FILED
DEC 28 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOYCE E. TURNER,)
Appellant-Cross Appellee,) Filed December 28, 1977
vs.)
ROBERT R. TURNER,) 334 / 2-59297
Appellee-Cross Appellant.)

Appeal from Polk District Court - A. B. Crouch, Judge.

Petitioner wife appeals the economic provisions of dissolution decree. Respondent husband cross-appeals the finding of a common law remarriage; the property division; and the order that he assume total liability for a potential income tax deficiency arising from tax returns filed jointly in 1969. - Affirmed in part, modified in part and remanded.

F. H. Becker, of Patterson, Lorentzen, Duffield, Timmons, Irish & Becker, and I. Joel Pasternak, Des Moines, for Appellant-Cross Appellee.

James F. Fowler & Darrell Goodhue, of Wilson, Goodhue & Fowler, of Indianola, for Appellee-Cross Appellant.

Heard by Donielson, Acting C.J., Snell, Oxberger and Carter, JJ; Allbee, C.J., takes no part.

PER CURIAM

Petitioner Joyce E. Turner appeals the economic provisions of the dissolution decree terminating the common law marriage between herself and respondent Robert R. Turner. Robert cross-appeals the finding of a marriage relationship and also the economic matters. Affirmed with modification.

The trial court concluded Joyce and Robert "are man and wife and this is a proper case for dissolution." Robert contends, as the husband in In re Marriage of Winegard, 257 N.W.2d 609 (Iowa 1977) did, that Joyce has failed to establish the intent and agreement in praesenti by the parties to be husband and wife. Regarding present intent to be husband and wife, **Winegard** cited Gammelgaard v. Gammelgaard, 247 Iowa 979, 77 N.W.2d 479 (1956) and McFarland v. McFarland, 51 Iowa 565, 2 N.W. 269 (1879). **Gammelgaard** observed proof of cohabitation, conduct and general repute in the community was admissable as "tending to strengthen a showing of present agreement." 247 Iowa at 980, 77 N.W.2d at 480. Further, **McFarland** found the woman could be entitled to a finding of common law marriage if she intends present marriage and the man does not, so long as they cohabit and his conduct justifies her in her belief he intends present marriage. 51 Iowa at 570, 2 N.W. at 273-74.

Robert's conduct was in direct contradiction to the posture he sought to establish in the trial court. Close scrutiny of the evidence, as required in In re Marriage of Grother, 242 N.W.2d 1 (Iowa 1976) of all claims of common law marriage, reveals every essential element of Joyce's allegation is fully established. We affirm the finding of a common law marriage.

Further, we agree with the trial court's consideration in the distribution of assets that the marriage was of the short six-year span of the common law marital relationship. The parties were originally married ceremonially in June 1947; they were granted a divorce in January 1966. The common law marriage commenced in July 1969. During the years following 1969 the parties amassed a sizeable fortune which is the fighting ground for this appeal. Joyce urges that Kantaris v. Kantaris, 169 N.W.2d 824 (Iowa 1969) requires consideration of the full number of years the parties spent together as husband and wife in deciding property division. We are

persuaded that **Kantaris** must be restricted to its facts which reveal a defendant husband's conduct that all but compelled a remarriage with his plaintiff wife. Likewise, his conduct ruined this second marriage. It was he on appeal who sought to overturn a property award and alimony provision, claiming the trial court had allowed his wife a higher amount because they had previously been married to each other. The court found his appeal was nothing more than an attack upon the plaintiff wife. **Kantaris**, 169 N.W.2d at 826.

We are, however, convinced Joyce should share in a greater portion of the marital assets which the trial court valued at $900,000. We are satisfied Joyce should receive $140,000 in addition to all assets awarded by the trial court.

We order the immediate release to Joyce of the $100,000 held in escrow. In satisfying the remaining $140,000 of the property division awarded Joyce, Robert shall pay Joyce $15,555.55 per year in nine annual installments, to commence March 10, 1978. Interest at the rate of seven percent shall be due from the date each such annual installment becomes due and owing and remains unsatisfied. Arnold v. Arnold, 258 Iowa 850, 140 N.W.2d 874 (1966). In addition, a lien shall be established in favor of Joyce in the amount of $140,000 against the farming operation awarded Robert.

We affirm the provisions of child support and the trial court attorney fees awarded Joyce. Each party should pay their own attorney fees on appeal. Costs of this action on appeal are taxed equally to the parties. In all other respects we affirm the trial court's decree. We remand for modification of the decree in accord with this opinion.

Affirmed in part, modified in part and remanded.

Donielson, Acting C. J., concurs in part and dissents in part.

DONIELSON, Acting C. J. (concurring in part and dissenting in part)

Although I concur in the conclusions reached by the majority that a common law marriage existed between the parties and that all property and alimony determinations should be based upon their six-year common law marriage and not upon the 28 years the parties spent together as husband and wife, I cannot agree with the property division modifications ordered by the majority. In this instance, I would defer to the sound judgment of the trial court and affirm the award of $130,000 in property to the petitioner, especially since I find no support in the record for the additional award of $140,000 in property which the majority now orders.

The majority indicates that its modifications are based upon the six-year common law marriage and that the first ceremonial marriage should not be considered here. However, I firmly believe that the substantial increase in property settlement awarded to petitioner is, in reality, based upon a consideration of the parties 28 years of marriage—the total number of years the parties spent together as husband and wife. Consequently, I feel that the majority is doing exactly what it states it should not do.

The $900,000 in assets accumulated during the pendency of the six-year marriage were amassed in a reasonably short period of time at about the same time that the common law marriage began. After reviewing the record and considering the specific criteria set forth in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), I can find no logical reason to disturb the property disposition made by the district court.

In affirming the dissolution decree provision imposing upon the respondent all contingent income tax liability for potential deficiencies resulting from the parties' 1969 income tax return, the majority may force respondent to pay federal tax deficiencies of approximately $400,000-$525,000, not to mention the state tax liability assessment.[1] In stark contrast to this huge potential financial obligation is the substantial property award of $270,000 in assets to petitioner as a result of the modifications ordered by the majority. Because of the "Russian roulette" which the majority plays with respondent's financial future, Robert may be forced to pay as much as $525,000 or more in tax deficiencies. Consequently, Robert may be left with as little as $105,000 or less in property while Joyce receives $270,000. I could not contemplate a more inequitable result if I tried.

[1] I seriously question how "contingent" these governmental income tax deficiency claims are inasmuch as the record reflects that the Internal Revenue Service's concern about the financial transactions involved in the instant case has reached advanced stages.