FILED
SEP 29 1981
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DYANE ELAINE MALLETT AND DAVID LYN MALLETT

Upon the Petition of)
DYANE ELAINE MALLETT,)
Petitioner-Appellant,)
And Concerning)
DAVID LYN MALLETT,)
Respondent-Appellee.)

Filed September 29, 1981

1-195
2-65401

Appeal from Polk District Court - Van Wifvat, Judge.

Petitioner-wife appeals from modification of the parties' dissolution decree, asserting 1) that no substantial change of circumstances was shown and 2) that awarding the parties' home to the husband when the decree ordered it to be sold constitutes an impermissible modification of a property division. REVERSED.

Charles R. Turner, Des Moines, for petitioner-appellant.

Richard G. Book of Jones, Hoffmann & Davison, Des Moines, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

JOHNSON, J.

Petitioner-wife, Dyane Elaine Mallett, appeals from trial court's modification of the parties' dissolution decree. She asserts 1) that no substantial change of circumstances was shown and 2) that awarding the parties' home to respondent-husband, David Lyn Mallett, when the decree ordered it to be sold constitutes an impermissible modification of a property settlement. We reverse.

The dissolution decree entered on June 21, 1979, awarded respondent custody of the parties' three minor children and ordered petitioner to pay child support of $50.00 per week. The parties' home was ordered sold and the proceeds were to be divided equally after payment of various debts.[1] The home was on the market for seven months but remained unsold. Trial court, therefore, further ordered that the parties would be credited for certain debt payments made in the interim. Respondent borrowed $5,000.00 from his parents to pay the outstanding debts that were in his name. Petitioner paid no child support but did satisfy a debt of $1,900.00 which was owed to the Post Office Credit Union.

On February 20, 1980, respondent filed an application to modify the decree asking trial court to quiet title to the home in him. He alleged that petitioner's remarriage, her failure to pay child support, and his desire to retain ownership of the home constituted a change of circumstances warranting modification. A hearing was held on April 17, 1980, and on May 21, 1980, trial court filed an order quieting title in the respondent. Past due and future child support payments were ordered credited against petitioner's share of equity in the home. Petitioner was also given credit toward her child support obligation for payment of the $1,900.00 debt.

I. Scope of Review. Our review of this equitable proceeding is **de novo**. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on these issues that are properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7).

---

[1] The parties' home was valued at $58,000.00 and subject to a $35,300.00 mortgage. The outstanding debts at the time of dissolution were $11,500.00. Thus, each party would receive $5,600.00 in equity after payment of the debts.

II. Authority to Modify. While section 598.21. The Code, generally permits modification of a dissolution decree upon proof of substantial change of circumstances, a court cannot modify the property division of a decree "absent extraordinary exceptions . . ." which would justify setting aside or changing a decree in any other type of case. In re Marriage of Johnson, 299 N.W.2d 466, 467-68 (Iowa 1980); see also Ash v. Ash, 172 N.W.2d 801, 803 (Iowa 1969). The court in Knipfer v. Knipfer, 259 Iowa 347, 144 N.W.2d 140 (1966), delineated those exceptions as "fraud, duress, coercion, mistake or other grounds as would justify the setting aside or changing a decree in any other case." Id. at 356, 144 N.W.2d at 145.

In this case, respondent neither pleaded nor proved any of the grounds set forth in Knipfer which would permit a court to modify the property division established in the original decree. Trial court ordered the modification for the sole reason that the original division of property was not working out as expected. This does not constitute a legal ground for modification.

Since we conclude that trial court had no authority to enter the order modifying the parties' decree, we reverse trial court's judgment.

REVERSED.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent. I cannot view the trial court's action as modification of a property settlement. I view this as the final resolution of a dissolution decree that turned out to be impractical and not in the best interest of the parties and children. After approximately eight years of marriage the parties in this case had three children (aged ten, eight and four), a home valued at $58,000.00, and debts totalling to $11,500.00. Petitioner was earning $500.00 bi-weekly and respondent was earning $515.00 bi-weekly. An orderly dissolution required a method to pay the debts of the marriage. The only asset available to pay the debts was the home. The court ordered its sale, but after seven months it could not be sold. In the meantime, petitioner failed to make any of the $50.00 a week child support payments (for three children) which were ordered by the trial court. Petitioner moved out of state and only made $1,900.00 worth of payments on the loan which secured the parties' two automobiles, in lieu of child support. The trial court's decree was never complied with. The house could not be sold and it became apparent the best disposition was to let the respondent keep the house as a home for the parties' three minor children, particularly with the child support assistance since petitioner refused to pay the child support. The debts of the marriage remained unpaid.

In my opinion, the trial court's order to sell the home was entered to pay the parties' debts, not to create a property division. The fact that some excess equity might remain to be divided after the sale was merely incidental and in a minimal amount. Since the method the trial court originally developed to settle the debts of the marriage did not work, I feel the trial court was justified in finding there was a substantial change in circumstances and in awarding the home to respondent.