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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARY A. SWIFT AND EDWARD A. SWIFT

Upon the Petition of	)	
MARY A. SWIFT,	)	Filed February 5, 1980
Petitioner-Appellee,	)	
And Concerning	)	346 / 2-63654
EDWARD A. SWIFT,	)	
Respondent-Appellant.	)	

Appeal from Dubuque District Court - Thomas H. Nelson, Judge.

Respondent appeals judgment denying modification of dissolution decree alleging changed circumstances justify sale of the parties' home and division of the proceeds. REVERSED AND REMANDED.

Dennis J. Naughton of Reynolds, Kenline, Breitbach, McCarthy, Clemens, McKay and Naughton, Dubuque, Iowa, for respondent-appellant.

Jean M. Didier of Dubuque Legal Services, Dubuque, Iowa, for petitioner-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

OXBERGER, C.J.

Respondent appeals judgment denying modification of dissolution decree alleging changed circumstances justify sale of the parties' home and division of the proceeds. We reverse and remand.

The marriage of respondent, Edward A. Swift, and petitioner, Mary A. Swift, was dissolved by decree entered November 6, 1975. Mary was awarded custody of the parties' two children and was granted possession of the couple's home "until the home is either sold by mutual agreement, petitioner becomes so disabled and can no longer care for the children in the home, or dies, whichever event first occurs." Modification of child custody, requested by Edward, was ordered March 8, 1977, based on the trial court's finding Mary's health had so deteriorated the best interests of the children would be served by the change of custody. The court stated the deterioration of Mary's health, due to multiple scleroris, constituted a change in circumstances warranting modification even though the original decree recognized that potential and made provisions to govern its occurrence. Provisions on possession or sale or the house were not specifically altered by the child custody modification. Edward then brought this action seeking modification of the possession provisions and the court ordered sale of the property. He appeals the denial of his petition.

Our review is de novo. Iowa R. App. P. 4. Subsequent changes in a dissolution decree are proper if "circumstances render them expedient." §598.21, The Code 1979. Normally, such circumstances must not have been considered or anticipated at the time of the original decree to be sufficient as grounds for modification. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974).

Here, the alleged changed circumstances (deterioration of Mary's health due to multiple sclerosis) were anticipated by the court at the time dissolution was ordered. Provisions, contingent on the possible deterioration of Mary's health due to multiple sclerosis, were incorporated in the right to possession section of the original dissolution decree. Since the deterioration of Mary's health was contemplated in the original decree, we cannot conclude circumstances render modification of the possession provision expedient.

Our inquiry does not end with that determination, however. Edward alleges the

earlier child custody modification terminated Mary's right to possession of the home since the original decree specifically stated her possession right ended when she became "so disabled and (could) no longer care for the children in the home." The trial court judge rejected this assertion based on his construction of the decree and modification, both of which he earlier had entered. He stated the decree, as modified, manifested the intent Mary could remain in possession of the home so long as she was capable of living there.

While a trial court's construction of its own decree is given weight in determining what a decree means, Peters v. Peters, 214 N.W.2d 151, 157 (Iowa 1974), we do not abdicate our role as trier de novo. In our judgment, the original decree, as modified, does not manifest the intent Mary shall enjoy continued possession of the home so long as she is capable of living there. Rather, we find under the clear meaning of the provisions employed, Mary's right to possession terminated when she became unable to care for the children in the home. The child custody modification did not mention the possession provisions of the original decree and we cannot conclude modification expanded Mary's right to possession. By operation of the original decree, Mary's right to possession of the home terminated when the court found she could no longer care for the children. The child custody modification decree confirmed the parties' stipulation made prior to dissolution. That stipulation awarded Edward possession of the home when he became entitled to custody of the children. The decree and stipulation also provided for division of proceeds of sale if the parties mutually agreed to sell the home. Since Edward provided another home for the children, we believe sale of the parties' house best distributes this asset and achieves the result implicitly intended by the original decree. Accordingly, we grant the relief requested by Edward and order the home be sold with the proceeds equally divided between the parties. We reverse trial court's order and remand for entry of provisions consistent with this opinion.

REVERSED AND REMANDED.

Johnson, J., dissents.

JOHNSON, J. (dissenting)

While I agree with the majority's conclusion that the instant proceeding involves construction of the original decree, rather than modification of that decree, I disagree with the conclusion respondent is entitled to his requested relief under the record before this court. The original decree granted petitioner the right to reside in the home "until ... [it] is either sold by mutual agreement ... [or] Petitioner becomes so disabled and can no longer care for the minor children in the home ... ." The court-approved stipulated modification provided for transfer of custody to respondent because "Petitioner's health has deteriorated to such an extent that it is now in the best interests of the parties' minor children ... that custody should be given to the Respondent ... ." Contrary to the majority's conclusion, I do not believe this latter provision establishes petitioner is unable to care for the children, the circumstance which would entitle respondent to possession of the house and, implicitly, the right to his requested relief. Because the record is devoid of evidence from which that determination can be made, I would remand this case to trial court for the necessary findings and entry of the appropriate ruling thereon.