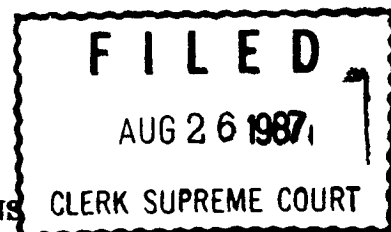


IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF HARRIETT A. SIMMONS
AND RICHARD HARRY SIMMONS



Upon the Petition of	)	282
HARRIETT A. SIMMONS,	)	
Petitioner-Appellant,	)	Filed August 26, 1987
And Concerning	)	
RICHARD HARRY SIMMONS,	)	<u>7-231</u>
Respondent-Appellee.	)	<u>86-1336</u>

Appeal from the Iowa District Court for Polk County (No. CD 36-21089),
A. M. Critelli, Judge.

Petitioner wife appeals from the district court's declaratory judgment that one of the two events had occurred which made due and payable respondent husband's lien on the house petitioner wife was awarded in a dissolution decree.
AFFIRMED.

Kolleen K. Samek, Des Moines, for appellant.

Roger A. Huddle of Weaver & Huddle, Wapello, for appellee.

Considered en banc.

DONIELSON, J.

Petitioner wife appeals from the district court's declaratory judgment that one of the two events had occurred which made due and payable respondent husband's lien on the house petitioner wife was awarded in a dissolution decree. The triggering events stated in the decree were petitioner wife's remarriage or her "no longer desiring to occupy" the house. On appeal, petitioner wife asserts that she went to live in an apartment because it was a requirement of her job as an apartment manager and that her absence from the house therefore did not constitute "no longer desiring to occupy" it. We affirm.

The marriage of petitioner Harriett A. Simmons and respondent Richard Harry Simmons was dissolved in August 1982. Harriett was awarded the parties' home at 518 S.W. Ash Drive in Ankeny, subject to a \$10,000.00 lien in Richard's favor, due and payable when Harriett remarried or "no longer desired to occupy" the house. In July 1983, Harriett took a job as a night manager and cleaning person at an Ankeny apartment complex. She moved into one of the apartments provided for her rent-free and utility-free by the apartment complex. When the apartment complex in which she was residing changed ownership, she continued in the same job but in a somewhat different capacity. Harriett was no longer night manager of the apartment complex, but remained as a cleaning lady on a self-employed basis. In August 1985, Harriett moved to Huxley, Iowa, with Robert Heckathorn, with whom she also resided at the Ankeny apartment.

On September 8, 1985, Richard's present attorney wrote a letter to petitioner advising her of the potential for this present case. On September 12, 1985, Harriett moved back into the home on Ash Drive. On December 19, 1985, Richard filed a petition for declaratory judgment, alleging that Harriett had not occupied the home on Ash Drive for a period of two years and that the failure to occupy the home triggered the institution of a lien in the amount of \$10,000.00.

The trial court found that Harriett's actions during the two years subsequent to the dissolution decree evidence an intent not to occupy the home and held that the \$10,000.00 lien was now due and payable at the rate of 10% per annum from and after November 22, 1986.

Our scope of review is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7).

Harriett argues that in order to find that an individual no longer desires to occupy the home, there would have to be shown an affirmative act of abandonment of the property and an intent to permanently remove herself therefrom. Harriett further argues that she was forced out of the home, though temporarily, due to pressing economic conditions. Harriett maintains that her job at the apartment complex required that she reside at the complex and that she had every intention of returning to the home once her employment ceased. Harriett further points out that she kept all of her furniture at the Ash Drive home, was responsible for the payment of taxes and utilities on the home, maintained the insurance and paid the mortgage payments, and had all of the non-business mail sent to her home. Harriett therefore argues that the trial court erred in finding she no longer had a desire to occupy the home. We disagree.

The dissolution decree as agreed to by the parties is a contract. Therefore, when interpreting the provisions of a contract, the words used in the contract are assigned their commonly-accepted and ordinary meaning and will be interpreted in the context in which they are used. Home Federal Sav. and Loan Ass'n of Algona v. Campney, 357 N.W.2d 613, 617 (Iowa 1984). Words may be assigned their ordinary dictionary meaning. Conco, Inc. v. Norwest Bank Mason City, N.A., 767 F.2d 470, 471 (8th Cir. 1985). The dissolution decree as a whole will be read in light of the surrounding circumstances and will be given such

practical construction as the parties themselves have placed upon it. Kroblin v. R.D.R. Motels, Inc., 347 N.W.2d 430, 433 (Iowa 1984).

We must begin our analysis by interpreting the word "occupy." Webster's New World Dictionary 984 (2d ed. 1976) defines the word "occupy" as follows: "To take possession of by settlement or seizure . . . to dwell in" Blacks Law Dictionary 1231 (4th ed. 1968) defines "occupy" as follows: "To take or enter upon possession of; to hold possession of; to hold or keep for use, to possess, to tenant; to do business in." Blacks Law Dictionary 1230 (4th ed. 1968) defines the "occupation" of a dwelling house as "living in it." "Occupancy," in its usual sense, has been defined as "the exercise of physical control over land. Occupancy implies the exclusion of everyone else from enjoyment. 'Occupancy' does not necessarily include residence." 73 C.J.S. Property § 29 at 222 (1903). It is thus apparent that the word "occupy" is often used with the word "possession."

Blacks Law Dictionary 1325 (4th ed. 1968) defines "possession" as "[t]he detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, either as owner or by another who exercises it in one's place and name." Possession may be deemed either actual or constructive. Actual possession or control owners ordinarily exercise in holding, managing, and caring for property of like nature and condition. Burgess v. Leverett and Assoc., 252 Iowa 31, 35, 105 N.W.2d 703, 706 (1960). Constructive possession has been defined as "that possession which the law annexes to the legal title or ownership of property, when there is a right to the immediate actual possession of such property, but no actual possession" 73 C.J.S. Property § 30 at 223 (1983).

While it does not appear that the word "occupy" has been interpreted by the Iowa courts in the context of a dissolution decree, it has been analyzed

in the context of cases relating to farm leases. In Paulson v. Rogis, 247 Iowa 893, 77 N.W.2d 33 (1956), the Iowa Supreme Court addressed the legal definition of the word "occupy." In Paulson, a dispute existed over a lease arrangement whereby the tenant had stayed on the farm for a number of years after expiration of a written lease. 247 Iowa at 893, 77 N.W.2d at 35. In attempting to terminate the tenancy without notice, the landlord argued that because the tenant "did not live on the land he leased he was a cropper." Id.

In determining that the defendant was not a cropper, the Iowa Supreme Court addressed the definition of the word "occupy":

Both parties place stress upon the words of the statute "occupying and cultivating" and especially "occupying". "Occupy" according to Black's Law Dictionary, Fourth Edition, means "to take or enter upon possession of; to hold possession of; to hold or keep for use; . . . to do business in." 67 C.J.S., page 82 states the word "occupy" is variously defined as meaning "to possess; to hold in possession; to have in possession or use." 73 C.J.S., Property, § 14, says "occupancy" generally refers to "actual possession . . . the exclusion of everyone else from enjoyment . . . does not necessarily include residence.

247 Iowa at 895, 77 N.W.2d at 35. The Paulson court held that "[w]hile residing upon the premises is a pertinent fact to consider on the question between a tenant and a cropper, it is not determinative" Id. at 896, 77 N.W.2d at 35-36. While the Paulson case does not deal with a homestead contained in a property division of a dissolution decree, it is applicable to the present case to the extent that the court defined "occupancy" as not necessarily including residence.

The line of cases discussing homestead rights are additionally helpful to our analysis. In order to become a family homestead, ordinarily the property must be occupied by the owner and at least one other person whom the owner is legally or morally obligated to support. Perez v. Perez, 303 N.W.2d 145, 148 (Iowa 1981). Occupancy of a dwelling house, except when the owner is

temporarily absent with a purpose to return, is essential to a claim of a homestead right. Berner v. Dellinger, 206 Iowa 1382, 1383, 222 N.W. 370, 371 (1928). Actual occupancy is necessary in order to create the homestead right. Fardal v. Satre, 200 Iowa 1109, 1111, 206 N.W. 22, 24 (1925). It therefore appears that under the homestead rights cases, "occupancy" means to actually "live in."

It is apparent from the above analysis that the word "occupy" does not have one meaning, but is to be construed according to the context in which it is used. We find that in the present case it was the intention of the parties at the time the trial court entered the decree the word "occupy" was meant to be defined as live in. Any other holding would create the possibility that Harriett would be able to technically "occupy" the Ash Drive home by leaving her clothing and furniture there, yet live at another residence for an indefinite period of time. Since the Ash Drive home was the parties' greatest asset, any other interpretation would frustrate the intent of the property division that at some point \$10,000.00 lien would be due and payable to Richard.

We also find that Harriett's actions subsequent to the decree support our conclusion that the \$10,000.00 lien is now due and payable to Richard. The record reveals that Harriett kept most of her clothing and furniture at the Ash Drive home. Harriett paid the mortgage payments on the home and also maintained the home insurance. Harriett paid the utilities on the home and had her non-business mail sent to the Ash Drive address.

The record also reveals, however, that Harriett resided for over two years at the Ankeny apartment. Though Harriett testified that she believed that her job as night manager would only be temporary, we believe that two years is longer than what would usually be considered temporary. Moreover, had a change of ownership not occurred in 1985, Harriett's job may have lasted

for much longer. Though Harriett testified that she always intended to move back to the Ash Drive home, we note that in August 1985, Harriett did not move back to the Ash Drive home, but instead moved to Huxley, Iowa, to live with Mr. Heckathorn. At that time, Harriett was no longer required to live in the apartment complex since she was no longer night manager. Harriett did not move back to the Ash Drive home until several days after she received a letter from Richard's counsel informing her of the potential for the present action. From these facts, we find that Harriett no longer desired to live at the Ash Drive home and that as a result such actions triggered the \$10,000.00 lien in favor of Richard on the home, such lien now due and payable.

AFFIRMED.

All judges concur, except Sackett and Schlegel, JJ., who dissent.

SACKETT, J. (dissenting)

I find a person who is temporarily absent from his or her home but leaves his or her furniture and personal effects in the home and intends to return to the home does in fact continue to occupy the home. I would reverse.

Schlegel, J., joins this dissent.