



253

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF KATHLEEN E. SMITH AND BRIAN K. SMITH

Upon the Petition of	)	
KATHLEEN E. SMITH,	)	Filed November 19, 1979
Petitioner-Appellant,	)	
And Concerning	)	
BRIAN K. SMITH,	)	272
Respondent-Appellee.	)	<u>2-62573</u>

Appeal from Scott District Court - Margaret S. Briles, Judge.

Petitioner-wife appeals order subsequent to dissolution decree imposing a lien on real property in favor of respondent-husband. - Vacated in part, remanded for further proceedings.

Samuel J. Walker, Bettendorf, for petitioner-appellant.

Michael J. McCarthy, of McCarthy & Hart, Davenport, for respondent-appellee.

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

OXBERGER, C.J.

Petitioner-wife appeals order subsequent to dissolution decree giving respondent-husband a lien against the parties' real estate to the extent of his interest in proceeds of sale. Vacated in part, remanded for further proceedings.

The marriage of Kathleen E. and Brian K. Smith was dissolved by decree entered July 9, 1976. The dissolution decree incorporated a stipulation of the parties on the division of their property. That stipulation awarded Kathleen the couple's real estate on certain conditions. The conditions relevant to this appeal required Kathleen to pay Brian one-half the net proceeds of sale "over the principle balance now due and owing in the amount of \$19,932.75" within 30 days of closing. That condition, by its express terms, was "not a lien upon said real estate" and was "enforceable upon application to the court." Brian made such an application when he learned Kathleen had moved to Kansas and intended to sell the property involved and not pay him his one-half share. Brian labeled his action an "application to enforce rights in real estate" and the lower court granted him a lien on the real estate to the extent of "one-half interest of the net proceeds of sale of the real estate." Kathleen appeals the imposition of the lien alleging the trial court abused its discretion by modifying the dissolution decree when the requisite grounds for modification were absent. She also claims the trial court violated her due process rights by entering the order without first having received evidence from the parties.

Our review is de novo. Iowa R. App. P. 4. While Brian labeled his action an "application to enforce rights in real estate" we believe the trial court treated it as an application to modify a dissolution decree. The trial court substantially changed provisions of the dissolution decree by imposing a lien and increasing Robert's share in the proceeds from one-half of the net proceeds over the amount due at the time of the dissolution decree to one-half of the net proceeds over the amount owed at the time of sale. Thus, the trial court's order increased Robert's share by one-half the amount of debt retired since the dissolution and encumbered Kathleen's title in the property as well. We find the trial court in fact modified the dissolution decree.

Although trial courts generally may make changes in a dissolution decree when "circumstances render them expedient", section 598.21, The Code 1977, a judgment

"adopting an adjustment of property rights as between the parties to a divorce proceeding . . . cannot be modified or vacated after it has become final in the absence of fraud, coercion or other grounds on which ordinary judgments may be reviewed, modified, vacated or set aside. . . ." Knipfer v. Knipfer, 259 Iowa 347, 355, 144 N.W.2d 140, 144 (1966). See In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). Here, Brian has not met his burden of showing such grounds. No record was made below. No evidence was received. We cannot conclude Brian proved fraud, coercion or any other ground upon which the decree could be modified. Therefore, we hold the trial court erred by modifying to the extent it changed the terms of the dissolution decree.

We do not hold, however, that the trial court was powerless to impose a lien to the extent of proceeds originally awarded Brian. Rather, upon a proper evidentiary showing, the trial court may implement the provisions of the original decree by imposing a lien on the real property. Such action would not be contrary to the rule stated in Knipfer since imposition of a lien here would serve only to enforce rights and obligations mandated by the dissolution decree itself; it would not modify the substantive provisions of the decree. When the parties agreed to the stipulated property division incorporated in the decree, they intended Brian to have rights in the real estate and provided for enforcement of those rights by application to the court. When Brian applied to the court in this action, he merely sought to utilize the procedural mechanism the decree provided for enforcement of his rights in the real estate. Imposition of a lien was contemplated in the original decree and Kathleen took the real property subject to that contingency. The trial court could impose a lien without violating the rule of Knipfer.

Since we find the order below went beyond mere enforcement of rights established in the original decree, we vacate it to the extent it gave Brian a greater share of proceeds than originally awarded in the dissolution decree. Further, since the absence of a record here prevents us from determining whether imposition of a lien is necessary to enforce the prior judgment, we stay the trial court order pending further proceedings below. If, on remand, the evidence adduced supports imposition of a lien to enforce Brian's rights awarded by the original decree, the trial court may do so. Such lien, however, cannot vary the terms of the original decree; it may only implement the

substantive provisions of the original decree which include Brian's rights in the real estate.

We vacate the trial court order in part, stay the order in part and remand for further proceedings. In light of our disposition of the case, Kathleen's constitutional issue need not be determined.

Vacated in part and remanded for further proceedings.

All judges concur, except Donielson and Johnson, JJ., who concur in part and dissent in part.

DONIELSON, J. (concurring in part, dissenting in part)

While I concur in vacating in part the trial court's order, I dissent from the majority's remanding of this case. On remand, the trial court is to determine whether imposition of a lien is necessary to enforce and protect respondent's rights under the original decree. The record of this case, although limited to the Application to Enforce Rights in Real Estate and the Order of the trial court, is sufficient to determine this question and I would affirm the imposition of the lien to the amount we have found here to be correct.

In an equitable proceeding we give weight to the findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7). Here, the trial court found petitioner had moved to Kansas and had advised the respondent she would not comply with the terms of the stipulation and decree with respect to the distribution of the proceeds of the sale of the real estate. This is what the majority wants determined on remand. Admittedly, this finding was based only on the filed pleading and statements by petitioner's attorney, not sworn testimony. But, I find this to be sufficient in this case. Petitioner had the responsibility to make a record and her failure to do so may be viewed as a waiver of error on that finding. See Maier v. Illinois Central Railroad, 234 N.W.2d 388, 395 (Iowa 1976); Boss Hotels Co. v. City of Des Moines, 258 Iowa 1372, 1377, 141 N.W.2d 541, 545, cert. denied, 385 U.S. 852, 87 S. Ct. 95, 17 L. Ed. 2d 80 (1966). We must accept the record as made by counsel. Cale v. Great Western Supply Co., 255 Iowa 237, 238, 122 N.W.2d 455, 455 (1963). Petitioner failed to explain how she was denied due process of law in making a record. I would affirm the trial court's order placing a lien on the property, but only to the extent we have determined to be correct.

Johnson, J., concurs.