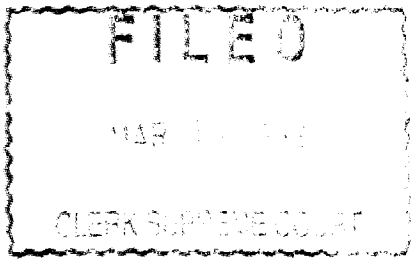
IN THE COURT OF APPEALS OF IOWA

No. 8-692 / 97-1623
Filed March 31, 1999

IN RE THE MARRIAGE OF CONNIE R. KINNARD and JAMES A. KINNARD

Upon the Petition of
CONNIE R. KINNARD,
Appellant,

And Concerning
JAMES A. KINNARD,
Appellee.



Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Connie Kinnard appeals the alimony and child support provisions of an order reinstating the parties' dissolution decree. **REVERSED AND REMANDED WITH INSTRUCTIONS.**

Roger J. Kuhle of the Law Office of Roger J. Kuhle, P.C., West Des Moines, for appellant.

Cathleen J. Schaffner and Kermit L. Dunahoo of the Dunahoo Law Firm, Des Moines, for appellee.

Heard by Huitink, P.J., and Vogel and Zimmer, JJ. Sackett, C.J., and Streit, J., take no part.

HUITINK, P.J.

I. Background Facts and Procedural History.

James and Connie Kinnard's marriage was dissolved November 23, 1988. The decree dissolving their marriage provided for joint custody of their three children, Michella, Jason, and Jeremy. Connie was awarded primary physical care of Michella and Jeremy. James was awarded primary physical care of Jason.

James was also required to pay $1500 monthly child support ($750 for each child) subject to annual adjustments based on a consumer price index. James' obligation was also subject to a one-third reduction when only one of the children was eligible for support. The decree also provided for termination of child support when an eligible child reached eighteen years of age or "otherwise becomes emancipated." Connie was ordered to pay James $100 monthly child support for Jason.

Connie was awarded $1000 monthly alimony for a five-year period following the date of the filing of the decree. Like the child support awards, the amount of alimony was subject to adjustment based on the consumer price index.

The decree's property division required James to pay Connie $67,595.82. The trial court also awarded Connie $3500 for attorney fees and related expenses.

James and Connie remarried on November 24, 1988. They lived together with their children from then until March 1989, when Connie filed a second dissolution action. That action was dismissed when the parties reconciled in May 1989.

After separating again in November 1989, Connie filed a third petition in December 1989 resulting in an October 17, 1990 dissolution decree. Under that decree, Connie was awarded primary physical care of Jeremy and $160 monthly child support commencing September 1990. James was awarded primary physical care of Jason.[1]

The 1990 decree also provided for a $3000 lump-sum payment of child support arrearage and attorneys fees accrued under a January 31, 1990 temporary support order. The parties' remaining real and personal property was divided as agreed. No alimony was awarded. Neither party appealed from the 1990 decree.

These proceedings began with Connie's July 31, 1991 application seeking modification of the October 1990 decree or alternatively an order vacating the decree. Connie alleged she was fraudulently induced to remarry James so he could avoid payment of his obligations under the November 1988 decree. The district court rejected Connie's claims and dismissed her petition to modify or vacate the 1990 decree. On appeal, we reversed citing evidence of James' extrinsic fraud and ordered the 1988 dissolution decree reinstated. *See In re Marriage of Kinnard*, 512 N.W.2d 821, 824 (Iowa App. 1993). James' application for further review was denied.

A series of orders were entered by the district court following issuance of procedendo on March 14, 1994. A judgment entry dated September 13, 1994, acknowledged that the October 17, 1990 decree was vacated and the November 23,

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[1] Because Michella had reached age eighteen, her custody an support were not implicated.

1988 decree was ordered reinstated except those paragraphs concerning custody, child support, and allocation of income tax exemptions. An ex parte nunc pro tunc order, entered on March 13, 1995, amended the September 13, 1994 judgment by deleting these exceptions and reinstating the November 1988 decree in its entirety.

On March 11, 1996, James moved to vacate the March 13, 1995 order. Connie filed a similar motion on August 16, 1996, seeking to amend the district court's prior orders to conform to our decision reinstating the 1988 decree. On August 30, 1996, the district court vacated its March 13, 1995 order and determined an evidentiary hearing should be held to determine the appropriate judgment to be entered in conformity with our opinion in *Kinnard*.

On December 20, 1996, an evidentiary hearing was held in accordance with the terms of the August 30, 1996 order. On June 3, 1997, the district court entered its findings of fact and conclusions of law and order reinstating the November 1988 decree and establishing James' obligations under that decree. In its findings of fact, the district court noted the parties' residential and custodial experiences since entry of the November 1988 decree. The court also made specific findings of fact concerning the amount of child support James paid since the November 1988 decree was entered. These findings included a determination Jeremy was self-sufficient since 1994 and James accordingly owed support for Jeremy from December 1989 through 1993. This order also provided:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The Respondent shall pay to the Petitioner $67,595.82 plus 10% interest per annum from December 1, 1988 for the property settlement under the 1988 decree.

2. The Respondent shall pay to the Petitioner $60,000.00 plus 10% interest per annum from the date of this order for alimony under 1988 decree.

3. The Respondent shall pay to the Petitioner $9,974.12 plus 10% interest per annum from the date of this order for unpaid child support.

4. The Respondent shall pay to the Petitioner $3,500.00 plus 10% interest from December 1, 1988 for attorney fees and expenses under the 1988 decree.

5. Both parties shall pay their own attorney fees for this action. They shall split the court costs evenly.

On appeal, Connie contends the district court's resolution of the issues raised by James' motions conflicted with the intent of our opinion in *Kinnard* and exceeded its mandate: She also argues the evidence does not support James' claim Jeremy became self-sufficient in 1994 and James' child support arrearage must be adjusted accordingly. Connie further claims she is entitled to interest from the date of each of James' delinquent alimony and child support payments relating back to 1988. She also seeks an award of appellate attorney fees.

James argues the district court acted within the scope of its equitable authority by resolving the issues raised by the parties' various motions. He also argues the June 3, 1997, judgment entry should be affirmed. James has not cross-appealed.

II. Scope of Review.

The parties disagree on our standard of review. The record indicates the relevant trial proceedings were filed and heard in equity. Our review is therefore

de novo. Iowa R. App. P. 4; *see Husker News Co. v. South Ottumwa Savs. Bank*, 482 N.W.2d 404, 406 (Iowa 1992).

We examine the entire record and adjudicate anew those issues properly presented and preserved for appeal. *Weiss v. City of Denison*, 491 N.W.2d 805, 807 (Iowa App. 1992). We give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. District Court's Compliance With the Intent and Mandate of Our Opinion in Kinnard.

Connie correctly notes the district court was duty bound to comply with the mandates of our 1993 opinion according to its expressed intent and meaning. *In re Matter of Luloff*, 569 N.W.2d 118, 123 (Iowa 1997)(citations omitted); *Heatherington Title Co. v. O. F. Paulson Const. Co.*, 192 N.W.2d 808, 809 (Iowa 1971) (citations omitted). This duty, however, does not prohibit the district court from interpreting our intentions or taking necessary actions to carry out that intent. *Id.*; *Thomas v. Miner*, 340 N.W.2d 285, 286 (Iowa 1983); *Sloper v. Killion*, 182 Iowa 245, 251, 164 N.W. 241, 243 (1917). The propriety of the judgment entered on remand may also be litigated in the action in which it was entered. *Thomas*, 340 N.W.2d at 287 (citation omitted). The district court nevertheless has no power or jurisdiction to do anything except proceed in accordance with our mandate. *Kuhlman v. Persinger*, 261 Iowa 461, 468, 154 N.W.2d 860, 864 (1967).

Our decision in *Kinnard* reinstated a dissolution decree five years after its original entry. Because the terms of that decree were not entirely self-executing, further proceedings on remand were necessary to conform its terms to existing circumstances and were clearly contemplated in our opinion. The issues raised on remand were properly considered by the court in discharging the foregoing duty. Whether the district court correctly interpreted our intent and mandate is a matter we separately consider.

Resolution of this issue requires us to interpret the meaning of our 1993 decision. We have "broad latitude in matters of this kind guided only by our review as to the intent of the prior decision." *Thomas*, 340 N.W.2d at 285. Pertinent considerations include the language used and the context of the proceedings. *Id.; see also* 5 Am. Jur. 2d. *Appellate Review*, § 782 at 450 (1995).

In our 1993 opinion, we concluded Connie was fraudulently deprived of the economic benefits of the 1988 decree. Our remedial intention was to restore these benefits by vacating the 1990 decree[2] and reinstating the 1988 decree. This remedy, we believe, preserved the equities of that decree for both parties and left them in the same position they were in when it was originally entered.

The terms of the procedendo issued following our opinion in *Kinnard* directed the district court to "proceed in the matter required by law and consistent with the

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[2] Iowa Rules of Civil Procedure allow a court to modify or vacate a final judgment on the grounds of irregularity or fraud practiced upon the court. *Hastings v. Espenosa*, 390 N.W.2d 602, 608 (Iowa App. 1983).

opinion of the court of appeals." The district court, acting within the scope of its remand authority, took the actions and entered the judgment earlier described.

Although our opinion in *Kinnard* clearly contemplated further proceedings in the district court, we are unable to reconcile the resulting judgment on remand with either our intent to preserve the equity of the 1988 decree or our remedial authority under Iowa Rule of Civil Procedure 252(b). As broad as that authority may be, we doubt that it allowed us, nor did we intend, to order the retroactive dissolution of the parties' 1988 remarriage and resulting accruals of interest, alimony, or child support under the decree nullified by that marriage. *See In re Marriage of Helm* , 271 N.W.2d 725, 726 (Iowa 1978)(remarriage of the parties to a dissolution renders the dissolution decree a nullity.) The factual and procedural quagamier encountered by the district court in its attempt to enter judgment illustrates the error and resulting inequity of its contrary interpretation. We believe reinstatement of the 1988 decree effective October 17, 1990, the date of the vacated decree, accomplishes the remedial objectives of our opinion in *Kinnard* and was its intended result. Because the judgment of the district court exceeded the scope of its mandate on remand, it is a nullity and must be set aside in its entirety. *Kuhlman v. Persinger*, 261 Iowa at 468, 154 N.W.2d at 864.

IV. Jeremy's Emancipation.

We briefly consider this issue because it may rise on remand. Under our interpretation of *Kinnard,* the November 1988 decree was reinstated on October 17,

1990. The district court's mandate was accordingly limited to conforming that decree to circumstances then existing. James' claim that Jeremy was emancipated was not raised until March 8, 1996, and was based on circumstances occurring in 1994. For the reasons above noted, the district court was without jurisdiction or authority to include resolution of this issue within the limited scope of our remand in *Kinnard*. Moreover, the relief granted by the district court resulted in a retroactive modification of James' child support obligation beyond that allowed by statute. *See* Iowa Code § 598.21(8) (judgment for child support may be retroactively modified only from date the pending petition to modify is served on the opposing party).

V. Attorney fees.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981). James shall pay $2500 toward Connie's appellate attorney fees.

VI. Summary.

The judgment of the district court entered on June 3, 1997, is vacated and set aside. This case is remanded for further proceedings in which the district court shall determine the rights and liabilities of the parties under the November 23, 1988 decree

dissolving their marriage *effective October 17, 1990.* The district court shall make such awards of interest accruing on delinquent installments of alimony, child support, and property division based on the October 17, 1990 effective date of the November 1988 decree. *See* Iowa Code § 535.3(2); *see also In re Marriage of Dunn,* 455 N.W.2d 923, 925 (Iowa 1990); *Muchmore Equip. Inc. v. Grover,* 334 N.W.2d 605, 609-10 (Iowa 1983).

REVERSED AND REMANDED WITH INSTRUCTIONS.