IN THE COURT OF APPEALS OF IOWA

No. 0-250 / 09-1335
Filed May 12, 2010

IN RE THE MARRIAGE OF BETH ELLEN ROWLEY AND KEVIN LEE ROWLEY

Upon the Petition of

BETH ELLEN ROWLEY,
Petitioner-Appellee/Cross-Appellant,

And Concerning

KEVIN LEE ROWLEY,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon, Judge.

Appeal from the district court ruling on respondent's application for declaratory relief. **REVERSED AND REMANDED.**

Douglas Beals of Moore, McKibben, Goodman, Lorenz & Ellefson, L.L.P., Marshalltown, for appellant.

Barry Kaplan and Melissa Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ.

SACKETT, C.J.

The marriage of Kevin Lee Rowley and Beth Ellen Rowley was dissolved by the Iowa District Court on January 13, 2009. The decree, among other things, directed the sale of certain assets and the distributions of the sale proceeds. On July 7, 2009, Kevin filed an application for declaratory relief asking the district court to enter a ruling declaring that the sale proceeds be distributed according to the January decree. In response to Kevin's application, the district court entered a ruling August 3, 2009, amending the January dissolution decree. Kevin appeals and Beth cross-appeals from both rulings. Kevin contends the August ruling impermissibly amended the January decree, which he contends is clear on its face. Beth contends that the August ruling correctly defined how the sale proceeds should be distributed and she should be awarded attorney fees. We reverse and remand and deny Beth's request for attorney fees.

BACKGROUND AND PROCEEDINGS. Beth filed a petition seeking a dissolution of the parties' twenty-one year marriage in May of 2008. She, among other things, asked for spousal support and an equitable division of property. The matter came on for hearing on January 8, 2009. Among other issues, the district court was asked to consider the division of certain antiques and collectibles owned by the parties. On January 13, 2009, a dissolution decree was entered. It ordered the antiques and collectibles sold and directed the distribution of the proceeds of the sale. Kevin subsequently filed a motion to enlarge, which was denied by the district court on January 28, 2009.

There was no further filing until July, 7, 2009 when Kevin filed the application for declaratory relief that is the subject of this appeal. The property the court ordered sold in the January decree had been sold. Kevin contended that the proceeds had not been distributed as provided in the January decree and an order should issue declaring they be distributed according to it.

The provision of the January decree in question provided the antiques and collectibles should be sold and proceeds from sale expenses "shall be applied as follows," and the court, in subparagraphs (a) through (f), ordered the payment of specific debts. Only subparagraphs (e) and (f) as set forth below are at issue here:

> (e) payment to Beth Rowley of $24,128.50 to equalize the property distribution, and
> (f) equal division of the balance.

Beth sought to distribute the proceeds so that the balance after the payment of debts was divided between her and Kevin and then Kevin would pay her the $24,128.50 from his half. Kevin sought distribution in accordance with the language of the January decree: that is, that the payment to Beth was paid from the sales proceedings and then the balance of the proceeds was to be divided.

Kevin's application for declaratory relief came before the district court, and on August 3, 2009, the court entered an order. The court interpreted the January 13, 2009, decree saying, "The decree did not effect that result [the court's intention that Kevin pay the $24,128.50 equalization to Beth from his share] and

will now be amended accordingly." The court then amended the order of payment from that in the decree to:

> (e) Equal division of the balance;
> (f) Payment to Beth Rowley of the sum of $24,128.50 to equalize the property distribution from Kevin Rowley's share as determined in subparagraph (e) above.
> (effecting the court's intent that Kevin pay the $24,128.50 to Beth from his share.)

On September 1, 2009, Kevin appealed from the order of August 3, 2009 as well as the order of January 13, 2009. On September 8, 2009, Beth appealed from the August 3, 2009 and the January 13, 2009 orders.

IS THE APPEAL TIMELY? Beth contends Kevin's appeal from the January 13, 2009, order is not timely. We agree with her that neither Kevin's appeal from that order, nor hers, is timely. All appeals to the supreme court except appeals from the termination of parental rights and child in need of assistance cases under Iowa Code 232 must be taken within thirty days from the entry of final judgment unless a post-trial motion is filed, in which event the appeal must be taken within thirty days from the filing of the post-trial ruling. Iowa R. App. P. 6.101(1)(*a*), (*b*) (2009). A timely appeal is jurisdictional. *Lutz v. Iowa Swine Exports Corp.*, 300 N.W.2d 109, 110 (Iowa 1981); *Qualley v. Chrysler Credit Corp.*, 261 N.W.2d 466, 471 (Iowa 1978); *Union Trust & Savs. Bank v. Stanwood Feed & Grain, Inc.*, 158 N.W.2d 1, 3 (Iowa 1968). Kevin's motion to enlarge the January 13 decree was denied on January 28, 2009, and no appeal was filed within thirty days of that ruling. Consequently the January 28, 2009 ruling is a final judgment and we consider it as such.

Kevin's appeal from the August 3, 2009 order is timely as it was filed within thirty days of the order. Beth's cross-appeal from the same order is also timely. *See* Iowa R. App. P. 6.101(2)(*b*).

DID THE DISTRICT COURT ERR IN AMENDING THE JANUARY 13, 2009 DECREE? Kevin contends that the district court was not correct when, on August 30, 3009, it amended its January 13, 2009 decree. He contends, among other things, the district's order exceeded what the court may do in entering a nunc pro tunc order.[1] Beth contends that the court, in its August order, merely clarified the January 13 decree. However this argument is belied by the district court's own language that "The [January] decree did not effect that result," and it needed to be amended to do so. The amendment clearly changed a property provision of the original decree that was final at the time the district court sought to amend it. That said, we disagree with Beth's position that the district court should be affirmed because the amendment was the district court's interpretation of what it had done in the January decree and that the court did not change the decree but only afforded Kevin the reasoning behind why Kevin's interpretation of the decree is unfair. Though making this argument, Beth makes no attempt to show how the equalization payment was computed or that the initial decree was not equitable. Absent here also is what we find lacking in a number of decrees: an accounting showing how the assets and liabilities were distributed according to the values determined by the district court and how an equalization payment, if one was ordered, was computed. Furthermore, if we were to determine the

[1] The district court did not term its order as a nunc pro tunc order nor do we do so.

equity of the property distribution in the January order were at issue here, which we do not, our careful review of the January decree gives no clear direction as to how the equalization payment was computed.

The district court's August 30 order clearly modified the property division of the January 13 decree, which at the time was a final order. The property division of a dissolution decree is not subject to change, even upon a petition for modification, absent extraordinary exceptions: fraud, duress, coercion, mistake, or other grounds as would justify setting aside or changing a decree in any other case. *See Knipfer v. Knipfer*, 259 Iowa 347, 355-56, 144 N.W.2d 140, 144-45 (1966). "The essential need for stability of judgments militates this stance." *In re Marriage of Johnson*, 299 N.W.2d 466, 468 (Iowa 1980). There are no such circumstances here.

The district court erred in amending the January decree that clearly provides for Beth's equalization payment to be made before the balance of the proceeds are divided equally. We reverse the court's order that amended the January decree and remand to the district court to order the distribution in accordance with the January decree before amendment.

We deny Beth's request for attorney fees. Costs on appeal are taxed to Beth.

REVERSED AND REMANDED.

MANSFIELD, J. (dissenting)

I respectfully dissent. I believe the district court had authority to enter a nunc pro tunc order altering the sequence of two paragraphs of its decree to conform to its original intent. Although the court did not use the specific words "nunc pro tunc" in its August 3, 2009 order, that is not essential. The court offered a detailed explanation for what it was doing and why:

> It was the intention of the court to divide nearly equally the assets of the parties including an equalization of the values of the two parcels of real estate. Requiring respondent to pay to petitioner the sum of $24,128.50 from his share [o]f the assets accomplished that goal. That amount properly should be paid by respondent to petitioner from Respondent's share of the marital assets. The decree did not [e]ffect that result and will now be amended accordingly.

This was a permissible exercise of nunc pro tunc authority. Nunc pro tunc orders can be used to correct obvious errors *or* to make an order conform to the judge's original intent. *See, e.g., State v. Johnson*, 744 N.W.2d 646, 648 (Iowa 2008). While a nunc pro tunc order may not be used when the judge's intent *changes,* e.g., to correct judicial thinking, a judicial conclusion, or a mistake of law, *id*., in this case, Judge Moon was simply amending the language of the decree to what he had actually intended. His order makes this quite clear. The judge previously made an inadvertent arithmetical error in failing to recognize that when a party receives a specific amount directly out of the sale proceeds of marital property she has essentially received an equalization payment of only one-half that amount. He explained that error and fixed it. *See id*. ("In reviewing a nunc pro tunc order, this court has declared that the intent of the trial judge is critical.").

While I share my colleagues' concern that property divisions in dissolution decrees should have a high degree of finality, in this case both parties were enlisting the court's assistance anyway. The process of splitting up the property was still in progress. I would affirm.