

**IN THE COURT OF APPEALS OF IOWA**

No. 2-584 / 12-0433  
Filed August 8, 2012

**SHIRLEY ZINGER,**  
Intervenor-Appellant,

**vs.**

**MILDRED CONKLIN, Executor of the  
Estate of DONALD D. ZINGER,  
Deceased,**  
Defendant-Appellee.

---

Appeal from the Iowa District Court for Scott County, David Sivright,  
Judge.

A claimant appeals from a judgment denying her claim in probate.

**AFFIRMED.**

Edward N. Wehr of Wehr, Berger, Lane & Stevens, Davenport, for  
appellant.

Thomas G. Schebler of Schebler Wine & Collins, Davenport, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Miller, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**MILLER, S.J.**

Shirley Zinger appeals from the probate court judgment denying her claim in probate against the executor of the estate of Donald D. Zinger. We affirm.

Shirley Zinger filed a claim in probate against the executor of the estate of Donald D. Zinger. The executor denied the claim, and the matter proceeded to a contested hearing. The evidence presented to the probate court apparently consists solely of the decree dissolving the marriage of Donald and Shirley. Accordingly, relevant facts are limited to the content of the decree of dissolution of marriage.

The marriage of Donald (the petitioner in the dissolution action) and Shirley (the respondent in that action) was dissolved by a January 27, 1983 decree. The decree contains no provisions concerning children. The relevant matters resolved by the decree are thus its economic provisions.

The decree provided that Donald and Shirley would own equal shares as tenants in common six lots in additions to the City of Bettendorf; they were to equally divide funds in a cash management account, a certificate of deposit, any refunds from their 1982 state and federal income tax returns, and their cemetery lots; and each would receive the life insurance policies insuring his or her life. The decree awarded Donald a lot in an addition to the City of Bettendorf and a nine-year-old automobile; awarded Shirley two lots in an addition to the City of Bettendorf, the mobile home she occupied, and the parties' interest in a loan to her nephew; and provided that these items awarded to each party separately

were awarded “free and clear of” any claim of the other. In further relevant part the decree provided:

It is further Ordered, Adjudged, and Decreed by the Court that the Petitioner herein shall pay to the Respondent as a property settlement the sum of \$750.00 within thirty (30) days from the date of the entry of the Decree herein and that he shall on February 1, 1983, and on the 1st day of each succeeding month until February 1, 1985, pay to the Respondent the sum of \$250.00 which shall represent additional funds to accomplish an equal division of the assets of the parties hereto. After February 1, 1985, said amount shall decrease to \$225.00 per month. Said payments shall be made through the Clerk of this Court and shall continue until the death or remarriage of the Respondent, whichever shall occur first.

. . . .  
 . . . It is specifically Ordered that neither party hereto is responsible or liable for any alimony . . . .

Donald died. Shirley has not remarried.<sup>1</sup> Shirley filed a claim in probate against the executor of Donald’s estate, seeking a continuation, after Donald’s death, of the \$225.00 per month payments. Following submission to the district court as a contested claim in probate, the court filed a ruling denying the claim. The court determined that the \$225.00 per month payments were in the nature of alimony, rather than property division, and terminated upon Donald’s death. Shirley appeals.

A contested claim in probate is triable as a law action. Iowa Code § 633.33 (2011); *Estate of Voelker*, 252 N.W.2d 400, 402 (Iowa 1977). Our review is thus for correction of errors, and not de novo. Iowa R. App. P. 6.907; *Solbrack v. Fosselman*, 204 N.W.2d 891, 893 (Iowa 1973). The contested claim was submitted to the district court on uncontested facts. Accordingly, our review is similarly limited to error in the court’s application of law to the facts. See *Sager*

---

<sup>1</sup> This fact is agreed to in the parties’ briefs.

*v. Farm Bureau Mut. Ins. Co.*, 680 N.W.2d 8, 10-11 (Iowa 2004) (holding that where the case was tried on stipulated facts, review is limited to assigned error in the application of law to the facts).

The dissolution decree clearly and explicitly orders Donald to make payments to Shirley as “property settlement” to make “an equal division of the assets.” However, as stated in *Knipfer v. Knipfer*, 259 Iowa 347, 144 N.W.2d 140 (1966),

In determining the primary question whether the financial provisions made for defendant in the decree constitute a property settlement or alimony, the trial court’s employment of the term “alimony” is not conclusive. It is not what the arrangement is called but what it is that fixes its legal status. It is the substance not the form which is controlling. If an order constitutes a property settlement as distinguished from alimony, its character is not affected by the name given it.

*Knipfer*, 259 Iowa at 351, 144 N.W.2d at 142 (citations omitted).

In determining whether the award here constitutes alimony or a property division, no single factor is controlling. The court must take into consideration all the relevant factors, including the provisions of the agreement between the parties, the circumstances under which the agreement was made, the nature and value of the property owned by and to be divided between the parties, the original divorce proceedings and the terms of the divorce decree sought to be modified.

*Knipfer*, 259 Iowa at 352, 144 N.W.2d at 143 (citation omitted).

The decree of dissolution states that the hearing was attended by Donald and his attorney, and by Shirley’s attorney, and the court heard evidence produced by Donald. Shirley had shown her approval of the decree by her signature approving it as to form and content. Here, the evidence, if any, of any

“agreement between the parties” must be drawn from the contents of the decree.<sup>2</sup>

The record contains a dearth of information as to the circumstances under which any agreement was made, or the original divorce proceedings.

Evidence as to the “nature and value of the property owned by and to be divided between the parties” is very fragmentary. The dissolution decree identifies the assets and how they are to be divided, but places no values on the assets. The decree orders Donald to make certain cash payments to Shirley to “accomplish an equal division of assets of the parties,” not to accomplish an equal division of the property of the parties.<sup>3</sup> With no information in the decree as to the values of the assets divided by the decree, or whether the parties had debts, and if so the nature and extent of their debts, neither the trial court nor we on appeal can know or estimate the relative allocation of property between the parties made by the dissolution decree.

As stated in *Knipfer*, “What is important in such cases is whether the settlement is considered a permanent one, for a fixed or determinable sum, and whether such settlement is in lieu of the wife’s rights and property, or in lieu of her dower rights.” *Knipfer*, 259 Iowa at 354, 144 N.W.2d at 144 (citation omitted).

---

<sup>2</sup> We do note that any “agreement between the parties” that is reflected in the decree is interpreted as a final judgment of the court, not a separate agreement between the parties, and in interpreting language incorporated in the decree we look not to the parties’ intentions but the intent of the court. See *In re Marriage of Sylvester*, 412 N.W.2d 624, 627-28 (Iowa 1987).

<sup>3</sup> See, e.g., *In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980) (holding that allocation of marital assets is only part of a property division, as property division also includes allocation of marital debts).

As noted above, the record does not allow a determination of whether the dissolution decree divided the property approximately equally or otherwise. For all a court can determine, the property division may have substantially favored Donald. If so, an award of alimony could very well be appropriate. See Iowa Code § 598.21(3)(c) (1983) (providing that the distribution of property is a factor to consider in determining whether alimony is appropriate).

In addition, the language of two requirements of the decree appears suggestive of alimony. First, the decree requires that the payments “be made through the Clerk of this Court,” a requirement usually imposed in cases of alimony, but much less commonly used in awards of property. Second, the decree provides that the payments “shall continue until the death or remarriage of the Respondent, whichever shall occur first,” language typical of an alimony award rather than a property award.<sup>4</sup>

Most importantly, the payments in question are not for “a fixed or determinable sum,” as is characteristic of property awards. See *Knipfer*, 259 Iowa at 354, 144 N.W.2d at 144 (stating that a factor in determining whether a settlement is a property award is whether it is “considered a permanent one, for a fixed or determinable sum.”). We agree with the trial court that “[t]he open ended nature of the obligation, payable until Shirley’s remarriage or death, suggest an intent to provide her support in lieu of Donald’s pre-dissolution legal obligation to support her.”

---

<sup>4</sup> We also note that nothing in the decree states that the payments are to continue after Donald’s death.

We conclude that the award in question has many more characteristics of alimony than of a property award. We find no error in the trial court's determination that the periodic payments were in the nature of alimony. "In general, alimony payments are presumed to terminate upon the obligor's death, absent a provision in the decree requiring that payments continue after such death." *In re Marriage of Hayne*, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). No reasons contrary to that presumption appear in the record. We therefore agree with the trial court's determination that Donald's payments terminated upon his death.

**AFFIRMED.**