FILED
OCT 0 7 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF KENNETH P. HANSON AND JANICE L. HANSON

UPON THE PETITION OF	)	
KENNETH P. HANSON,	)	
Appellant,	)	Filed October 7, 1977
AND CONCERNING	)	
JANICE L. HANSON,	)	264 2-59142
Appellee.	)	

Appeal from Cerro Gordo District Court - L. E. Plummer, Judge.

Appeal from judgment on Cross Application for Modification of Dissolution Decree finding portion of decree requiring payment of taxes, assessments, and mortgage encumbrances on residence awarded to respondent to be in nature of property settlement and not alimony. AFFIRMED.

Richard L. Petersen, of Weible, Stipp and Petersen, of Forest City, counsel for appellant.

Ray E. Clough, of Mason City, counsel for appellee.

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

40

DONIELSON, J.

Petitioner-Kenneth Hanson appeals from an adverse decision on his Cross Application for Modification of Decree. He and the respondent, Janice Hanson, were married on February 7, 1953. On September 21, 1972, petitioner filed a Petition for Dissolution of Marriage. On March 20, 1973, the parties entered into a stipulation regarding child custody, child support, and property settlement. On April 3, 1973, the trial court issued its Judgment and Decree which essentially recited verbatim the provisions of the stipulation.

The Decree provided, in pertinent part:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Respondent shall have and receive as her separate property, free and clear of any claim of the Petitioner, the following described real estate:
>
> (a) The home of the parties, known locally as 2615 South Lakeview Drive, Clear Lake, Iowa, and legally described as Lot Eight (8), in Lakeview Addition, Clear Lake, Iowa.
> The Petitioner shall pay before they become delinquent all taxes, assessments, and mortgage encumbrances now existing or hereafter placed against said real estate for so long as the Respondent maintains this property as her principal residence.
>
> (b) The cottage, legally described as Lot Five (5) Block Two (2) in South Haven Addition to Clear Lake, Iowa,
>
> subject to taxes, assessments, and mortgage encumbrances now of record." (emphasis added)

On April 11, 1975, respondent filed an Application for Modification of Decree, the subject of which is not relevant to the instant appeal. However, on July 2, petitioner filed his Resistance and Cross Application which alleged, inter alia, that the portion of the Decree requiring him to pay the taxes, assessments, and mortgage encumbrances on the house was, in effect, an installment alimony provision, and that by reason of respondent's remarriage, all obligations to pay alimony cease as of the date of the remarriage. See In re Marriage of Woodward, 229 N.W.2d 274, 280 (Iowa 1975).

On December 18, 1975, a hearing was held on these applications, and on January 13, 1976, the district court issued its Findings and Ruling. In essence, the court found that the pertinent provision was in the nature of a property settlement and not alimony, and consequently was not terminated by respondent's remarriage.

On appeal, petitioner asserts that the district court erred in concluding that the provision regarding the payment of taxes, etc. constituted a property settlement. Our review in this matter is de novo. Rule 4, Rules of Appellate Procedure. Although we give weight to the trial court's findings of fact, we are not bound by them. Rule 14(f)(7), R. App. P.

Section 598.21, The Code, provides that a dissolution decree may be modified "when circumstances render them expedient." The subsequent change of circumstances which is necessary to justify a modification of the original decree is a substantial change, In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973), and the circumstances which have changed must be those which were not within the contemplation of the trial court at the time it entered the original decree. Page v. Page, 219 N.W.2d 556, 557 (Iowa 1974).

The law is settled that if a portion of a dissolution decree is part of the property settlement reached by the parties, it is ordinarily not subject to modification of any kind. Wernli v. Wernli, 216 N.W.2d 322, 324 (Iowa 1974). In Knipfer v. Knipfer, 259 Iowa 347, 144 N.W.2d 140 (1966), the court, faced with the identical question of whether certain payments constituted alimony or property settlement, stated:

> "In determining whether the award here constitutes alimony or a property division, no single factor is controlling. The court must take into consideration all the relevant factors, including the provisions of the agreement between the parties, the circumstances under which the agreement was made, the nature and value of the property owned by and to be divided between the parties, the original divorce proceedings and the terms of the divorce decree sought to be modified. . . ." Id. at 352.

See Wernli v. Wernli, supra, at 324.

The Knipfer court also stated, supra, at 354:

> "The fact the award was to be paid in installments rather than in a lump sum is immaterial. . . . (citation omitted).
>
> "What is important in such cases is whether the settlement is considered a permanent one, for a fixed or determinable sum, and whether such settlement is in lieu of the wife's rights in property, or in lieu of her dower rights."

After a review of the entire record and the standards set forth in Knipfer, we are convinced that the provision at issue is in the nature of a property settlement. We agree with the sound reasoning of the trial court, and feel that this is an especially appropriate case for deference to its findings. Consequently, we affirm the judgment of the district court.

AFFIRMED.

All Judges concur except Oxberger, J.. who dissents.

OXBERGER, J. (dissenting)

I dissent. I agree that the Knipfer v. Knipfer. 259 Iowa 347 144 N.W.2d 140 (1966) decision is dispositive of the question However as I read **Knipfer** it establishes that a decision of whether an award is alimony or property division is to be made on the basis of asking two questions: 1) whether the settlement is considered a permanent one, for a fixed or determinable sum and 2) whether such settlement is in lieu of the wife's rights in property or in lieu of her dower rights. 259 Iowa at 354 144 N.W.2d at 144.

In **Knipfer** the settlement was a charge upon the husband's estate and was secured by a deposit of a $50,000 insurance policy on his life with the wife as beneficiary. "The award was definite, certain and fixed and was to continue for a definite time (a minimum period of 10 years), even beyond plaintiff s (the husband's) life, a factor not generally embodied in an alimony allowance provided by court decree." 259 Iowa at 354, 144 N.W.2d at 144. In Wernli v. Wernli, 216 N.W.2d 322 324 (Iowa 1974), the settlement was a deposit of $60,000 which secured payment of $50.000 to the wife if she survived the husband without having remarried. The court found in answer to the second query of **Knipfer** that the only reasonable interpretation of such a settlement was that it was a property division in lieu of any dower interest which would have accrued to the wife if the marriage had survived. 216 N.W. at 324.

In this case Janice received title to the family home in the original dissolution decree; Kenneth was to pay all taxes, assessments and mortgage encumbrances so long as Janice maintained the property as her principal residence. I would rule this settlement is periodic alimony under the first question of **Knipfer**. It is indefinite, uncertain and not fixed as to duration. By the decree's literal terms, Janice has only to cease maintaining it as her principal residence at any time and her right to have mortgage and taxes paid by Kenneth ceases. In re Marriage of Woodward, 229 N.W.2d 274 (Iowa 1975) reversed the trial court's characterization of a settlement as property division The supreme court ruled that the original award of $15,600 annually was made to meet family expenses found by the trial court to be $15,500. Such a settlement was periodic alimony. In

this case at the time of entry of the decree, Janice had five minor children to house and maintain. The court accepted the parties' stipulation as to $500 per month child support. There is no indication in the record that Janice was employed and able to provide for herself and the children at the time the decree was entered. No financial statements were filed in the dissolution action.

Counsel for Janice at the modification hearing objected to presentation of any evidence of the parties' financial affairs at the time of the dissolution. The only evidence before the court indicated Janice received the entire net worth of the parties with the $9800 mortgage deducted from her share of assets in arriving at a net award of $61,211 to her. Kenneth received a net loss of $12,471. Even if Kenneth's recapitulation is grossly distorted, I would view the evidence before the court as indicating a disproportionately high share of the assets to Janice. Kenneth's evidence at least was sufficient to present a prima facie case of alimony in the amount of the mortgage and taxes assumed by him under the decree. Janice chose not to present any counter evidence to Kenneth's evidence. Upon such a record I would hold the mortgage payments and taxes made to Janice constituted alimony, and that the trial court was therefore required to terminate such alimony upon Janice's remarriage absent proof of some extraordinary circumstances justifying its continuance. **Woodward**, 229 N.W.2d at 280.