

IN THE COURT OF APPEALS OF IOWA

No. 8-477 / 97-1728

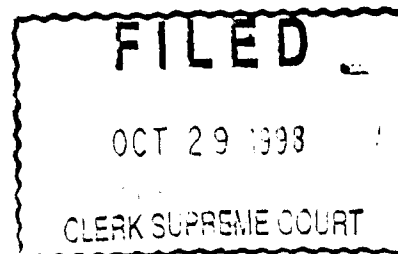
CARL H. LEMKE and SHIRLEY C. LEMKE,

Plaintiffs-Appellants,

vs.

**COLLEEN E. MURPHY, LENARD C.E. LEMKE,
LEONARD SHELLEY, DEAN SHELLEY, and
KYLE N. LEMKE,**

Defendants-Appellees.



COLLEEN E. MURPHY f/k/a COLLEEN E. LEMKE,

Plaintiff-Appellee,

vs.

CARL H. LEMKE and SHIRLEY C. LEMKE,

Defendants-Appellants.

Appeal from the Iowa District Court for Guthrie County, Paul R. Huscher,
Judge.

Plaintiffs appeal a district court ruling in plaintiffs' foreclosure action granting
a judgment in rem only against the farm property of defendant Lenard Lemke and
excluding the farm property of defendant Colleen Lemke. **AFFIRMED.**

Thomas J. Anderson of McMartin & Anderson, Harlan, for appellants.

James W. Mailander of Mailander Law Office, Anita, for appellees.

Considered by Streit, P.J., and Mahan and Perkins,* JJ.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

MAHAN, J.

Carl and Shirley Lemke appeal the district court's ruling in their foreclosure action against a mortgage on farm property which secured a loan to Colleen Murphy and Lenard Lemke. The district court determined Colleen Murphy was not liable for further advances on the loan and granted an in rem judgment only against Lenard's farm property. The district court also found the loan to Colleen and Lenard was interest free. We affirm.

During their marriage, Colleen and Lenard purchased a 160-acre farm described as: The Northeast Quarter of Section 30, Township 78 North, Range 32 West of the 5th P.M.¹ Colleen and Lenard could not obtain financing for the land on their own. The Lemkes, Lenard's parents, co-signed on a \$46,000 bank loan and personally loaned Colleen and Lenard \$36,000. The following year, Lenard's parents paid off the bank loan and the bank released its mortgage. Colleen and Lenard have made payments to the Lemkes totaling \$29,855.51.

Additionally, the Lemkes claim Colleen and Lenard owe them for further advances to pay for such things as tiling and real estate taxes. None of these agreements were in writing. However, Lenard later signed a promissory note evidencing the debt during a period of separation from Colleen. Lenard executed the mortgage at issue several days after Colleen filed for dissolution. Colleen did not sign the promissory note or the mortgage.

¹ We assume this is the correct description of the property in question. In the district court's ruling, it appears the words "township" and "range" were mistakenly transposed.

In the dissolution decree, Colleen was awarded the Northeast Quarter of the Northeast Quarter of Section 30, Township 78 North, Range 32 West of the 5th P.M. (the Northeast Forty). Lenard was awarded the remaining 120 acres and was allocated all the debt owed to Carl. The district court, in the dissolution action, determined the loan was made without interest based upon inconsistencies in tax returns, financial statements, the notes, and Lenard and Carl's testimony. That court further stated, "Colleen is the most credible source on the interest obligation" and "Len[ard]'s note and mortgage executed after the filing of the Petition [for dissolution] herein is symptomatic of he and Carl's bout to keep Colleen from taking her fair share of property of the marriage."

The district court in this foreclosure action also determined the loan was made without interest. Colleen and Lenard were adjudged to be jointly and severally liable for \$52,144.49.² Colleen was determined not to be liable for further advances on the loan and an in rem judgment was granted only against Lenard's farm property.

I. STANDARD OF REVIEW. As this case was tried in equity, our review on appeal is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *Donald Newby Farms, Inc. v. Stoll*, 543 N.W.2d 289, 291 (Iowa App. 1995). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

² The \$52,144.49 represents the original amount of the loan less payments made. It does not include any of the further advances, for which Colleen was found not to be liable.

II. THE MORTGAGE. The Lemkes claim it is unfair to them, as creditors, if Colleen is permitted to keep the Northeast Forty free and clear of any in rem obligation to the Lemkes. They claim she is receiving something for nothing at their expense. We disagree.

First, it is clear Lenard, as co-owner, only granted a lien on his one-half undivided interest in the property; Colleen did not sign, authorize, or ratify the mortgage. *Decorah State Bank v. Zidlicky*, 426 N.W.2d 388, 391 (Iowa 1988); *Meyer v. Wegener*, 114 Iowa 74, 76, 86 N.W. 49, 49-50 (1901); 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 111, at 202-203 (1995). Therefore, when the property was partitioned by the dissolution decree, Colleen properly received the Northeast Forty free and clear of any in rem obligation to the Lemkes. *See* Iowa R. Civ. P. 281; *Spratt v. Spratt*, 456 N.W.2d 181, 182 (Iowa 1990) (dissolution court may order partition as part of the property division); *Miller v. Bates*, 228 Iowa 775, 777, 292 N.W. 818, 818 (1940) (proper description in foreclosure decree is of land awarded plaintiff in partition, not the land in which plaintiff had owned an undivided interest); 68 C.J.S. *Partition* § 181(d), at 295-296 (1950).

Second, Colleen is not receiving something for nothing. The district court took into account the debt owed to the Lemkes and the indemnification provision. Lenard was awarded more of the asset value of the property to offset the debt obligation; the property division ordered in the dissolution decree is equitable. *See In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa App. 1996); *In re Marriage of Williams*, 449 N.W.2d 878, 882 (Iowa App. 1989).

III. FURTHER ADVANCES. The district court found no evidence Colleen agreed to be liable on any further advances, beyond the purchase price of the farm, made by the Lemkes to Lenard. While we are not bound by the district court's findings of facts, we see nothing in the record to justify disturbing these findings. Colleen is not liable for the future advances.

IV. INTEREST. Carl and Lenard contend the loan was made with interest. However, the evidence presented to prove the loan was made with interest is inconsistent, at best. Carl and Lenard have variously claimed there was no interest, the interest rate was variable or fixed at 9.25 percent or 10 percent, and the interest accrued annually or was payable at the end of the loan. Two district courts have had an opportunity to evaluate the credibility of Carl, Lenard, and Colleen as witnesses on this issue. Both courts, after reviewing the testimony, tax returns, financial statements, and the mortgage, determined the loan was made without interest. We will not disturb the district court's findings.

For the foregoing reasons, we affirm the district court.

AFFIRMED.