IN THE COURT OF APPEALS OF IOWA

No. 6-688 / 95-1083

IN RE THE MARRIAGE OF WILLIAM LAWRENCE RAMSEY AND CHARLENE ENID RAMSEY

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Upon the Petition of
WILLIAM LAWRENCE RAMSEY,

Petitioner-Appellant,

And Concerning
CHARLENE ENID RAMSEY,

Respondent-Appellee.

FILED
MAY 29 .997
CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, David E. Schoenthaler, Judge.

William Ramsey appeals from a post-dissolution order granting Charlene Ramsey's motion to release William's funds from the sale of the marital home to satisfy his alimony arrearage. **AFFIRMED.**

Jack E Dusthimer, Davenport, for appellant.

Dennis D. Jasper of Stafne, Lewis, Jasper, Alexander & Preacher, Bettendorf, for appellee.

Considered by Habhab, C.J., and Sackett and Cady, JJ.

HABHAB, C.J.

William and Charlene Ramsey's marriage was dissolved in June 1994. Before the final decree of dissolution was entered, a temporary order provided William was to pay $600 per month in alimony to Charlene. Charlene filed a rule to show cause after William did not pay the alimony set forth within the temporary order. The court found William was not in contempt and it terminated further temporary alimony. It reasoned temporary alimony had been granted to assist Charlene with the expense of setting up her own household. As the parties were residing together when Charlene filed her rule to show cause, the court determined the basis for issuing the temporary support order no longer existed and it would be inequitable to continue temporary support.

The final decree was entered by the district court on June 6, 1994. It ordered the immediate sale of the marital home to satisfy the joint debt of the parties. William was ordered to pay $600 per month in alimony until Charlene died or remarried. Both parties remained in the home after the final decree was entered until the time of the sale. The home was sold March 9, 1995 and $7950 was deducted from William's portion of sale proceeds and set aside to satisfy his alimony arrearage.

Charlene filed a motion seeking release of these funds to her. William resisted arguing Charlene moved back into the marital home after the dissolution and before the sale, and he continued to pay the household and living expenses on her behalf.

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He urged the court to consider these payments to be in lieu of his alimony obligations, as it did in terminating his temporary support obligation. The district court concluded Charlene's actions did not operate to release William from his alimony obligation and there was no evidence she waived her rights to enforce the alimony judgment. William's rule 179(b) motion was denied.

William appeals claiming Charlene was equitably estopped from collecting the alimony arrearage. He also contends the district court should have held an evidentiary hearing to determine the question of estoppel. We reject William's contentions and affirm the district court's order.

As this is an equity action, our review is de novo. Iowa R. App. P. 4. We give weight to the findings of fact made by the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). We have a duty to examine the evidence anew, disconnected, ultimately, from the trial court's findings. *See In re Marriage of Siglin*, 555 N.W.2d 846, 849 (Iowa App. 1992).

I. Release of Proceeds from Sale of Marital Residence. The final dissolution decree provided each party had the right to reside in the marital home until it was sold. It also fixed William's support obligation at $600 per month. After the dissolution, both parties lived in the marital home until it was sold. The record also reflects on August 3, 1994, Charlene acknowledged the receipt of $450 from William

in satisfaction of support due to her for that month. After careful review of the record, we find the district court properly determined Charlene's actions did not constitute a waiver of William's obligation to pay alimony. The district court noted:

> The fact that [Charlene] specifically waived her rights with regard to the $450 payment indicated that she did not intend a similar waiver by her acceptance of other benefits. Furthermore, by the terms of the divorce decree, either party had the right to live in the house until it was sold. Therefore, petitioner cannot claim to have provided value by allowing respondent to live in the home.

On our de novo review of the record, we affirm the order of the district court releasing the retained proceeds from the sale of the home to Charlene less the $450 credit for support paid in August 1994. We reject William's allegation the district court erred in failing to conduct an evidentiary hearing in this matter. We find he had sufficient opportunity to present evidence in this matter and elected not to do so. Furthermore, we have considered the remaining contentions raised by William and reject them as they are without merit.

II. Appellate Attorney Fees. Both parties request an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Scheppele*, 524 N.W.2d 679, 680 (Iowa App. 1994). In determining whether to award appellate attorney fees, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the decision of the trial court on appeal. *Id.* On our de novo review of the record, given the circumstances

of the parties in this action, we find equity warrants an award of appellate attorney fees in the amount of $750 to Charlene. The request for appellate attorney fees for William is denied.

AFFIRMED.

Cady, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part; dissenting in part)

I concur in part and dissent in part. I would not award attorney fees.