

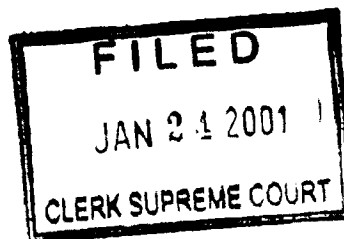
IN THE COURT OF APPEALS OF IOWA

No. 0-739 / 00-0253
Filed January 24, 2001

**IN RE THE MARRIAGE OF JOHN P. TOLSON
AND JOAN C. TOLSON**

**Upon the Petition of
JOHN P. TOLSON,
Petitioner-Appellee,**

**And Concerning
JOAN C. TOLSON,
Respondent-Appellant.**



Appeal from the Iowa District Court for Marshall County, Timothy J. Finn,
Judge.

The respondent appeals the economic provisions of the parties' dissolution decree. Respondent contends the court's decree is null and void because it did not satisfy the requirements of Iowa Code section 598.21 (1999) by specifically setting forth the value and distribution of assets or resolve support issues. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

David L. Brown of Hansen, McClintock & Riley, Des Moines, for appellant.

Patrick W. Brooks and Curtis A. Ward of Brooks, Ward & Robinson,
Marshalltown, for appellee.

Heard by Sackett, C.J., and Vogel and Mahan, JJ.

SACKETT, C.J.

Petitioner-Appellant Joan C. Tolson appeals after the district court entered a decree dissolving her thirty-five year marriage to Respondent-Appellee John P. Tolson. The district court divided the property and resolved the economic issue by adopting an earlier agreement of settlement dictated by the parties and their counsel in the record. Joan contends that the district court erred in adopting the settlement, dissolving the marriage without dividing the parties' property and addressing issues of spousal support. She further contends the matter should be remanded to the district court for resolution of these issues. John, who has not cross appealed, contends the decree should be upheld but assets should be divided without an equalizing payment, and a qualified domestic relations order should be entered to divide John's pension. We affirm in part, vacate in part and remand.

Our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981).

Joan filed a petition for dissolution of the marriage on August 31, 1998. The parties had a substantial net worth and discovery commenced. There were no children subject to support. The case was scheduled for trial on May 11, 1999. The district court was told at that time the matter had been settled. At the May 11th court appearance both parties and their attorneys were present for purpose of making a record of the settlement. The settlement provided the marriage had broken down and there were no minor or dependent children

whose interests needed representation. These provisions have not been subject to dispute.

The portion of the stipulation now challenged concerns the economic provisions of the decree. The court was told the parties had equitably and fairly divided their personal property including household goods, motor vehicles, various accounts and other items of personal property with an itemized list to be presented as a part of the stipulation. Certain unidentified personal property was excluded from this division. After the division of property John was to pay Joan an additional sum of money, which at the time the stipulation was dictated had not been determined, but was to be recited specifically in final documents presented to the district court. This amount was to be paid by John each week from his regular earnings but was not to be taxable to Joan. A time share the parties owned in Little Rock, Arkansas was to be quit claimed to the parties' son Scott with each party paying one-half of the costs of transfer. The family home in Newton was to be listed for sale and after the payment of the costs of sale the proceeds were to be divided equally. Joan was allowed to live in the home pending sale for up to a year and she was to pay the utilities. The taxes and insurance would be split and the mortgage would be paid off during that period with each paying one-half thereof. After a year whomever lived in the house would be solely responsible for taxes and insurance. No alimony was to be paid by or to either party. Each party was to pay his or her own attorney fees and John was to pay court costs.

The attorneys representing each party separately stated on the record that the stipulation dictated in the record comported with his understanding of the

overall settlement. Both parties also stated on the record in answer to questions from the judge that the settlement was satisfactory to each of them.

The parties asked for thirty days to prepare a stipulation, decree, and qualified domestic relations order. The promised stipulation signed by both parties was not forthcoming. Additional promises were made to the court that it would be, but finally each party filed a separate motion to enforce the settlement agreement. Finally on November 30, 1999, the district court wrote both attorneys advising them that unless he received the promised signed stipulation formalized and reduced to writing by December 10, 1999 he would enter a decree of dissolution approving the stipulation dictated in the record. The district judge, true to his promise, on December 10, 1999 entered a decree of dissolution of the marriage adopting the provisions of the stipulation dictated in the record.

This appeal, as the district court anticipated, followed with each party pointing the finger at the other as the person thwarting the formalization of a settlement.

Iowa Code section 598.21(1)(k) (1999) allows the court to consider "any written agreement made by the parties concerning property distribution" in devising an equitable property distribution. While it is proper and necessary for the court to consider any agreements made by the parties, the provision in section 598.21(1)(k) that the court considers any written agreement made by the parties concerning property distribution is only one of the considerations the court must address. *In re Marriage of Hansen*, 465 N.W.2d 906, 909 (Iowa App. 1990).

A stipulation of settlement in a dissolution proceeding is treated as a contract between the parties. See *In re Marriage of Lawson*, 409 N.W.2d 181, 183 (Iowa 1987); *In re Marriage of Bries*, 499 N.W.2d 319, 321 (Iowa App. 1993). It becomes a final contract only when it is accepted and approved by the court. *Lawson*, 409 N.W.2d at 183; *Prochelo v. Prochelo*, 346 N.W.2d 527, 529 (Iowa 1984). Once the stipulation is merged in the dissolution decree, "it is interpreted and enforced as a final judgment of the court, not as a separate contract between the parties." *Prochelo*, 346 N.W.2d at 530.

The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement received the sanction of the court or is rendered and promulgated as a judgment. *Hansen*, 465 N.W.2d at 908 (quoting *Van Donselaar v. Van Donselaar*, 249 Iowa at 505-09, 87 N.W.2d 311, 313-14 (1958)). That consent must exist at the very moment the court undertakes to make the agreement the judgment of the court. *Id.* The parties must have manifested mutual assent to the terms of the agreement. *Kristerin Dev. Co. v. Granson Inv.*, 394 N.W.2d 325, 331 (Iowa 1986) (citing *Hayne v. Cook*, 252 Iowa 1012, 1021, 109 N.W.2d 188, 192 (1961)). Whether such assent has been given is to be determined objectively. *Id.*

Here the stipulation was read in open court at which time both parties were represented by counsel. Both attorneys consented to the agreement as did both parties separately. The district court questioned both parties as to the agreement. Both parties actively participated in the May 11, 1991 hearing, and objectively assented to the terms of the stipulation.

The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Both parties were represented by legal counsel at the time of the stipulation was dictated in the record. There is nothing to show the agreement was not equitable. See *Bries*, 499 N.W.2d at 323.

However, at the time the stipulation was incorporated in the dissolution decree it no longer represented the agreement of the parties. The power of the court to render a judgment by consent is dependent on the existence of the consent of the parties at the time the agreement receives the sanction of the court or is rendered and promulgated as a judgment. *Van Donselaar*, 249 Iowa at 508, 87 N.W.2d at 313.¹ A valid consent judgment cannot be rendered by a court when the consent of one of the parties thereto is wanting and it is not sufficient to support the judgment that a party's consent thereto may at one time have been given; consent must exist at the very moment the court undertakes to make the agreement the judgment of the court. See *id.* In *Van Donselaar* the court reasoned that a consent judgment does not represent the reasoned, deliberate decision of the court, but is merely the agreement of the parties, made a matter of record by the court. *Id.* at 314. And until it is actually entered, the issue is the question of contract between the parties, either one may repudiate the agreement because of actual or supposed defenses thereto--lack of consideration, fraud, duress, and the like--such as would be available against

¹ Holding earlier cases of *Garretson v. Altomari*, 190 Iowa 1194, 181 N.W. 400 (1921), and *Burnett v. Poage*, 239 Iowa 31, 39, 29 N.W.2d 431 (1969), so far as they hold that a trial court may enter a judgment by consent of the parties after it is advised that one of them no longer consents were overruled in *Van Donselaar v. Van Donselaar*, 249 Iowa 504, 87 N.W.2d 311 (1958).

any other contract. See *id.* These defenses would be precluded if the court, knowing of the withdrawal of consent, should nevertheless have the right to enter judgment on the agreement as made. *Id.* The term consent judgment or judgment by stipulation necessarily implies a consent at the time the judgment is entered. See *id.* This is not to say that the agreement and or stipulation may not be a binding contract, subject to be enforced as other contracts; but the court may not enter judgment when it is advised one of the parties either denies the existence of the contract or repudiates it or for any other reason is no longer consenting to the judgment. *Id.* It is not sufficient to support the judgment that a party's consent thereto may at one time have been given; consent must exist at the very moment the court undertakes to make the agreement the judgment of the court. See *Hansen*, 465 N.W. 2d at 908-911.

We distinguish *Bries*, where this court addressed a husband's contention he should have a retrial because the district court erred by incorporating the stipulation regarding the division of property into the decree. In *Bries* we upheld the decree however the agreement had been formalized at the time it was submitted. See *Bries*, 499 N.W.2d at 321.

We affirm the dissolution of the marriage. We vacate the decree entered in all other respects and remand to the district court to hold a hearing on all the economic issues.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.