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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-671 / 89-914

IN RE THE MARRIAGE OF KATHERINE J. GIESMAN AND FRED O. GIESMAN

Upon the Petition of
KATHERINE J. GIESMAN,

Appellee,

And Concerning
FRED O. GIESMAN,

Appellant.

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Appeal from the Iowa District Court for Jasper County, Richard D. Morr, Judge.

Appeal from an order denying appellant's application to modify or interpret the parties' dissolution decree concerning payment of a lien. **AFFIRMED AS MODIFIED.**

Lee M. Walker of Walker, Knopf & Billingsley, Newton, for appellant.

Katherine J. Giesman, pro se.

Considered by Oxberger, C.J., and Donielson and Habhab, JJ.

DONIELSON, J. 67

The marriage of Katherine Giesman and Fred Giesman was dissolved by decree on December 19, 1986. Pursuant to the decree, the physical custody of the parties' children was placed with Katherine. Katherine was awarded the parties' homestead, subject to the mortgage indebtedness. Fred was awarded a lien on the property equal to one-half of the equity without interest.

The relevant language from the decree regarding payment of the lien is as follows:

> [O]ne-half of the remaining equity shall be established as the Respondent's lien without interest, payable at such time as the youngest child reaches the age of 18 or graduates from high school, unless such child first reaches the age of 18 and is actively pursuing a high school education or at such time as the property is sold or no longer maintained as the sole personal residence of the Petitioner or the Petitioner's death, whichever event shall first occur. Petitioner shall be allowed to sell said property and reinvest said funds in another property more suitable for her needs, so long as any of the children are under the age of eighteen (18) or have not yet graduated from high school. Respondent shall sign any documents necessary to establish any new mortgage on a different residence as a first lien against the property with his lien established as a second lien which shall transfer to the new property acquired, provided that the equity in the new property shall be sufficient to adequately secure his lien. The property shall be considered adequate to secure his lien provided the appraisal, less the mortgage indebtedness to be established against the new property, is more than the amount of his lien.

On November 28, 1988, Fred filed a petition for modification of the decree. He sought a change in the physical care of the children. On March 23, 1989, the district

court entered its order modifying the dissolution decree by awarding the primary care of the parties' children to Fred and requiring Katherine to pay child support. No appeal from this order was taken.

On May 9, 1989, Fred filed an application for modification or interpretation of the decree. He sought an order requiring Katherine to pay the lien he had on the family home. Fred argued payment was due since he now had custody of the children and because Katherine was residing in the residence with her current husband, David Wickett.

Following a hearing, the district court entered its findings of fact, conclusions of law, and order. The district court rejected Fred's argument that the homestead was no longer Katherine's sole personal residence because David lived there.

Fred appeals from the district court order denying his application for modification or interpretation of the dissolution decree. He contends the district court erred in: (1) determining Katherine was not obligated to pay him on his lien on the homestead because the homestead was still her sole residence; (2) determining the delayed payment of the lien was not a form of child support; and (3) finding the issue of payment of the lien should have been raised in the prior modification.

I. **Scope of Review.** To resolve the issues presented by the parties we turn to well-established principles. Our

scope of review is de novo. Iowa R. App. P. 4. Although not bound by the trial court's determination of factual findings, we will give considerable weight to them. Iowa R. App. P. 14(f)(7). Prior cases, though helpful, have little precedential value since we must base our decision primarily on the particular circumstance of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

II. **Interpretation of Decree.** The first modification hearing addressed the issues of child custody and support. The district court rendered its ruling awarding Fred physical care of the children and ordering Katherine to pay child support.

Fred subsequently filed a second application for modification captioned "Application for Modification or Interpretation of Decree." Fred sought either a modification or interpretation of the decree which would provide that Katherine was obligated to pay off his lien on the family home.

In making property dispositions, courts may consider the desirability of awarding the family home to the party having custody of the children. Iowa Code § 598.21(1)(g) (1989). Property divisions are not subject to modification. Iowa Code § 598.21(8) (1989); Heishman v. Heishman, 367 N.W.2d 308, 310 (Iowa App. 1985). The district court was correct when it concluded the award of

the family home to Katherine was a property award which could not be subsequently modified. No support exists for Fred's claim that the award of the home was a form of child support and thus is subject to modification.

Even though the award of the family home and Fred's lien were not subject to modification, the district court was free to interpret the decree as requested by Fred.[1] A dissolution decree is to be construed like any other written instrument. The determinative factor is the intention of the court as gathered from all parts of the judgment. In re Marriage of Lawson, 409 N.W.2d 181, 182 (Iowa 1987). The decree is taken by its four corners to ascertain from its various provisions the court's intent. Matter of Estate of Jones, 434 N.W.2d 130, 132 (Iowa App. 1988).

A review of the decree reveals the purpose of awarding the home to Katherine and delaying payment of the lien was to ensure the children's continuing residence in the family home. Fred claims the children's move into his home and David Wickett's assumption of residence with Katherine requires Katherine to pay off Fred's lien.

The district court concluded the decree language "sole personal residence" meant "only residence." As the family

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1. We find no res judicata issue with regard to interpreting the decree and concluding when Katherine is to pay off the lien.

home was Katherine's only residence, the court concluded she was not yet required to pay off the lien. The district court misconstrued the importance of the decree language "sole personal residence." Unlike "sole residence," "sole personal residence" relates to the occupancy of the home and Katherine's status as the only party to live there (with the exception of the minor children whose presence was assumed in the decree).

It is not unusual for a right of residence or alimony to be contingent upon a parent's sole occupation of a home. See generally In re Marriage of Lambert, 426 N.W.2d 649, 650 (Iowa App. 1988) (change of custody and cohabitation by noncustodial parent warranted sale of family home); In re Marriage of Ogren, 375 N.W.2d 710, 713 (Iowa App. 1985) (issue of cohabitation is relevant factor in determining spousal support); In re Marriage of Heinemann, 309 N.W.2d 151, 153 (Iowa App. 1981) (court modified decree to provide for sale of family home if parent cohabited in the home). A review of all parts of the decree, and specifically the language "sole personal residence," convinces this court Katherine became obligated to pay off the lien when she began to reside in the residence with someone other than the parties' minor children. She is hereby ordered to pay Fred the stipulated amount of the lien, $6,965.03. Costs of this action are assessed to Katherine.

AFFIRMED AS MODIFIED.

Habhab, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I respectfully dissent. The majority has modified a property division. In Marriage of Knott, 331 N.W.2d 135 (Iowa 1983), the supreme court rejected the argument adopted by the majority here. That is that the provision relating to the homestead was a provision for child support.

The Knott court also reaffirmed the rule of law that property divisions are not subject to modification unless they are a product of fraud, duress, coercion or mistake, none of which are claimed here.

I would affirm the trial court and refuse to modify the property division.