

IN THE COURT OF APPEALS OF IOWA

No. 0-326 / 89-1421

FILED

SEP 26 1990

CLERK SUPREME COURT

**IN RE THE MARRIAGE OF RICHARD L. SEARL AND
CHARLOTTE KELLEY-SEARL**Upon the Petition of
RICHARD L. SEARL,

Appellee/Cross-Appellant,

And Concerning
CHARLOTTE KELLEY-SEARL,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Black Hawk
County, Dennis D. Damsgaard, Judge.

The respondent wife and petitioner husband appeal and
cross-appeal from various divisions of a modification
decree entered by the trial court. **AFFIRMED IN PART AND
REVERSED IN PART.**

Terry Diane Parsons of Olsen, Parsons & Ament,
Cedar Falls, for appellant/cross-appellee.

David J. Dutton and Maureen C. Brown of Mosier, Thomas,
Beatty, Dutton, Braun & Staack, Waterloo, for appellee/
cross-appellant.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, J.

The marriage of Richard and Charlotte Searl was dissolved by decree on February 8, 1977, after nearly eleven years of marriage. Pursuant to the decree, Richard was to make the payments on the marital home and pay the utilities. Richard also paid off the loan on Charlotte's car, and paid off other marital debts. Richard received his personal property, a dining room set belonging to his grandmother, and an oil painting. Charlotte retained possession of the family's home, furniture, and automobile. Richard was to receive \$12,500 at the time the house was sold, which represented Richard's interest in the house, furniture, and automobile. Richard was also to pay \$250 per month in child support for their two children.

Pursuant to a 1981 modification proceeding, Richard's child support obligation was increased to \$300 per month. In 1983, Kent, the parties' sixteen-year-old son, moved in with Richard. As a result, Richard was required to pay only \$150 per month for support of the parties' younger daughter, Jean. In 1986, Jean moved in with Richard, and Charlotte began paying Richard \$120 per month in child support, which amount was to be credited against the \$12,500 lien Richard held against the home equity. During this period Charlotte had taken out a home improvement loan with a second mortgage.

By the time both children had moved in with Richard, Richard had remarried. Richard's present wife has two

children from a previous marriage. Richard, at that time, earned \$32,455 as a State of Iowa employee, while his second wife earned \$15,600. Charlotte was earning approximately \$23,000 per year as a nurse at the Lutheran Home.

In 1987, Charlotte moved to Iowa City to pursue her B.S.R.N. degree. Charlotte accepted an offer of \$18,500 for the house, and after payment of the mortgage and taxes, there was a net profit of \$377.62. Charlotte had paid Richard approximately \$2,500 of his home equity interest by child support payments. At this time, Kent and Jean were both attending college at Iowa State. Through 1989, Richard had contributed over \$15,000 to Kent's college expenses, and \$4,800 to Jean's expenses. Charlotte had contributed less than \$1,000. In April 1988, Charlotte ceased making payments to Richard. At that time Richard and his wife had started a retail clothing business.

On June 14, 1988, Richard filed an application for modification of the decree, seeking judgment against Charlotte in the amount of \$10,000, representing the balance of the judgment lien after reduction of Charlotte's \$2,500 payment and future child support. Trial was held on May 1, 1989, and the trial court subsequently held that Richard was entitled to a judgment against Charlotte for the amount of the second mortgage deducted from the sale price. The trial court ruled neither party should bear the full burden of the drop in real estate prices. Richard and

Charlotte both filed motions for expanded findings. The court subsequently ruled Richard was to receive \$1,680.14 plus \$606 in taxes that Richard paid, but had been Charlotte's obligation. The trial court further held the \$2,500 payment Charlotte had made to Richard was not an advance on any receipts from the sale of the home. The court ordered Charlotte to pay Jean \$100 per week for college assistance, to be paid only while Jean is at school.

Charlotte appeals and Richard cross-appeals from the trial court's ruling. Charlotte argues the \$100 per week award to Jean is inequitable since her 1988 net income was \$16,716, and her support obligation would be over \$4,000. Charlotte argues that Richard is not as heavily in debt as it would appear, since a large part is corporate debt which Richard and his wife would not be liable personally. Charlotte alleges Richard has over \$10,000 in discretionary income after expenses each year, while she has a monthly deficit of over \$350. Charlotte also maintains the child support payments would have the effect of reimbursing Richard for his previous contributions. Charlotte lastly contends the trial court erred in refusing to hold the \$2,500 in child support payments was an advance against Richard's equity.

Richard has cross-appealed, arguing the trial court erred in refusing to enforce the \$12,500 judgment lien in its entirety upon sale of the home. Richard additionally

claims the trial court erred in failing to order Charlotte to reimburse him for an equitable portion of Kent's college expenses.

Our review in this case is de novo. Iowa R. App. P. 4. We are not bound by the trial court's factual findings, but give them weight. Iowa R. App. P. 14(f)(7).

We turn first to Charlotte's contention \$100 per week for Jean's college expenses is too high in light of Charlotte's financial circumstances.

I. Educational Expenses

Iowa Code section 598.1(2) allows a trial court to order a divorced parent to pay for an adult child "who is regularly attending an approved school" or who is in good faith a "full-time student in a college." It is the duty and responsibility of both parents to furnish financial assistance for higher education in such an amount as their financial condition will permit. Sandler v. Sandler, 165 N.W.2d 799, 802 (Iowa 1969). The award of support for college students is discretionary, not mandatory. In re Marriage of Mott, 444 N.W.2d 507, 509 (Iowa App. 1989); In re Marriage of Vrban, 293 N.W.2d 198, 202 (Iowa 1980). The court is to consider, among other things, the "financial condition of the parent, ability of the child for college work, age of the child, and whether the child is self-sustaining" Vrban, 293 N.W.2d at 202.

Initially, we note the trial court originally ordered Charlotte to pay \$50 per week to Jean for college support,

and \$50 for one hundred and twenty weeks to Richard as reimbursement for his expenditures in putting their son, Kent, through college. In a subsequent Ruling on Motion for Amended and Expanded Filings, the trial court held it erred in awarding Richard retroactive reimbursement for Kent's educational expenses. The basis of the court's reversal of its original ruling was Kent was over the age of twenty-two at time of trial of the modification. Its rationale was based on its reading of In re Marriage of Pieper, 369 N.W.2d 439 (Iowa 1985). Both parties rely on Pieper in their arguments. We agree Pieper is controlling.

In Pieper, the Iowa Supreme Court specifically stated it was addressing "the question of whether a court has authority to modify for college expense if the child has become of age before the modification is requested." Pieper, 369 N.W.2d at 442 (emphasis added). The Court held support orders for educational purposes could be modified "until [the child] becomes twenty-two." Id. (emphasis in original).

We hold the trial court was correct in its original interpretation of the law. This modification proceeding was filed before Kent became twenty-two. The fact the hearing is held subsequent to his twenty-second birthday should have no bearing on the case. The supreme court stated the time when the hearing was "requested" as the controlling factor, not when the hearing is held or the ruling issued. Pieper, 369 N.W.2d at 442. To hold

otherwise would put the parties at the mercy of the vagaries of the trial court's calendar.

The trial court had authority to order retroactive educational support for college expenses. See In re Marriage of Lieberman, 426 N.W.2d 683 (Iowa App. 1988). Although the decree involved in Lieberman allowed for modification for educational expenses, the specific language of Pieper allows for such modification in absence of such a provision in the dissolution decree. See Pieper, 369 N.W.2d at 442.

We reverse the trial court on this issue and reinstate its original order. Charlotte is to pay Richard \$50 per week for one hundred and twenty weeks as reimbursement for Richard's expenditures for Kent's education. She, as well as Richard, has the responsibility to assist in Kent's educational expenses as her finances permit. Sandler v. Sandler, 165 N.W.2d 799 (Iowa 1969).

In the same ruling, the trial court retracted its original award of retroactive reimbursement for Kent's educational expenses and increased Jean's educational support from Charlotte from \$50 to \$100 per week. This appears to be an attempt by the trial court to equalize the parties' educational costs within the perceived constraints of Pieper. We interpret Pieper to specifically allow educational support orders in cases like the present one. We modify the trial court's award to Jean for her educational expenses to \$50 per week. We determine these

awards are equitable to Charlotte under her present financial circumstances. She has a present salary of \$28,000 and no dependents. We decline to deduct any of Charlotte's contributions not paid into the clerk of court.

II. Richard's Equity in House

We affirm the trial court's ruling on payment to Richard for his equity in the house. The trial court was interpreting the language of the original dissolution decree.

A dissolution of marriage decree is susceptible to interpretation on the same basis as other instruments, the determinative factor being the intent of the dissolution court as gathered from the language of the decree and the context in which it was rendered.

Sieren v. Bauman, 436 N.W.2d 43, 46 (Iowa 1989).

The decree in question provided in pertinent part: "Upon the sale of said premises the petitioner [Richard] shall receive the sum of \$12,500.00 over and above any closing costs or other expenses. The balance of said proceeds shall be the property of the respondent." (Emphasis added.)

This language indicates Richard is to receive a first lien of \$12,500 on the proceeds of the sale of the house. Charlotte is to receive the balance, if any, of the proceeds. The trial court interpreted the dissolution decree correctly.

The house sold for around \$18,000. The housing market in the Cedar Falls area had fallen significantly since the

divorce decree. The original decree provides Richard is to receive \$12,500 from the proceeds of the sale of the house. Due to a second mortgage Charlotte took on the house without Richard's assent, only slightly more than \$300 was realized as profit on its sale.

Richard is entitled to the proceeds from the sale of the house up to \$12,500. The amount remaining due on the second mortgage at the time of sale should be considered part of the proceeds. Richard is entitled to an amount equivalent to the second mortgage remaining due at the time of the sale, plus taxes paid out of the sale price which Charlotte was responsible for. He is not entitled to a judgment against Charlotte for the rest of the \$12,500. We affirm the trial court in full on the issue of the house equity.

Additionally, we agree with the trial court Charlotte's child support payments should not be credited against Richard's judgment. The November 5, 1985, Modification Order refers to Richard's "judgment" in the dissolution decree. However, we have determined the \$12,500 mentioned in the dissolution decree was not a judgment, but essentially a first lien on the proceeds. As the trial court stated, Charlotte had an obligation to support her children without an offset to the disadvantage of Richard. Finally, we observe Richard is not getting the full \$12,500. Charlotte gains more under our present holding than she would from a ruling entitling her to \$2,500 credit against a \$12,500 judgment for Richard.

We affirm the trial court's holding concerning the house equity. We reverse the trial court on reimbursement to Richard for Kent's educational expenses. Charlotte is ordered to pay \$50 per week for one hundred and twenty weeks to Richard as reimbursement for her share of Kent's educational expenses. The original order of the trial court concerning Charlotte's payments of \$50 per week to Jean during the period Jean is actually attending college is reinstated. Charlotte is not entitled to credit for contributions not made through the clerk of court.

The parties are responsible for their own attorney fees on appeal. Each party shall pay one-half the costs of this appeal.

AFFIRMED IN PART AND REVERSED IN PART.