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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-475 / 89-218

IN RE THE MARRIAGE OF CALVIN W. HESSE AND LaVONNE A. HESSE

Upon the Petition of **CALVIN W. HESSE,**

Appellant,

And Concerning **LaVONNE A. HESSE,**

Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Peter Van Metre, Judge.

Calvin appeals from the district court's ruling denying him reimbursement from LaVonne for the amount of alimony he paid during appeal. **REVERSED AND REMANDED.**

Mark Fransdal of Redfern, McKinley, Mason & Dieter, Cedar Falls, for appellant.

No appearance on behalf of appellee.

Considered en banc.

OXBERGER, C.J.

The parties were granted a dissolution of marriage in 1983. Calvin was ordered to pay LaVonne $500 per month alimony. On November 15, 1985, Calvin filed a petition seeking modification of the alimony award. The trial court reduced the alimony to $250 per month as of March 2, 1987. On appeal the Iowa Court of Appeals modified the award to provide Calvin's alimony obligations shall cease on March 2, 1987, the date of the trial court's order modifying the decree.

During the appeal, Calvin continued to make the alimony payments ordered by the district court. He did not file a supersedeas bond to stay proceedings under the trial court's judgment or order pending the appeal.

On July 5, 1988, Calvin filed application in district court for an order to require LaVonne to reimburse him for alimony he paid to her during appeal, over and above the amount determined by the Iowa Court of Appeals.

Our review is de novo. Iowa R. App. P. 4.

Calvin's main argument before the trial court and on appeal is that Iowa Code section 686.15 (1987), has application to this case. We recite this code section as follows:

> If, by the decision of an appellate court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from the appellant by means of a judgment or order, either the appellate court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to the appellant such property or its value.

He claims section 686.15 has never been interpreted or applied in a way that would preclude its application to the present case. He does not cite any case authority, nor do we find any, holding section 686.15 is applicable or controlling here. LaVonne, on the other hand, has not filed a brief in this appeal.

The trial court ruled adverse to Calvin and in favor of LaVonne by denying the requested reimbursement.

The trial court said:

> According to [Lutz v. Darbyshire, 297 N.W.2d 349 (Iowa 1980),] and [In re Marriage of Shepherd, 429 N.W.2d 145 (Iowa 1988)], LaVonne acquired a vested property right to the alimony payments as a result of the District Court modification. Filing an appeal does not stay, vacate or affect a lower court judgment. See Iowa Rules of Appellate Procedure 7(a) and 7(c), and Lutz. Both the dissolution that ordered $500 a month alimony and the District Court's decree modification were valid court judgments. The Iowa Supreme Court has declared their "policy of protecting the stability of court judgments and the vested interests of the parties." Shepherd at 147.

The holding in Shepherd does not address the authority of an appellate court to modify a trial court's decree.

In Lutz, the issue was enforcement of a decree while an appeal was pending where no stay order was entered nor a supersedeas bond filed. The Lutz court did not discuss section 686.15. Section 686.15, The Code contains no language stating that the right to restoration for moneys paid pursuant to a trial court decree, later modified by the appellate court, is conditioned on a filing of a stay

order or supersedeas bond. We will not write such a condition into this legislation.

It has long been the law once a judgment under which a party has acted is reversed, it becomes that party's duty to restore all property taken under the judgment, or the value thereof. See Klaes v. Scholl, 412 N.W.2d 178, 179 (Iowa 1987); Hess v. Cedar Rapids State Bank, 191 Iowa 685, 691, 182 N.W. 813, 815 (1921); Orke v. McManus, 149 Iowa 685, 688, 129 N.W. 68, 69-70 (1910); Hanschild v. Stafford, 27 Iowa 301, 302 (1869).

Calvin had an obligation to obey the trial court decree until it was modified by this court. Because this court modified the trial court decree, Calvin does not have any legal obligation to pay alimony after March 2, 1987. Section 686.15, The Code authorizes reimbursement of moneys paid pursuant to a trial court decree later modified by an appellate court. Section 686.15, The Code is not conditioned by a requirement that there be a filing of a supersedeas bond or stay order. In fact, if a judgment is stayed on appeal, there is no need for a successful party to utilize section 686.15, The Code, because by virtue of the supersedeas bond they will have given up nothing they need restored.

Calvin is granted reimbursement of alimony payments made after March 2, 1987, as required by the trial court

decree.

REVERSED AND REMANDED.

All judges concur except Hayden, J. and Schlegel, J. who dissent.

I respectfully dissent.

In Lutz v. Darbyshire, 297 N.W.2d 349, 352 (Iowa 1980), our supreme court reaffirmed the following long-standing precedents: "an appellee may invoke judicial power to enforce a decree while its correctness is being appealed, unless a supersedeas bond is filed, or a stay is entered by this court. . . . If there is jurisdiction of the parties and legal authority to make an order, it must be obeyed, however erroneous or improvident." (Citations omitted.)

Iowa Rule of Appellate Procedure 7(a) states in relevant part:

> No appeal shall stay proceedings under a judgment or order unless appellant executes a bond with sureties, to be filed with and approved by the clerk of the court where the judgment or order was entered. The condition of such bond shall be that appellant will satisfy and perform the judgment if affirmed.

In following the edict in Lutz, and the applicable provisions of Iowa Rule of Appellate Procedure 7(a), the trial court held an appeal does not stay, vacate, or affect a lower court judgment.

I would affirm on the principles Calvin failed to file a supersedeas bond to stay the proceedings pending appeal or no stay order was rendered by the Iowa Supreme Court. I determine Lutz and Iowa Rule of Appellate Procedure 7(a) are controlling in this case as opposed to Iowa Code section 686.15.

Schlegel, J., joins this dissent.