

FILED

NOV 24 1981

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF J. K. MEYER AND L. M. MEYER

UPON THE PETITION OF)

J. K. MEYER,)

Petitioner-Appellant,)

Filed November 24, 1981

AND CONCERNING)

L. M. MEYER,)

Respondent-Appellee.)

1-289
2-65582

Appeal from Polk District Court, Joel D. Novak, Judge.

The husband appeals from the trial court's findings of fact and conclusions of law interpreting the parties' dissolution decree, which was filed July 8, 1980, and from an adverse ruling on his motion to enlarge the above. The wife cross-appeals. **AFFIRMED AND REMANDED WITH INSTRUCTIONS.**

Harlan M. Hockett of Flagg, Hockett, Benhart, Golden & Cook, Des Moines, for petitioner-appellant.

F. H. Backer of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, Des Moines, for respondent-appellee.

Considered by Oxberger, C.J., and Carter, Snell, and Johnson, JJ. Danielson, J., takes no part.

The husband appeals from the trial court's findings of fact and conclusions of law interpreting the parties' dissolution decree, which was filed July 8, 1980, and from an adverse ruling on his motion to enlarge the above. The wife cross-appeals. We affirm.

As a preliminary matter, the parties have appealed from findings of fact and conclusions of law. The trial court ordered the attorney for the respondent-wife to prepare a supplemental decree, but that was never done. The husband appealed, and the wife cross-appealed, directly from the order denying the motion to enlarge the court's findings, and from the findings. As such, there was no final judgment to be appealed from. However, we will treat the appeal as an application for interlocutory appeal pursuant to Iowa R. App. P. 1(c).

On September 13, 1974, the parties in this action obtained a decree of dissolution of marriage. The decree awarded the husband possession of the parties' home until his minor son Scott became age 25 or became self-supporting. At that time the property was to be sold and the proceeds divided equally between the parties. The husband was to make all payments while he continued in possession. The decree also provided that each party was to pay any debts incurred by him or her and to hold the other harmless from any claims for such debts.

During the marriage, the parties obtained a first mortgage on the home from Polk County Federal Savings and Loan. They obtained a second mortgage from the husband's parents on which no payments have ever been made. The husband also signed a home improvement lien and promissory note to his parents during the marriage.

On October 10, 1979, the wife made an application for a supplemental decree, asking that the husband be required to (1) show he had made the required payments under the decree, and (2) proceed with the sale of the parties' home, alleging that Scott had become self-supporting. After a hearing, the trial court entered its findings and conclusions on July 8, 1980. The court found that (1) Scott is self-supporting and, therefore, under the terms of the original decree, the house must be sold; (2) that the husband was solely liable for payment of the home improvement loan since the wife had not signed for it; (3) that the husband was not entitled to credit for the mortgage payments he has made since entry of the decree nor for improvements made to the home; and (4) that the balance owing on the second mortgage was to be split, with

payments due prior to entry of the decree to be deducted from the gross proceeds of sale of the house, and that payments due since that date be paid from the husband's share of the equity. The court further ruled that expenses of sale were to be deducted from the gross proceeds, except for repairs made to place it in marketable condition, which were to be paid for by the husband. The court also refused the wife's request to be compensated for delay since her first demand for the sale of the house was made.

I. The Finding that Scott is Self-Supporting.

The husband argues that the trial court erred in finding that Scott was self-supporting, thus triggering the provision requiring sale of the home. We disagree.

The evidence showed that Scott is a full-time student at Drake University. The husband, Scott's father, has paid and will continue to pay for Scott's tuition. This payment is not required under the terms of the original decree. Scott is married, has not lived at home since June 15, 1979, and is 22 years old. Except for the voluntary tuition payments and a wedding present, the husband has made no financial contribution to Scott and his wife. The couple's average income for the nine and one-half months following their marriage was \$885 per month net. This was obtained by Scott's part-time employment and his wife's earnings. The trial court was correct in holding under the facts of this case that Scott is self-supporting. See McGregor v. McGregor, 237 Ga. 57, 226, S.E. 2d 591 (1976). Therefore, under the terms of the original decree, the parties' home must be sold.

II. The Improvement Loan.

The husband argues that the trial court erred when it ruled that he was solely liable for the home improvement loan signed in favor of the husband's parents on November 19, 1969. We disagree.

The evidence shows that the wife did not sign the promissory note. The decree states that the husband will take full responsibility for debts incurred by him up to the date of the supplemental decree. Therefore, the trial court was correct in holding the husband solely liable for this debt.

III. Credit for First Mortgage.

Next, the husband argues that he should receive credit for the amount the principal has been reduced on the first mortgage by his payments since the date of the decree. He also argues he should receive credit for improvements made to the

property. The original decree states that the husband shall be solely responsible for all maintenance and upkeep of the home and shall make the payments on the home. The trial court was correct in holding that therefore, the husband may not receive credit for such improvements and payments. Only the balance remaining on the first mortgage at the date of sale reduced by any overdue payments, should be deducted from the gross sale proceeds prior to the division of the parties' equity.

IV. The Second Mortgage.

On December 20, 1967, both the husband and the wife executed a second mortgage to the husband's parents to secure a \$7,287.82 loan. This mortgage was recorded. No payments have ever been made on this second mortgage. The trial court was correct when it stated "Payment of the current balance would provide an unjust enrichment to Petitioner [husband] by deducting payments due after September 13, 1974, from the gross proceeds prior to division of equity, however requiring Petitioner to pay the full amount from his portion of the net equity would provide an unjust enrichment to Respondent [wife] as payments were due prior to the date of Decree and she received a benefit through nonpayment between March 20, 1968, and September 13, 1974." Therefore, we affirm the trial court's holding that payments due prior to September 13, 1974, be deducted from the sale gross proceeds prior to distribution of the parties' equity, and that the payments accruing after that date be paid from the husband's portion of the net equity.

V. Charge for Husband's Occupancy.

The wife argues that the husband should be charged a reasonable sum for his occupancy of the home since June 16, 1979, the date Scott married and moved out of the home. We affirm the trial court's denial of this request. The husband has continued to make payments on the home, and it has appreciated in value since that date, and the wife will therefore be adequately compensated for any delay.

All other aspects of the trial court's findings and conclusions and ruling on the motion to enlarge are affirmed. Since a supplemental decree was never entered, this case is remanded to the trial court with instructions to enter a decree in conformity with this decision.

All costs are to be taxed to the husband-appellant.

AFFIRMED AND REMANDED WITH INSTRUCTIONS.