

IN THE COURT OF APPEALS OF IOWA

No. 1-903 / 11-0745
Filed February 1, 2012

**IN RE THE MARRIAGE OF PEGGY ANN KOLPEK
AND DOUGLAS BRIAN KOLPEK**

**Upon the Petition of
PEGGY ANN KOLPEK,**
Petitioner-Appellee,

**And Concerning
DOUGLAS BRIAN KOLPEK,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Robert J. Blink,
Judge.

Douglas Kolpek appeals a district court order interpreting the provisions of
a dissolution decree regarding the proceeds from the sale of the marital home.

AFFIRMED.

Patricia A. Shoff and Lance W. Lange of Belin & McCormick, P.C., Des
Moines, for appellant.

Leslie Babich and Kodi A. Brotherson of Babich & Goldman, P.C., Des
Moines, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

This appeal involves the interpretation of provisions concerning the division of proceeds for the sale of the parties' marital home in a decree of dissolution of marriage between Douglas and Peggy Kolpek. The district court determined the provisions provided that upon the sale of the home, Peggy was to receive from Douglas the sum of \$70,000. We affirm.

I. Background Facts and Proceedings.

Douglas and Peggy Kolpek ended their thirteen-year marriage by a stipulated dissolution decree on November 24, 2008. The decree contained the following provisions regarding the sale of the marital home and the division of the proceeds from the sale:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the property . . . is by this Decree quieted in [Douglas]. . . . [Douglas] shall be solely responsible for payment of the mortgage, Principal home equity line of credit, taxes, insurance and utilities and shall hold [Peggy] harmless therefrom and indemnify her from the same. [Peggy] shall have a lien on the real property for her 1/2 of the net equity in the home as calculated in the following paragraph. [Peggy's] interest in the home shall be nondischargeable in the event of bankruptcy as this award is necessary for the support and maintenance of the children and [Peggy] as contemplated by Section 523(a)(5) of Title 11, United States Code.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties acknowledge and agree that the property . . . is currently listed for sale and shall remain for sale until sold. The parties shall execute all necessary documents, in order to list the property for sale (which shall be with Iowa Realty, Prudential or ReMax) accept any reasonably compliant offers to purchase after consultation with their realtor as to fair value, and close the sale transaction. [Peggy] agrees, however, that [Douglas] will have total discretion regarding the acceptance of an offer for the sale of the parties' home as long as [Peggy] is guaranteed a minimum of \$70,000.00 in proceeds from the sale. [Peggy] will cooperate and sign any offer that accomplishes this result. Any changes in the

listing price shall be made jointly by the parties. Each party shall receive 1/2 the net proceeds from the sale after deducting the mortgage balance, the standard costs of sale which shall be limited to standard closing costs as set forth in the Iowa Realty Estimate of Proceeds dated 7/14/08 signed by both parties (which shall not include seller assumed costs to benefit buyer), realtor commission, taxes, and abstracting and after setting aside to [Douglas] any reduction in the principle balance on the mortgage, based upon \$527,000.00 of current existing debt on the home. [Douglas] shall be responsible for all taxes paid current and shall have the same deducted from his share of the proceeds. The parties shall true up with one another as to the division of the net proceeds. . . .

At the time the decree was entered, the parties believed the home to be valued at approximately \$750,000, and the home was listed at \$775,000. However, following the entry of the decree, the home's value decreased substantially, and remained on the market for over two years without any offers.

In February 2011, two offers were made on the home. Due to disagreements between Douglas and Peggy regarding counteroffer amounts, Douglas consulted with the realtor and had an appraisal done which showed the value of the home to be \$605,000. The first offer made was for \$550,000 and was rejected. The second offer was negotiated to \$610,000. As a part of the negotiated price, Douglas had to include several items awarded to him in the dissolution decree including some appliances, electronics, and furniture. Douglas accepted the second offer.

After the offer was accepted, Douglas and Peggy disagreed on how to split the proceeds from the sale. Douglas contended that Peggy was only permitted to receive half of the net proceeds from the sale of the home or \$27,427.62 (the total net proceeds obtained from the sale was \$54,855.24).

Peggy disagreed and asserted that she did not need to release her lien against the home unless she received \$70,000 from the sale.

On March 9, 2011, Douglas filed an application for interpretation of the dissolution decree. The application came to a hearing on April 13, 2011.

At the hearing, the parties stipulated to the entry into evidence of emails between Peggy's attorney and Douglas's attorney regarding the marital home provisions now at issue. The emails reveal that Douglas inserted the sentence providing for a minimum of \$70,000 in order to ease his concerns that Peggy had no incentive to sell, and thus could hold out for higher offers when Douglas was responsible for making all of the payments associated with the home. Douglas's attorney then states:

The provision contemplates the 70 K would come from the sale proceeds and is a minimum amount she would receive even if the house doesn't sell for price that would net 140 K- that is the reason for the total discretion in him – so he can decide that he might take a lower offer and take a hit if he can't continue to carry the house.

On April 20, 2011, the district court entered an order finding that upon the sale of the property, Peggy was to receive from Douglas the sum of \$70,000 to be paid within thirty days of the closing of the real estate. The district court further ordered Douglas to pay Peggy attorney fees in the amount of \$5000 and court costs. Douglas appeals the district court's construction of the dissolution decree.

II. Applicable Law.

We review the construction of a dissolution decree as a matter of law. *In re Marriage of Goodman*, 690 N.W.2d 279, 282 (Iowa 2004). A dissolution

decree is construed like any other written instrument. *In re Marriage of Brown*, 776 N.W.2d 644, 650 (Iowa 2009).

The decree should be construed in accordance with its evident intention. Indeed the determinative factor is the intention of the court as gathered from all parts of the decree. Effect is to be given to that which is clearly implied as well as to that which is expressed. Of course, in determining this intent, we take the decree by its four corners and try to ascertain from it the intent as disclosed by the various provisions of the decree.

Goodman, 690 N.W.2d at 283. In construing a dissolution decree, we give force and effect to every word, if possible, in order to give the decree a consistent, effective, and reasonable meaning in its entirety. *Brown*, 776 N.W.2d at 650.

III. Analysis.

The parties dispute what effect the following language has when the marital home is sold for fair market value, but the sale does not provide enough proceeds for Peggy to receive \$70,000 after the agreed upon costs are paid:

The parties shall execute all necessary documents, in order to list the property for sale (which shall be with Iowa Realty, Prudential or ReMax) accept any reasonably compliant offers to purchase after consultation with their realtor as to fair value, and close the sale transaction. [Peggy] agrees, however, that [Douglas] will have total discretion regarding the acceptance of an offer for the sale of the parties' home as long as [Peggy] is guaranteed a minimum of \$70,000.00 in proceeds from the sale. [Peggy] will cooperate and sign any offer that accomplishes this result.

Douglas argues that according to the first sentence, as long as an offer on the home was for "fair value" as confirmed by their realtor, the parties were required to sell the property and divide the proceeds equally, and that the second sentence guaranteeing a minimum of \$70,000 to Peggy only comes into play if Douglas chooses to accept an offer for something other than "fair value." Peggy

argues the sentences ensure that she receive \$70,000 after the marital home is sold.

In support of his position, Douglas puts emphasis on the use of the word “however” in the second sentence. He claims that “however” indicates an alternative intention, thus contrasting the previous clause. We disagree. Although “however” can be used to signal an alternative, it may also be used to introduce a restricting or counterbalancing consideration, much like the words “nevertheless,” “although,” or “notwithstanding.” The American Heritage Dictionary 626 (2d College Ed. 1982). In context, the second meaning makes the most sense. When reading the decree’s language as a whole, we find the intent was to guarantee Peggy a minimum amount of proceeds from the sale of the marital home regardless of whether the sale was for “fair value.”

The provisions at issue are a compromise between the conflicting interests of the parties in the sale of the home. Under the provisions of the decree, Douglas was given title to the home and made solely responsible for all the payments associated with the house (i.e. mortgage, taxes, insurance, and utilities), and Peggy was given a lien on the property for half of the property’s net equity. Since Peggy was not required to shoulder any of the costs and burdens of the home and thus had no incentive to sell, she could conceivably hold out indefinitely on the sale of the home until a price is offered that reaches her desired share of proceeds. To remedy this hold out scenario, Douglas was given “total discretion” in selling the home, and Peggy was “guaranteed a minimum of \$70,000.00 in proceeds from the sale.” As the one with “total discretion,”

Douglas carried the risk of a downturn in the housing market. In facing a downturn, the decree provided Douglas with two options: take a loss if he no longer wanted to carry the home, or keep the home until an offer was received that would net sufficient equity and while waiting receive an offset for any reduction in the principal balance of the mortgage. Douglas chose to sell the house and take a loss.

Douglas further argues that this construction of the decree is inequitable because it not only results in Peggy being awarded all of the proceeds from the sale of the home, but requires him to pay her an additional \$15,144.76. First, it is important to note that Peggy is guaranteed \$70,000 from the “proceeds” of the home, not “net proceeds.” Thus, the decree clearly contemplates the possibility that the “net proceeds” would not be sufficient for each party to receive \$70,000, but nonetheless guaranteed Peggy \$70,000 from whatever proceeds were received. Second, Douglas had “total discretion” and he chose to exercise that discretion in what he now complains results in an inequitable situation regarding the net equity. This court cannot protect him from his own decision.

Douglas also cites to *In re Marriage of Wessels*, 542 N.W.2d 486, 489 (Iowa 1995), to argue that “notwithstanding an agreement and decree to the contrary, later occurrences are so extreme in their nature as to render the initial understanding grossly unfair and therefore subject to change.” *Wessels* was a spousal support modification case. *Wessels*, 542 N.W.2d at 489. The Iowa legislature has clearly provided that spousal support is modifiable upon a proper showing of substantial change of circumstances. Iowa Code § 598.21C(1)

(2011). It has likewise provided that “property divisions made under . . . chapter [598] are not subject to modification.” *Id.* at § 598.21(7); *see also In re Marriage of Johnson*, 781 N.W.2d 553, 556 (Iowa 2010). The provision of the decree in controversy here concerns property division, not spousal support. Although Douglas has tried to frame his argument as one seeking an equitable result, he is really asking this court to find that the precise language of the decree fails to provide an equitable result under the current circumstances and should thus not be applied; that is, it should be modified. Douglas has not provided authority to support a modification of property division, and we know of none.

IV. Conclusion.

We find the district court correctly construed the parties’ dissolution decree to guarantee Peggy a minimum of \$70,000 upon the sale of the marital home. Accordingly, we affirm.

AFFIRMED.

Tabor, J., concurs; Danilson, P.J., dissents.

DANILSON, P.J. (dissenting)

I respectfully dissent. The majority has interpreted a provision intended to shield Peggy from abuses by Douglas in a manner that serves as a sword, and inflicts a significant inequity upon Douglas. The evidence shows the real property was sold at or near its fair market value. Douglas did not accept an offer well below the fair market value simply to eliminate his responsibilities to pay the mortgage, taxes, insurance, and utilities which would give rise to Peggy's claim for \$70,000. Further, Douglas did not accept an offer that was unacceptable to Peggy. There was constant communication between Douglas and Peggy regarding offers received on the property. For example, Peggy told Douglas if he was willing to give up the appliances made a part of the offer, then he should "go for it." She also told him not to go lower than "610." The offer accepted was for \$610,000. The fact the home's sales price was approximately \$140,000 less than the amount anticipated by the parties in 2008 came at no fault of either party.

If Douglas had accepted an offer significantly below fair market value because he could no longer meet his financial responsibilities related to home ownership, or in bad faith at Peggy's expense, then Peggy's claim for the application of the term granting her \$70,000 of the proceeds would have merit. However, under these facts, the proper interpretation and equitable application of the terms of the decree require the net proceeds to be equally shared between the parties. I would reverse.