's interest in the house. **AFFIRMED.**

Dan T. McGrevey, Fort Dodge, for plaintiff-appellant.

H. A. Stoebe of Stoebe Law Office, Humboldt, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson and Snell, JJ.

Plaintiff appeals from trial court's judgment dismissing her petition seeking either a division of the rents formerly received by defendants on a house and proceeds from the sale of the house or the defendant's purchase of the plaintiff's interest in the house. She alleges that payments made by defendants on the mortgage on behalf of plaintiff and her husband constituted a valid gift of the property. We affirm.

Plaintiff Sandra K. Lampe was married to defendant Douglas A. Prime in July of 1966. In August, 1966, the couple moved into a home purchased by defendants, C. O. and Laurell Prime, the parents of Douglas. On January 27, 1967, C. O. and Laurell executed a real estate contract selling the home to their son and daughter-in-law for a purchase price of \$5,250. The elder Primes made a down payment of \$1,250 as a gift to Douglas and Sandra with the buyers agreeing to pay the balance by assuming the obligations of a mortgage and outstanding note on the lots. Five \$50.00 payments had been made on this note before the real estate contract was executed. Thereafter, the purchasers made payments totaling \$100.00. Since the younger Primes were having financial difficulty, the elder Primes made the mortgage payments for them. The mortgage was paid off in July, 1976. For about one year, Sandra and Douglas lived in Illinois. While they resided there, the mortgaged property in Iowa was rented out by the elder Primes.

On October 8, 1979, a decree was entered dissolving the marriage of Sandra and Douglas. By stipulation of the parties, Sandra was to have a right of occupancy in the real estate in question which would cease if she left the premises for more than a temporary absence. In that event the house was to be sold through a realtor at a mutually agreeable price. After the proceeds were applied to the balance of the purchase money contract, the sale expenses, and the clearing of liens, the remaining equity was to be divided equally between the parties.

Sandra exercised her right of occupancy until April, 1980, at which time she

moved to Fort Dodge, Iowa. C. O. and Laurell then took possession of the property. They renovated the dwelling and rented it out in July, 1980. The rental income from July of 1980 through October of 1982 was applied toward renovation costs.

On June 2, 1982, C.O. and Laurell served a notice of forfeiture of real estate contract on Sandra, advising her that unless she paid the remaining purchase money balance, interest, insurance expenses, and taxes within 30 days, the contract would be forfeited. Payment was not made within the 30 days. In support of her petition for a division of the rents received by C. O. and Laurell, Sandra asserted that the payments made by C. O. and Laurell on the mortgage and their final accelerated mortgage payment in July of 1976 constituted a valid gift of the property.

The trial court concluded that plaintiff's interest in the disputed real estate under the dissolution decree could be no greater than her interest in it under the real estate contract. Furthermore, the contract made payment of all sums owing by plaintiff a condition precedent to the conveyance of a deed by defendants C. O. and Laurell Prime. The court further held that, unless excused or waived, payment must ordinarily be made in order to entitle plaintiff to specific performance. The trial court also found that the elder Primes considered the mortgage payments made on behalf of Douglas and Sandra as loans to be repaid when the purchasers were able to do so. This appeal followed.

We agree with the trial court that C. O. and Laurell considered the mortgage payments as loans and expected to be repaid when the couple became financially able. There was testimony at the trial indicating that not only did the elder Primes expect to be repaid but the plaintiff herself was fully aware of her obligation under the real estate contract and specifically acknowledged the debt owed to C. O. and Laurell. We reject plaintiff's contention that the mortgage payments made by the elder Primes constituted a gift. The record affirmatively

shows that there was consideration paid, minimal though it was upon the contract, and that one of these payments was as late as after the return of Douglas and Sandra from Illinois. At that time Sandra gave a check to C. O. and Laurell marked one-half (1/2) of house payment. Long sufferance of one entitled to payments does not forbid subsequent demand for money since only the punctuality has been waived, not the payment. Bettis v. Bettis, 228 N.W.2d 193, 195 (Iowa 1975).

Having considered plaintiff's claim and finding it without merit, we affirm the judgment of the trial court.

AFFIRMED.