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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-405 / 89-1857

89

IN RE THE MARRIAGE OF STEVEN F. GLIDER AND MARCIA J. GLIDER

Upon the Petition of
STEVEN F. GLIDER,

Petitioner-Appellee,

And Concerning
MARCIA J. GLIDER,

Respondent-Appellant.

TRANSAMERICA COMMERCIAL FINANCE CORPORATION,

Intervenor-Appellee.

Appeal from the Iowa District Court for Dubuque County, James L. Beeghly, Judge

Appellant, Marcia Glider, appeals the trial court's judgment and decree, following trial on her application for modification of dissolution of marriage. **AFFIRMED IN PART AND REVERSED IN PART.**

Wayne A. Norman, Jr., and Dirk J. Hamel of Norman, Gilloon & Wright, Dubuque, for appellant.

Frank Murray Smith of Smith & Harms Law Offices, Des Moines, for appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ.

HAYDEN, J.

The marriage of Steven and Marcia Glider was dissolved in 1983. The dissolution decree placed Steven and Marcia's one minor child in Marcia's care and directed Steven to pay alimony and child support. Marcia was awarded a lump sum of $13,000 to be paid over twelve years at ten percent interest in monthly installments of $155.37. The decree awarded the marital residence to Steven.

At the time of the 1983 dissolution decree Steven was employed by Sears, Roebuck & Company in a management position and was earning $26,000 to $30,000 per year. He later left that job and went into business for himself, operating a video rental store. He obtained floor plan inventory financing for his business from Transamerica Commercial Finance Corporation (Transamerica).

Steven's video rental business eventually failed. In response to his business failure, Steven arranged for the sale of his house. This house was awarded to him by the 1983 dissolution decree. Steven then left town.

Transamerica repossessed Steven's inventory. On May 18, 1989, it filed a petition seeking a deficiency judgment and a writ of attachment to stop Steven from absconding with the house sale proceeds. The house proceeds were deposited in First National Bank of Dubuque, Iowa. On May 30, 1989, Marcia obtained a temporary injunction ordering the bank to hold the house proceeds in an interest paying account until further disposition.

On May 31 the sheriff attached the same proceeds under Transamerica's writ of attachment. On June 6 Marcia filed a petition to modify the dissolution decree. She asked for the full amount of alimony and child support due her under the original dissolution decree be paid from these proceeds.

Transamerica filed to intervene in the modification proceeding. Marcia objected to the intervention, but the trial court overruled her objection. Neither party appeals this ruling.

On July 25 Transamerica obtained a deficiency judgment against Steven. The deficiency judgment was for $12,829.20, plus $1,707.85 attorney fees and costs.

The district court denied Marcia's requested modification of the dissolution decree. The court provided the house sale proceeds shall be applied: (1) first to the payment of alimony and child support which were delinquent as of May 30, 1989; (2) second to Transamerica's deficiency judgment; (3) third to the payment of alimony and child support which were delinquent as of October 30, 1989, the date of the district court's order; and (4) fourth to the court costs of the modification action. The court provided any remaining proceeds be paid to Marcia. Marcia asserts the proceeds are sufficient to satisfy only provisions (1) and (2) above.

On appeal, Marcia contends Steven's economic reversals and alleged disappearance constitute sufficient change of circumstances to warrant a modification of the 1983 dissolution decree. She claims the district court should have applied all of the house sale proceeds toward Steven's past and future child support and alimony obligations. She argues the district court erred by applying the bulk of the sale proceeds toward Transamerica's deficiency judgment.

Steven takes no part in this appeal. Transamerica has filed an appellee's brief.

Our review of this case is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings of facts, but give them weight. Iowa R. App. P. 14(f)(7).

I. Change of Circumstances

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." In re Marriage of Kern, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing In re Marriage of Vetternack, 334 N.W.2d 761, 762 (Iowa 1983)).

The principles enumerated in Vetternack and applied in Kern are applicable here as well:

> A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been in the contemplation of the trial court when the original decree was entered.

Vetternack, 334 N.W.2d at 762.

In reviewing the record, it is apparent both Marcia and Transamerica believed there was a significant change in Steven's circumstances. This change motivated them to obtain extraordinary judicial measures to protect their financial interests owed them by Steven. Transamerica filed for and obtained a pre-judgment writ of attachment on the grounds Steven might move his assets beyond the reach of his creditors. Marcia filed for and obtained a temporary injunction on those same grounds.

Finally, the trial judge specifically found under the circumstances a security bond should be imposed to secure future child support and alimony payments. See Iowa Code § 598.22. The trial court established a trust account with the remainder of the house proceeds for future support payments.

We agree with the trial court a security bond should be posted as provided by statute. Steven has demonstrated he is unreliable in payment of his support obligations. There

is a strong possibility he will remain so in the future. Under these circumstances, we feel compelled to impress a trust on whatever assets may be available to secure the delinquent debtor's future support obligation. We affirm the trial court on its imposing a trust on the proceeds to secure future support payments.

Based upon both parties' pleadings and the record as a whole, it is clear there has been a change of circumstances not in the contemplation of the trial court in the original dissolution. Steven has become heavily indebted. His business has failed. He has defaulted on his loan payments. At the time of trial he was at least five months behind on his support payments. He moved unexpectedly, without communicating his move to Marcia. He did not leave his forwarding address with Marcia, nor apparently with Transamerica. Apparently, he was only located through the realtor who sold the house.

We determine there is adequate evidence in the record to support a finding of a substantial, permanent change in circumstances. We accordingly reverse the trial court on this matter.

II. Temporary Injunction

Next we must consider the effect of the temporary injunction Marcia obtained on May 30, 1989. This injunction ordered the bank to hold the proceeds of the house sale "for the benefit of the parties, until further Order of Court."

One of the leading Iowa cases on injunctions, Kent Products v. Hoegh, states "the true purpose of a temporary injunction."

> It is to a great extent a preventative remedy to maintain the status quo and so to protect the subject of the litigation that the fruits thereof shall not be lost to the successful party.
>
> The status quo which will be preserved by a temporary injunction is the last, peaceable, noncontested status which preceded the pending controversy.

Kent Products v. Hoegh, 245 Iowa 205, 214, 61 N.W.2d 711, 716 (1953) (citations omitted; emphasis added); accord Foods, Inc. v. Leffler, 240 N.W.2d 914, 919 (Iowa 1976) (citing to Kent Products). See also 43 C.J.S. Injunctions § 5 (1978), and 43A C.J.S. Injunctions § 66 (1978).

> Where the main suit is pending in equity, the court, as ancillary thereto, may grant an injunction to prevent the sale, transfer, or any change in the status of the property that will interfere with the equitable adjustment of the rights of the parties in the final decree.

43A C.J.S. Injunctions § 66(b) (1978).

The temporary injunction was issued May 30, 1989. Transamerica attempted to attach the house proceeds May 31, 1989. However, it was estopped from doing so by the temporary injunction already in place. Because the writ could not attach, neither could Transamerica's lien attach.

III. Lump Sum Alimony was a Judgment

In the dissolution Marcia was awarded $13,000 to be paid over twelve years at ten percent interest in monthly installments of $155.37. Dissolution decrees are final

judgments. In re Marriage of Schlenker, 300 N.W.2d 164, 166 (Iowa 1981). This is true even though they may be subject to modification. Matson v. Matson, 186 Iowa 607, 625, 173 N.W. 127 (1919).

Final judgments are judgment liens against realty of the judgment debtor. Iowa Code § 624.23.

> "...[T]he court had the power to decree that the awards for alimony and child support should be a lien on any real estate which the appellant owned. The fact that judgment was entered for the awards would in itself make them liens upon any real estate owned by him."

Joneson v. Joneson, 251 Iowa 825, 832, 102 N.W.2d 911, 915 (1960) (quoting Davis v. Davis, 228 Iowa 764, 773, 292 N.W. 804, 808 (1940).

These judgment liens are effective in the county where rendered and any county where the judgment is filed. Iowa Code § 624.24. Both the dissolution and Steven's house were located in the same county. Thus, the lump sum alimony constituted a judgment lien against the realty held by Steven Glider in Dubuque County and any other county where it was properly filed. Iowa Code §§ 624.23, 624.24.

The dissolution decree is dated March 31, 1983. Marcia's judgment lien on Steven's real property attached as of that date. The temporary restraining order was issued on May 30, 1989. "The status quo which will be preserved by a temporary injunction is the last, peaceable, noncontested status which preceded the pending controversy." Kent Products, 245 Iowa at 214, 61 N.W.2d at

716 (1953). Thus, the temporary injunction essentially froze the position of the parties as it existed on May 30, 1989.

The record shows Marcia signed a release of liens on the house real estate that same day. The real estate closing was the next day, May 31, 1989. Her attorney was the notary public on the release. We conclude, based on the record before us, Marcia signed this release to facilitate the house sale and remove any cloud upon its title. The temporary injunction served to keep alive her interest in the proceeds generated from the sale of property.

Marcia argues an equitable lien in the proceeds should be established in her favor. The Iowa Supreme Court case Tubbs v. United Central Bank, N.A. provides guidance.

> equitable liens are generally recognized, [however] the doctrine is one of obscure definition. It has been said it is "difficult to give an accurate and comprehensive definition of the term equitable lien and, ... it frequently has been stated such a lien is a right not recognized at law, to have a fund or a specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts."

Smith v. Village Enters., Inc., 208 N.W.2d 35, 38 (Iowa 1973) (quoting 51 Am. Jur. 2d Liens §22 (1970)) (emphasis added).

> As we noted in Smith, the concept of equitable lien may cover many varying factual situations. Smith, 208 N.W.2d at 38. The equitable lien is said to be a restitution concept applied by courts of equity to avoid injustice and particularly to avoid unjust enrichment. Restatement of Restitution § 161 (1937). The lien may arise either by the express contract of the

parties or by implication under equitable principles. In Farmers & Merchants Bank v. Commissioner of Internal Revenue, 75 F.2d 846, 849 (8th Cir. 1949), the Court stated:

> An equitable lien arises from either a written contract which shows an intention to charge some particular property with the debt or the obligation, or is implied and declared by a court of equity out of general considerations of a right and justice as applied to the relations of the parties and the circumstances of their dealings.

Tubbs v. United Central Bank, N.A., 451 N.W.2d 177, 185 (Iowa 1990) (emphasis added).

> The essential elements of an equitable lien "include a debt, duty, or obligation owing by one person to another, and a res to which that obligation fastens." 53 C.J.S. Liens § 4(a) (emphasis added). It is a remedy for a debt and provides a method for the enforcement of the debt. 51 Am. Jur. 2d Liens § 22.

Federal Land Bank of Omaha v. Boese, 373 N.W.2d 118, 121 (Iowa 1985); accord In re Receivership of Hollingsworth, 386 N.W.2d 93, 96 (Iowa 1986) (lien must be definite as to: "(1) The identity of the lienor; (2) The amount of the lien; (3) The property to which it attaches.")

In this case, all three elements are definite. Marcia has a judgment debt against Steven. The amount of the debt, $13,000.00, is set forth in the dissolution decree. It is amortized in respondent's exhibit number one. Marcia held a judgment lien on Steven's real property. The house real property was sold, providing the res at stake here.

> An equitable lien is a mere floating equity until a judgment or decree subjecting the property to the payment of the debt or claim is rendered, but even though not judicially recognized until a

> judgment declaring its existence, it relates back to the time it was created by the conduct of the parties.

51 Am. Jur. 2d Liens § 22 (1970).

Marcia's judgment lien attached March 31, 1983, the date of the dissolution decree. On May 30, 1989, Marcia obtained a temporary injunction to prevent the dissipation of the house proceeds. She signed the release on the same day. The injunction specifically spelled out the reasons for her claim and for the injunction. Her conduct shows an intent to maintain her claim to the real estate sale proceeds.

> ...the effect of these instruments was clearly in equity a reservation to the plaintiff of an interest or lien to the amount of $10,000. This was the intent of the parties to that contract. A court of equity looks at the substance, and not at the form, and we see no reason why such provision could not have been enforced in a court of equity as between the original parties to such contract, even though through mistake, inadvertence, or oversight, no mortgages had in fact been executed.
>
> We have frequently held that, where land is sold subject to an encumbrance, the land becomes the primary fund for the payment of such encumbrance. The encumbrance is presumed to have been provided for in adjusting the consideration. [Citations omitted.]
>
> In this case, even though the mortgages be deemed a nullity as suable obligations, they may still be resorted to as items of evidence tending to throw light upon the intention of the parties.

Marshall Investment Co. v. Lindley, 156 Iowa 6, 10, 134 N.W. 853, 854 (1912) (where the court upheld an equitable lien even though the mortgage itself may have been invalid).

In the present case there is a judgment lien already in place. The land is "the primary fund for the payment of such encumbrance." Id. When Marcia obtained the temporary injunction, her intent to preserve her claim on the real property was clearly spelled out. This temporary injunction is evidence "tending to throw light upon the intention of the parties." Id.

The actions of Marcia under the circumstances were reasonable. The various claims had not yet been established by the court. She facilitated the sale of the property, which otherwise might have sat unsold and deteriorating due to the cloud on the title. She maintained her claim by obtaining the temporary injunction. She is entitled to fair value for her release of liens.

We determine Marcia has an equitable lien on the real estate sale proceeds. Her equitable lien is merely a continuation of her judgment lien, transformed by equity to a lien on the proceeds. Her equitable lien therefore dates back to her original judgment lien, March 31, 1983.

Transamerica points out "a lien may be created only by contract ... or by some statute or fixed rule of law; it cannot be created by the court merely from a sense of justice." Hollingsworth, 386 N.W.2d at 96. However, we do have a statutory judgment lien present here. Id.; see Iowa Code § 624.23(1); Joneson, 251 Iowa at 832, 102 N.W.2d at 915. Moreover, the basis for the equitable lien is at

least as strong here as in the Tubbs case. In that case the court impressed an equitable lien on the property based upon prior representations and statements in recorded instruments. Tubbs, 451 N.W.2d at 184-85. Here we have a prior judgment lien. We find Tubbs to be controlling.

The lien we impose flows from the statutorily provided judgment lien. "[E]quitable liens arise only in particular circumstances such as unjust enrichment occurring under facts entitling the plaintiff to a hold on specific property as distinguished from an in personam claim. An equitable lien then is a remedial alternative to a constructive trust." Hollingsworth, 386 N.W.2d at 96 (emphasis added). Marcia had a judgment lien on Steven's realty. She is entitled to an equitable lien on the proceeds from the sale of that realty.

We do not base our determination here on principles of unjust enrichment. Both parties before us have judgment claims against Steven. Rather, we base our holding on "general considerations of a right and justice as applied to the relations of the parties and the circumstances of their dealings." Tubbs, 451 N.W.2d at 185. Marcia's judgment lien was created on March 31, 1983. She signed a release of liens to facilitate the sale of the house. She did not give up any claims to the sale proceeds, as evidenced by the temporary injunction. Her equitable lien flows from her judgment lien and so dates back to March 31, 1983.

Marcia is entitled to fair value from the sale proceeds for her release. According to respondent's exhibit number one, Marcia was still owed $8,213.50 as of June 15, 1989. We hereby impress an equitable lien in Marcia's favor on the real estate proceeds for that amount. Marcia is entitled to $8,213.50, plus ten percent interest from May 30, 1989, to the date of final disbursement, to be paid from the property proceeds.

Transamerica states its priority as a lienholder against the sale proceeds relates back to the date of attachment. Iowa Code § 639.38. Thus, its lien, if it attached at all, attached on May 31, 1989. In light of our above holding, its alleged lien is not prior to the lump sum alimony judgment.

IV. Trust Account for Child Support

The only remaining question is whether Transamerica's attachment lien is prior to the trust account the trial court found should be imposed to secure future child support payments. The temporary injunction is the deciding factor here.

The temporary injunction was issued May 30, 1989. Transamerica attempted to attach the house proceeds May 31, 1989. However, it was estopped from doing so by the temporary injunction already in place. Because the writ could not attach, neither could Transamerica's lien attach. "The status quo which will be preserved by a

temporary injunction is the last, peaceable, noncontested status which preceded the pending controversy." Kent Products, 245 Iowa at 214, 61 N.W.2d at 716.

The non-attachment of Transamerica's lien puts both parties in the position of unsecured creditors of Steven. Therefore, we must examine, as between the two creditors, which should have priority.

There is a strong public policy favoring parental support for their children. For example, the Iowa Code gives priority to mandatory wage assignment of income for delinquent child support payments. "The assignment of income has priority over a garnishment or an assignment for a purpose other than the support of the dependents in the court order being enforced." Iowa Code § 252D.1(2) (1989).

Additionally, there is a strong public policy against allowing subsequent interests or rights to displace prior rights.

> As a general rule, an attachment or garnishment is effective only to the extent of the debtor's interest in the property attached, and the lien does not displace prior rights or equities. The right first acquired is, as a rule, superior."

Verschoor v. Miller, 259 Iowa 170, 177, 143 N.W.2d 385 (1966).

Transamerica was on notice of the judgment ordering child support at the time it made the loan to Steven. The child support order existed prior to the Transamerica loan. Further, we look to the trial court's ruling in the present case for additional guidance.

The trial court specifically found:

> Under the circumstances [Marcia] is entitled, the the Court should require, that [Steven] secure future payments for support. Iowa Code Section 598.22 (last paragraph). Under these circumstances the Court should require that the proceeds of sale of the homestead should be held in trust to secure the future payments. "Support" includes alimony and child support. Iowa Code Section 598.1(2).

This case is analogous to In re Marriage of Vetternack. In that case, an ex-husband was incarcerated. Consequently, he could not pay child support. However, he did have about $15,000 equity in the marital property. The Iowa Supreme Court held:

> We agree with the trial court that the petitioner's equity in the house should be charged for the support payments he is unable to meet during the period of his incarceration. The crucial thing is that, during the petitioner's incarceration, it will continue to be necessary to care, feed, and provide for the children. He remains liable for those expenses. It would not be equitable for his equity in the home to remain set off to him while his children were being supported by others.

Vetternack, 334 N.W.2d at 763 (emphasis added).

We determine the trial court was correct in finding a need for a security bond to ensure payment of child support. Steven had defaulted on his support obligations for at least five months, from the time of his moving to time of trial. It is his obligation to support his child. There is no guarantee he will resume support payments in the future. Our decision is in light of the high public policy interest in ensuring parental support obligations and the fact Transamerica is merely an unsecured general creditor as to the sale proceeds of Steven's house.

We determine the remainder of the house sale proceeds after payment of the lump sum alimony shall be posted as security for Steven's child support obligation. The fund shall be held in the interest bearing trust account as authorized by the trial court.

The bank is ordered to pay Marcia from the house sale proceeds the value of her release of lien, namely the remaining principle of her $13,000 judgment in the original dissolution decree. This amount is $8,213.50, at ten percent interest, calculated as of June 15, 1989.

The bank is further authorized to pay all arrearages in child support to the clerk of district court, together with appropriate interest. The other provisions of the account shall remain as the district court directed in its ruling.

At the termination of the child support obligation, the bank is authorized to pay the remainder, if any, of the account to Steven or to his creditors, whichever is appropriate.

Marcia has not asked for attorney fees on appeal, and we make no provision for them. We reverse the trial court on its award of attorney fees and costs to Transamerica.

Costs of this appeal are assessed against Transamerica.

AFFIRMED IN PART AND REVERSED IN PART.

Schlegel, P.J., concurs; Sackett, J., concurs in part and dissents in part.

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

I concur in part and dissent in part. I would affirm in all respects.