FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF GENE E. SEWELL AND JANICE K. SEWELL

126

UPON THE PETITION OF
GENE E. SEWELL,

Petitioner/Appellant-Cross-Appellee,

AND CONCERNING
JANICE K. SEWELL,

Respondent/Appellee-Cross-Appellant.

Filed September 25, 1984

4-305
84-29

Appeal from the Iowa District Court for Polk County, Joel D. Novak and Van Wifvat, Judges.

Petitioner-husband appeals and respondent-wife cross-appeals from the district court order which clarified the decree dissolving the parties' marriage, as modified by the court of appeals. AFFIRMED.

Richard J. Howes of Dickinson, Throckmorton, Parker, Mannheimer & Raife, Des Moines, for petitioner-appellant.

Michael J. Galligan of James & Galligan, Des Moines, for respondent-appellee.

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

OXBERGER, C.J.

The petitioner-husband in this action presents for our review the lower court interpretation of a court of appeals decision. The trial court interpreted our decision to indicate that the decree dissolving the parties' marriage shows profits from rental property awarded to him should be used toward his children's higher education. He says this is error, and that the appeals court meant the profits should be so used if petitioner was able to make the additional contributions. He also says he should not have to contribute to respondent's attorneys fees on appeal. Respondent-wife cross-appeals claiming that the changes made by the court of appeals regarding the divorce decree should not operate retrospectively, as determined by the trial court. We affirm the trial court in all respects and decline to require contribution from petitioner towards respondent's appellate attorneys' fees.

The rental property in question is located at 3215 Wright Street and was awarded to petitioner in the original divorce decree. The court stated, "Equivalent profit of the rental property at 3215 Wright Street should continue to be devoted to the higher education of the children of the parties unless it is sold or so heavily encumbered that it is no longer profitable to do so." The court also awarded $60 per week per child for two children still at home, and $30 per week per child for two children in college. The court of appeals modified certain portions of the decree regarding the property settlement and support, citing an inequitable distribution to petitioner, but left the ownership of the rental property with petitioner. The court of appeals decision noted, "Although Gene is awarded the rental property, we find that the amount of the rents and profits from the property will be used for the higher education of the child." A dispute arose between the parties as to whether the profits from the rental property should have been set aside for the children's college education. The trial court was asked to interpret the provision, and it decided the rents should be paid to the college fund.

We initially dispose of respondent's contention that we should not hear

petitioner's appeal on this issue because he did not present it on the initial review of the divorce decree. It is specifically the trial court's interpretation of the ruling that is being challenged here, and that question was properly raised after the court's determination.

Petitioner first claims the trial court made an improper modification of the original decree, and that there was no substantial change in circumstances warranting the action. We disagree that the trial court modified the decree. The language of the trial court opinion, and pleadings of the parties show nothing more was presented or undertaken by the court than a clarification of the ruling. This was a proper proceeding for the court. Cooper v. Cooper, 158 N.W.2d 712, 713 (Iowa 1968).

Petitioner claims the provision for applying rental profits to the children's further education was merely encouragement by the court that he provide additional support, if possible. He says the opinion shows the amount required to be paid by him for college education is $30 per week per child. If the court had intended more, he says, it would have been more specific as to how the profits were to be paid and applied. He also says that since the court stated the profits would apply until the properly was sold or was no longer profitable, he could void this obligation simply by selling the property. In addition, he says if the profits were intended for college education, the court would have spelled out the requirements of section 598.1(2) which shows the child must regularly attend an approved school and meet other various requirements if support is to be paid past the child's eighteenth birthday.

Our courts have considerable discretion in setting out child support in dissolution proceedings. Yansky v. Yansky, 172 N.W.2d 114, 117 (Iowa 1969). The court had already indicated child support payments were to be made to the Friend of the Court. The court had also indicated support payments for post-high school education would continue as long as the children were enrolled in college and

making progress. The fact that petitioner was allowed by the court to sell the property if necessary does not, we believe, indicate there was no obligation for petitioner to apply the profits to educating the children. The court did not have to presume petitioner would avoid his obligation to his children. It would also be pointless for the court to require him to continue to keep the property if there were no profits to be put into a college education fund.

We believe it is evident from the language of the trial court and appellate opinion that the rental profits were to be paid for the children's post-high school education. In the first decree, the court stated the "equivalent" of the profits would be applied to college education. In our review of the case we also stated that the rents would be used for further education and "The record indicates that the net rental on the house awarded to Gene amounts to approximately $2400 per year, indicating that there is approximately $200 per month for the children's education from that source." We believe that taking the language of the opinion as a whole, along with the language and disposition of the original decree, the rental profits were to be paid in addition to the $30 per week support and that the payment was not optional. We affirm the trial court in its construction of the ruling.

Respondent counters that it was error for the court to determine that changes by the appeals court in property division and alimony relate back to the date of the original decree. The trial court in dealing with this question could find no authority on this point. Since the parties' appeal, the supreme court has made known its opinion in this area. In Thomas v. Minner, 340 N.W.2d 285, 286 (Iowa 1983) the court stated it would look to the language of the opinion in deciding if an appellate decision was retrospective. If the intent of the court may be determined, that indication takes precedent. Id. Where an opinion is silent as to the time of its operation, the court decided a holding of "affirmed as modified"

means the original decree is affirmed, with some changes. Id. This, the court explained, shows the appellate decision was a substituted judgment as of the date of the district court decree. Id.

In this case, we also have an appellate opinion where the court affirmed the district court, with some modifications. There is no language in the opinion to show the intent of the court regarding retrospective or prospective operation of the decision. There is also nothing in the nature of the appellate court disposition showing its action was to operate from the date of its opinion. Therefore, we conclude, as the court did in Thomas, that the appellate court opinion was to operate retrospectively. We affirm the trial court in this regard.

Respondent claims such a result will create a great hardship to her if she is forced to repay money petitioner has paid in excess of what was owed. However, the trial court adequately responded to this problem by indicating that if we decided the rental profits were to be used for the higher education of the children, then petitioner's credit could be satisfied by applying the amount of rental profits due from him until the credit is satisfied. We believe this results in equity for both parties.

Based on the criteria for determining contribution to another's attorneys fees set out at In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981), we consider the needs of the requesting party, the party's ability to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. Considering the cross-appeal by respondent, the results on appeal, the property award, and financial condition of each party, we hold respondent shall pay all her own attorneys fees on appeal.

AFFIRMED.