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CLERK SUPREME COURT



IN THE COURT OF APPEALS OF IOWA

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| LESTER E. ARP, | ) | |
| Appellee, | ) | Filed September 9, 1977 |
| vs. | ) | |
| EDITH B. ARP, | ) | 173<br>2-58074 |
| Appellant. | ) | |

Appeal from Cedar District Court - R. K. Stohr, Judge

Appeal from refusal of district court to terminate trust established by divorce decree.

AFFIRMED.

Martin F. McCarthy, of McCarthy & Hart, of Davenport, counsel for appellant.

J. Hobart Darbyshire, of Carlin & Darbyshire, of Davenport, and William M. Dallas, of Cedar Rapids, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Edith Arp appeals the denial by the trial court of a motion to terminate a trust established as part of a 1963 divorce decree. She asserts that the trial court erred in applying the "clean hands" maxim of equity in this case and that the court below should have terminated this trust because, inter alia, its purposes have been achieved.

Lester and Edith Arp resided on a 220 acre farm in Cedar County with their three children until March, 1963. The farm, which was then valued at $60,000, had been a gift to Edith from her parents and she was the sole owner. Edith had become "emotionally involved" with a neighbor, Marvin Barenthein, and she took the three children to Reno, Nevada, in an attempt to establish residence there in order to institute divorce proceedings. The record indicates that while in Reno, Edith lived with the children and Barenthein, but also spent some time in a hospital as a result of psychiatric problems relating to her personal situtation.

Lester went to Reno and contacted Edith, and subsequently returned to the farm with the three children, after which he filed suit for divorce on April 25, 1963. Edith was represented by an Iowa City law firm which was also representing her in an alienation of affections suit previously filed in Cedar County by Barenthein's wife who was seeking damages of $120,000. Although one of Edith's attorneys appeared in her behalf in the divorce action, Edith did not appear upon the advice of her attorneys, and she did not return to Iowa until after the divorce decree was entered on August 1, 1963.[1]

In the court hearing of the instant matter, Edith testified that she was not shown a copy of the decree by her attorney prior to its submission, and did not see a copy of it until after it had been entered. She stated that she had not been aware of its terms prior to that time, nor did she remember ever discussing any of the proposed terms of the decree with her attorneys. Finally, she testified that she never consented to any arrangement whereby her farm would be taken away from her and put in trust.

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[1] The alienation of affections action brought by Mrs. Barenthein against Edith resulted in a settlement against her for $6,000. This settlement was reached after the divorce decree had been filed.

The 1963 decree established a trust which, in relevant part, permitted Lester to lease the 220-acre farm for six years, commencing March 1, 1963, for which he was to pay the trustee $20 per acre per year as rent, and certain increased taxes and insurance on the farm and buildings thereon. Lester had a right to renew this lease while any of the children were still residing on the farm. If Lester ceased to occupy the farm personally, or if he decided to sub-lease it, his rights to operate it could be terminated by the trustee or Edith. If this occurred, Edith could occupy the farm or it could be rented to someone else.

Of the rental income obtained, the trustee was authorized to use 10 percent for maintenance and improvement of the property. The taxes, insurance, and expenses of administration were to be paid next, and two-thirds of the balance was to be paid to Edith in monthly installments for her life, with the remaining one-third to be divided equally among the three children, and paid to the person having custody of them. The trust also specified that when each child marries, dies, enters military service, becomes self-supporting, or reaches the age of 21, whichever occurs first, that child's portion of the income shall thereafter be paid to Edith for the term of her life. The trust contained a spendthrift provision which protected the farm from execution or attachment by creditors of Lester, Edith or the children. The trust also provided:

> It is the specific intention of this decree to reserve and require the use of and income from the said farm for the benefit of Edith B. Arp and the three minor children, and at the same time provide a farm home for the three minor children, and a continuation of the farm operation by the Plaintiff Lester E. Arp, to the extent provided for above.

The decree specified three situations in which the trust could be terminated. First, if Edith should die before the last child has reached 21, or marries, etc., the trust shall continue until the last child reaches 21, at which time the legal title to the property vests in the three children or their issue per stirpes. Secondly, if Edith and Lester agree to terminate the trust and the court approves, the trust may be terminated and the title will then vest in Edith. The third situation, which is applicable in the instant case, provides that if Edith is alive when the last child reaches 21, or marries, etc., the entire net income is to be paid to Edith and the trust is to continue for the term of her life. However, in this third instance, no

specific provision was stated in the trust instrument for the disposition of the property upon Edith's death.

The record indicates that Edith did not directly appeal the divorce decree and the trust provisions, but did file an Application for Modification of Decree on February 10, 1966, in which she stated:

> . . . The plaintiff has, however, removed himself and the minor children of the parties from the farm home and now occupies a residence . . . in Davenport, Iowa. The plaintiff is no longer engaged in farming and he now follows the occupation of real estate salesman . . . . Since the court's expressed purpose of having the minor children have a farm home is no longer being carried out, the defendant should now have her property rights in her farm restored to her and the trust created by the court in the Decree respecting the farm should now be terminated.

Edith also asked for modification of the custody and visitation provisions of the decree. On March 2, 1966, Lester and Edith entered into a Stipulation for Modification of Decree which dealt with child visitation only. This stipulation, which was approved by the court, did not make reference to the trust in any manner. With the approval of her daughter who was residing with her, Edith filed a Petition to Terminate Trust on August 28, 1974. This petition was resisted by Lester and the two sons and, after a hearing, the court denied the application to terminate the trust on November 13, 1974. At the time the instant matter was commenced in the court below, the farm was valued at approximately $250,000.

At the hearing of this matter in the court below, Lester testified that he and Edith's father had been the witnesses at the divorce proceedings, and that there were several discussions between his attorney and Edith's attorney regarding a proposed trust. It was the wish of Edith's father, who had given the farm to Edith, that the farm be placed in trust. Lester also testified that the reason he refused to consent to the termination of the trust was because it had been originally established so that the farm would ultimately go to the three children. [2]

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[2] Although court-created trusts are rare, they are recognized as valid. See Bogert, Trusts and Trustees, 2d ed., § 254; Neiderhiser v. Neiderhiser, 254 Iowa 791, 803-804, 119 N.W.2d 245 (1963). Since the court itself is the settlor of this trust, Bogert, supra, § 41, the rule that a settlor of a spendthrift trust may not also be a beneficiary is not violated, Id., § 223, and, therefore, this spendthrift trust is still valid.

Edith's first argument is that the trial court erred in applying the "clean hands" maxim to this case and denying the application on this basis. In its Application of Law to Facts, the trial court described the trust in the following manner:

"... Its primary purpose was to preserve the farm in question and to keep it from falling into the hands of the plaintiff in the alienation of affections suit. This record discloses that the plaintiff in the alienation of affections suit had a good case against the defendant, and that at the time of the suit she was asking damages in the amount of $120,000, and that the farm itself was appraised at $60,000. All of the efforts of the parties and their attorneys were directed to preserving the farm for the parties and for the parties' children. ... In other words, the trust was created to defeat the alienation of affections suit and preserve for the parties the farm in question.

"This court would make a determination at this time that the trust created by the decree was a fraud on the plaintiff in the alienation of affections [sic], and that this court was used in order to achieve the desired result."

In an equity case, our review is de novo. Rule 4, Rules of Appellate Procedure; Myers v. Smith, 208 N.W.2d 919, 921 (Iowa 1973). Although we give weight to the trial court's findings, we are not bound by them. Rule 14(f)(7), R. App. P. If the judgment in an equity case is correct, it is our duty to affirm it although the reasons given by the trial court do not meet with our approval. Myers v. Smith, supra.

The testimony at the hearing reflects that Lester was aware of the pendency of the alienation of affections action and knew that if the plaintiff in that suit recovered, she could levy on the farm in order to satisfy the judgment. The trial court, after first noting that the attorneys who participated in the drafting of the decree were not called as witnesses and the judge who signed the decree was deceased, construed the testimony to indicate that the purpose of the spendthrift trust provision was to insulate the farm from a potential judgment in the alienation of affections suit. Although we can understand how the trial court could have reached this conclusion, we do not feel that this case was an appropriate one for the invocation of the "clean hands" doctrine. In describing this doctrine, the Iowa court has stated in Myers v. Smith, supra, at 921:

> "It is ordinarily invoked to protect the integrity of the court where granting affirmative equitable relief would run contrary to public policy or lend the court's aid to fraudulent, illegal or unconscionable conduct. (citations omitted) (emphasis added).

As the court stated in Cedar Mem. Park Cem. Assn. v. Personnel Assoc., Inc., 178 N.W.2d 343, 353 (Iowa 1970), the "clean hands" doctrine is not one to be applied "rigorously", and is disfavored by the courts. Butler v. Butler, 253 Iowa 1084, 1125, 114 N.W.2d 595 (1962); 22 Am.Jur.2d, Equity, § 136.

On the basis of the record that exists in the instant case, we feel that the trial court erred in applying the "clean hands" doctrine. The court below utilized the term "fraud" in its ruling and stated that the court was "used to perpetrate the fraud." In Town of Grimes v. Adel Clay Products Co., 256 Iowa 145, 148, 126 N.W.2d 270 (1964), the court stated that "every finding of fact must be based on logic and human experience. The facts presented must persuade the trier of fact of the existence of the ultimate fact." Similarly, in the context of a similar proceeding, certiorari, the court has indicated that substantial evidence must exist to support findings upon which a lower tribunal arrives at a challenged conclusion of law. If no such evidence exists, that tribunal has acted illegally. City of Sioux City v. Civil Service Comm., 247 Iowa 1254, 1258, 78 N.W.2d 833 (1956); Sueppel v. Eads, 261 Iowa 923, 926, 156 N.W.2d 115 (1968); see also 30A C.J.S., Equity, § 479 (1965). We feel that the conclusions of the trial court were made on the basis of inferences and presumptions and not on the basis of substantial evidence in the record.

The Iowa court has established that fraud may not be presumed; it must be clearly proven. Interstate Power Co. v. McGregor, 230 Iowa 42, 53, 296 N.W. 770 (1941). In equity, the proof of fraud must be sufficient to overcome the natural presumption that men are honest and act from correct motives. 30A C.J.S., Equity § 479 (1965). Although in equity an inference of fraud may occasionally be drawn on the proof of facts which would not be deemed sufficient at law for that purpose, id., we do not believe that this case falls within that category. Consequently, we do not feel that fraud was clearly proven and hold that the trial court erred in basing its decision on the "clean hands" doctrine.

The appellant, Edith Arp, also asserts that the trial court erred in refusing to terminate the trust. We do not agree. A review of the 1963 divorce decree and the testimony given convinces us both that (1) the provisions relating to the farm and the establishment of the trust were in the nature of both support for Edith and the children and a property settlement between Edith and Lester, and that (2) all of the purposes of this trust have not yet been accomplished.

We feel that the portion of the trust instrument which purports to give Edith a life income interest and keep the farm for the children's benefit and use is in the nature of a property settlement, [3] and is not subject to review in an application for modification of decree or petition to terminate the trust.

The record indicates that Edith never appealed the original divorce decree. In light of the messy circumstances surrounding this divorce, we feel that Edith was well represented by counsel, and we are unsympathetic with her assertions that she was unaware of the full implications of the decree. Such assertions are also contradicted by the fact that she sought to modify the decree provisions regarding the trust in 1966.[4]

The law is settled that if a portion of a divorce decree is part of the property settlement reached by the parties, it is ordinarily not subject to modification of any kind. Wernli v. Wernli, 216 N.W.2d 322, 324 (Iowa 1974); see generally, In Re Marriage of Woodward, 229 N.W.2d 274 (Iowa 1975).

Conceivably there might be situations where a court-created trust, because of its prolonged existence, might encounter conditions not contemplated by the court at the time of the decree. In such situations, relaxation of the foregoing rule might be in order. But this is not such a case.

Edith's argument for terminating the trust involves the contention that its purposes have now been fully achieved. She urges this is the case because the children have now reached 21, neither the children nor Lester are residing upon the farm, and Lester is no longer operating the farm. The answer to this contention is that the express provisions of the trust contemplate that all of these situations might occur and in spite of such occurances that the trust will continue for the balance of Edith's life. The trust provides that any prior termination requires

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[3] A survey of the entire divorce decree reveals that all of the provisions surrounding the paragraph creating this trust clearly relate to the division of property between the spouses. In view of the care that was taken in making specific, detailed provisions regarding all aspects of custody, alimony, and a property settlement, it seems reasonably safe to assume that the creation of this trust served as a quid pro quo for other provisions negotiated and agreed upon by the parties.

[4] It also seems significant to this court that the stipulation of modification of decree contained provisions relating to virtually every request for modification except that dealing with the trust and farm property.

Lester's consent. The fact that Lester has ceased to operate the farm gives Edith the right to occupy or it may be leased to someone else, but it does not create a basis for terminating the trust. [5]

We credit Lester's testimony that the matter was originally presented to the court by counsel for both parties with the idea that the existing arrangement was agreeable to all. If Lester had not been assured of a disposition in the trial court whereby the farm would ultimately go to his children, he might well have chosen to seek a greater interest in the property himself either by taking a different position in the trial court or by appealing the decree. To upset this provision some 14 years later and give the farm outright to Edith, contrary to what was decided at the time, is simply not warranted on the record before us. We need not decide if the original decree was subject to correction if appealed, it was not void and must stand as a final judgment.

The record supports a finding that an additional purpose of this trust was to insulate the funds from execution by creditors, including the creditors of Edith Arp. We do not conclude that the basis for this was solely the pending alienations suit in view of other evidence of Edith's financial improvidence.

In Sawyer v. Sawyer, 261 Iowa 112, 121, 152 N.W.2d 605 (1967), a similar issue arose in the context of a will contest. There the plaintiff, life beneficiary of a spendthrift trust, argued that there was a merger of all interests in the trust property after the remaindermen had assigned all their interests to the plaintiff. The Sawyer court refused to terminate the spendthrift trust. The instant case must be resolved in the same manner, especially since the trust instrument does not indicate who acquires title to the farm upon Edith's death.

In unequivocal language, the Sawyer court stated:

> " 'The cases are adamant in holding that where the life interest is limited by a spendthrift provision the trust cannot be terminated by the court. . . .

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[5] In this regard the trust distinguishes between sale of the farm and termination of the trust. It is provided that Edith and the trustee may sell the farm without Lester's consent if he ceased to operate it. There is no provision that the trust may be terminated without Lester's consent in the event he ceased to operate the farm.

> "'Also, a spendthrift trust is not terminable by the consent of those whom it is designed to protect. Furthermore, a trust ordinarily cannot be terminated by the consent, contract, conveyance, or transfer of a beneficiary unless the object of the trust has been attained, or at least practically accomplished, . . .
>
> "'. . . If by the terms of the trust . . . the interest of one or more of the beneficiaries is made inalienable by him . . . the trust will not be terminated while such inalienable interest still exists, although all of the beneficiaries desire to terminate it or one beneficiary acquires the whole beneficial interest and desires to terminate it.'" [citations omitted] 261 Iowa at 122; Lunt v. Van Gorden, 229 Iowa 263, 271-273, 294 N.W. 351 (1940).

For all of the reasons stated, we do not believe the trust should be terminated.

We must dispose of one additional matter. It has previously been noted that the language of the judicially created trust instrument does not clearly specify who is to recieve the corpus of the trust if Edith dies after the children reach age 21. If she had died prior to that time, it is provided that the corpus would have gone to the children or their issue per stirpes. Based upon what is provided in the trust and the evidence of its purpose, we find the clear intent to be that the corpus shall vest in the three children of the parties or their issue per stirpes at Edith's death. As so construed, no further action is required by the trial court in providing for the disposition of this property.

AFFIRMED.

All Judges concur, except Oxberger, J., who dissents.

**OXBERGER, J.** (dissenting)

I dissent. I agree with the majority in their finding that the trial court erred in applying the doctrine of "clean hands." I disagree with the majority's finding that the trust should not be terminated because Edith's sole recourse was a direct appeal at the time of the creation of the trust by the divorce decree entered in 1963.

The court has allowed a collateral attack by one of the partys to a divorce action upon the ground the award of property was void for lack of jurisdiction. Ponzelino v. Ponzelino, 238 Iowa 201, 26 N.W.2d 330 (1947). The plaintiff husband attacked the **Ponzelino** divorce decree awarding real estate to the defendant wife by claiming he held such realty in trust as a trustee and it was therefore not subject to the jurisdiction of the court as a part of the marital assets. The court observed that on collateral attack:

> "Any mere error in such decree is not here reviewable. The provision of the decree in question may now be assailed only if the court was without jurisdiction to enter it. We are now concerned only with the question whether, as plaintiff now contends, the award of property in question to defendant wife is void for want of jurisdiction." 238 Iowa at 203, 26 N.W.2d at 331.

There was no claim in **Ponzelino** that the plaintiff husband was not before the court in the original decree proceedings.

Edith properly raises by this collateral attack the question of the jurisdiction of the trial court to impose a trust upon the farm assets for the benefit of the children. In Davison v. Davison, 182 Iowa 1116, 165 N.W. 44 (1918) the court cancelled a divorce decree trust provision for the benefit of a minor daughter:

> "The right of the court to take into consideration the interests of minor children, in fixing the amount of alimony to be allowed is, of course, always recognized; but the court should not undertake to control the division of the property of the defeated party among the children." 182 Iowa at 1120, 165 N.W. at 46.

Subsequently in Szymanki v. Szymanki, 188 Iowa 931, 176 N.W. 806 (1920) a trial court award which placed title of homestead property to be disposed of by a divorce decree in an adopted infant daughter was reversed on appeal:

> "No authority to transfer the property to Gladys, the adopted daughter, is conferred by statute. 188 Iowa at 937, 176 N.W. at 809.

The homestead was given, on appeal, absolutely to the plaintiff wife in **Szymanski.**

I would rule at most under **Davison** the trial court had jurisdiction to fix child support duties in so far as the children were concerned. The children involved have all now reached majority, this function of the decree is fully exhausted. Under **Szymanski** and **Ponzelino,** I would rule the trust void and unenforceable. In so far as the decree purports to award property to the children it is without jurisdiction and upon collateral attack must fall.

The trust should be declared void and unenforceable.