**IN THE COURT OF APPEALS OF IOWA**

No. 2-1085 / 12-0693
Filed February 13, 2013

**IN RE THE MARRIAGE OF ROBERT L. HARRIS AND LAURALEI L. HARRIS**

**Upon the Petition of**

**ROBERT L. HARRIS,**
Petitioner-Appellant,

**And Concerning**

**LAURALEI L. HARRIS,**
Respondent-Appellee.

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Appeal from the Iowa District Court for Woodbury County, Jeffrey L. Poulson, Judge.

Robert Harris appeals his dissolution decree's property distribution and allocation of debt. **AFFIRMED.**

John S. Moeller, Sioux City, for appellant.

Edward Joseph Keane of Gildemeister & Keane, L.L.P., Sioux City, for appellee.

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

**TABOR, J.**

Robert Harris appeals the property distribution and allocation of debt in the decree dissolving his marriage to Laura Harris Kemblowski. He contends the district court improperly found he dissipated assets from the marital estate and, as a result, inequitably assigned the majority of the debt to him.

Because Robert depleted the marital estate in violation of the court's pre-trial order and failed to show the disputed debts were incurred for marital obligations rather than his company or personal expenditures, the district court appropriately allocated those amounts to him. Also, because Laura did not appeal from the decree, we decline to award Robert's entire retirement account to her. We also deny Laura's request for attorney fees.

## *I. Background Facts and Proceedings*

Robert and Laura married in 1971. Having a bachelor of science degree in manufacturing, Robert worked in senior management for various companies. The couple moved across the country on several occasions to accommodate Robert's career. Laura stayed home to raise their three children, but also worked outside the home during the span of the marriage. At the time of trial, Robert was sixty-six years old and Laura was sixty-two. Their children are now adults.

In 2000 the parties moved to Sioux City, where Robert worked for Gateway Computers and the couple purchased an historic home known as the Wetmore Mansion. They took out two mortgages on the property to fund renovations: one for $233,000 through CitiMortgage, and a second for $150,000 through Wells Fargo.

In 2004 Robert experienced a hemorrhagic stroke while working for a hospital in a Chicago suburb. He moved back to the Sioux City house, where Laura was living at the time. Deemed permanently disabled by the Social Security Administration, he qualified for disability benefits of approximately $6500 per month until he turned sixty-five and is now receiving social security retirement benefits of $2179 per month. He further supplements his income with a $486 monthly pension from GenCorp, one of his former employers. By rolling over his 401k plans over his career, he now owns an Edward Jones investment retirement account (IRA), which was valued at $140,376 when the marriage was dissolved.

Robert's mother died in September 2004 and bequeathed roughly $360,000 to Robert, who used the funds to establish the Robert Harris Revocable Trust of 2005. With $98,703 of that inheritance, the parties purchased a row house located at 3936 Stratford Road in Drexel Hill, Pennsylvania. To cover unrelated expenses, Robert and Laura took out a mortgage on the property, which at the time of dissolution, had a remaining balance of $104,348. The parties used marital funds to purchase a second row house at 3924 Stratford Road, which has a $34,594.27 mortgage balance remaining. They originally purchased the houses to serve as residences for two of their children who attended school in Pennsylvania.

In 2005 Robert financed Harris Speed Works, an aftermarket automotive performance enhancer for late model muscle cars. He invested between $280,000 and $300,000 in the company, the majority of which came from his

trust. Robert was president of the company and his two sons ran the business. At the time of trial, the business was insolvent and defunct.

While in Sioux City, Laura worked at Bath & Body Works and MCI. In September 2008, Limited Brands, the parent company of Bath & Body Works, offered her a promotion to manage a larger store in Philadelphia. Ambitious to advance her career, Laura departed for Pennsylvania. She lived at the 3936 Stratford home while Robert stayed in Sioux City to sell their residence there.

Robert filed for divorce on April 2, 2009. Laura has since moved to Des Plaines, Illinois to care for her father. After both mortgagors foreclosed upon the Sioux City house, Robert moved into the 3924 Stratford home, where he remains today.

Throughout their marriage Robert and Laura shared a joint checking account at Wells Fargo, which they used to deposit their income and pay bills. The parties accumulated debts through credit cards, open accounts, and tax delinquencies. Harris Speed Works had been collecting sales tax while not paying proceeds to the State of Pennsylvania, and because of additional accounting issues with the company, Robert has not filed joint-marital tax returns since 2007. Laura testified she was not involved with Harris Speed Works and did not realize their tax delinquency for years. She began filing married separate tax returns and is now up to date on her individual IRS filings.

Laura testified she was unaware of the parties' debt load until after their separation. From 2006 to 2009, Robert would periodically withdraw money from his IRA and apply it against the debt. On June 4, 2009, the district court enjoined

each party "from molesting or disturbing the peace of the other party and from concealing or in any way disposing of property of the parties." Despite this order, Robert made two additional withdrawals from his retirement account and auctioned off property from the Sioux City home before the sale. Laura also disregarded the order by selling a ring for $750. In February 2010, unbeknownst to Robert, Laura individually filed for bankruptcy.

On April 22, 2011, the district court entered a partial decree dissolving the marriage and continuing trial to address the economic aspects of the dissolution. Trial began on January 31, 2012. On February 17, 2012, the court entered a decree awarding Robert $500 per month in alimony until August 2015. The decree also awarded Robert the 3924 Stratford home, with $75,404.73 in equity, as well as the corresponding debt of $34,595.27; the 2006 Corvette, valued at $18,525 and the 2002 Jeep, worth $5253; and $37,125.70 of his IRA. The court awarded Laura the 2008 Jetta and 2005 Hyundai, valued at $11,000 and $3323 respectively; her individual IRA, worth $5700; $97,126.70 of Robert's IRA; and her $46,998.27 Limited Brands 401k. The court included as assets the IRA withdrawals, the auction proceeds, and the ring sale, all of which violated the court order, and assigned a majority of the debt to Robert. Robert now appeals the property distribution.

## *II. Scope and Standard of Review*

Our review of dissolution cases is de novo. *In re Marriage of Cooper*, 769 N.W.2d 582, 584 (Iowa 2009). While we decide the issues before us anew, we

accord weight to the district court's fact findings, especially with respect to witness credibility. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

## *III. Analysis*

### A. Did the Decree Equitably Divide the Marital Assets and Debts?

Robert disputes the district court's fact-findings used to support its property division in three particulars: (1) he contends any dissipation in assets was used to pay for the parties' continued debt load following his stroke in 2004, (2) he alleges most of the debts allocated to him were incurred before the couple's separation, and (3) Robert asserts he does not plan to file bankruptcy.

Laura embraces the district court's rationale for its property division and further contends the court should have awarded her Robert's entire IRA account to make the division more equitable.

The marital estate includes property each party brings into the marriage, as well as assets obtained during the marriage, but not property inherited or received as a gift by one party. *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007). A court must identify the assets held and debt owed by each party—individually or together—before dividing the marital estate. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007). The value of the property should be determined as of the date of trial. *Id.*

Iowa is an equitable division state. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). A property division may be equitable without necessarily being equal. *Id.* "The determining factor is what is fair and equitable in each particular circumstance." *In re Marriage of Gensley*, 777 N.W.2d 705,

719 (Iowa Ct. App. 2009). We are guided by the factors set out in Iowa Code section 598.21 (2009) when making this determination. *In re Marriage of O'Brien*, 821 N.W.2d 423, 425 (Iowa 2012).

Additionally, we consider whether one party dissipated marital assets. *Fennelly*, 737 N.W.2d at 104. "In determining whether the dissipation has occurred, courts must decide (1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances." *Id.* (internal quotation marks omitted). As an evidentiary matter, the first issue is satisfied if the spending spouse can demonstrate how the property was disposed of or funds were spent by producing adequate evidence. *Id.* The second issue involves resolving several factors, including:

> (1) The proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefited the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure.

*Id.* at 104–05.

The district court found that between March 2007 and December 2009, Robert withdrew $154,000 from his IRA to pay for miscellaneous expenses and to purchase his Corvette. During that timeframe, the court issued an order enjoining each party from disturbing, concealing, or disposing of the parties' property. On three separate occasions, Robert knowingly violated the order. In December 2009, he withdrew $4225 around Christmas to buy his children gifts. In June 2010, Robert withdrew $20,025 to pay the sales tax proceeds that his

business was collecting but not paying to the State of Pennsylvania. Before the Sioux City house was foreclosed upon, Robert auctioned off $4330.50 of the parties' property from the house.

In reviewing these transactions, the district court held those distributions violating its previous order would be attributed to Robert: "This is a case in equity and Robert cannot benefit from his wrongdoing."

We agree with the district court's decision to allocate to Robert the value of the assets depleted after the June 2009 order.[1] The auction of household items and the IRA withdrawals occurred after Robert petitioned for dissolution. Laura testified she was not involved in the Harris Speed Works company, which was the benefactor of a substantial portion of the funds.

Before dividing the estate, the court identified and valued the following debts that accumulated over the course of the marriage:

> Sioux City weed abatement, $260; Enhanced Recovery Corporation—Wells Fargo overdraft, $489.58; Hawkeye Adjustment, $7,851.49; Capital Management Services (collecting for GE Money Bank), $2,130.11; Wells Fargo Judgment, $16,879.38; Calvary Portfolio Services (Bank of America), $9,892.71; LVNV Funding LLC (HSBV Bank Nevada), $2,557.75; Best Buy, $2,264; Verizon Wireless, $1,336.55; Lee Goodwin, $2,165.75; Baron, Sar, Goodwin, $1,091.85; Teresa O'Brien, $1,832.50; Richard Harris, $2,000; MCM/Chase Bank, $18,340.42; MCM/JCPenney, $1,007.22; Citizen's Bank Credit Card (co-signed for Harris Speed Works), $7,551; Card Service International (co-signed for Harris Speed Works), $105; Federal Express (co-signed for Harris Speed Works), $1,049; Marlton Pike Precision (co-signed for Harris Speed Works), $2,128; Tom Kemblowski, $10,000; Edward J. Keane, $4,425.10; Capital One, $400.

[1] The court also allocated $750 to Laura's property share for her selling a ring after the court's order.

Laura acknowledged responsibility for the debts of $10,000 to Kemblowski, $4425.10 to Keane, and $400 to Capital One, and the district court attributed those amounts to her. The court allocated the remaining debt to Robert, reasoning:

> Robert has dissipated large amounts of family money through withdrawals from his IRA. Because of his pattern of dissipating assets and considering that most, if not all, of the remaining debts were incurred by him and also factoring in Robert's option of discharging these debts in his own bankruptcy, the balance of the debts listed above are equitably attributed to Robert.

Robert asserts a majority of the debts assigned to him were incurred before he and Laura separated and, thus, the withdrawals from his IRA should not be considered dissipated assets.[2]

As the spending spouse, Robert bears the burden to prove the funds were spent for marital purposes—through testimony, receipts, or similar evidence. *See Fennelly*, 737 N.W.2d at 104. By his own admission, a portion of the IRA withdrawals benefitted Harris Speed Works. Those debts listing Robert as co-signer for Harris Speed Works would account for debts separate from the marital estate. Laura testified she did not know the origin of several listed debts and that Robert would buy and sell property without her permission. Laura also testified she did not authorize several of the instruments bearing her name as co-signer.

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[2] Because the district court set out the value of each debt at the date of dissolution before allocating them between the parties, Robert's additional argument that the district court ran afoul of the *Keener* and *Locke* cases is without merit. *See Keener*, 728 N.W.2d at 193 (directing district court to identify assets and debts held by either or both parties before dividing the estate); *Locke v. Locke*, 246 N.W.2d 246, 252–53 (Iowa 1976) (requiring district court to ascertain value of property at the date of trial).

We rely on the district court's finding that Laura's testimony was more credible. *See In re Marriage of Blume*, 473 N.W.2d 629, 632 (Iowa Ct. App. 1991).

Robert had an opportunity to show the portion of the debt incurred on behalf of the marital estate through receipts, documents, and corroborating testimony. The record does not reveal the identity of each transaction that accumulated the several debts, but in review of the documents Robert presented specifying particular purchases, we agree with the district court that a majority of expenditures benefitted Robert individually or his business, rather than serving marital purposes. The district court's decision to allocate the majority of debt to Robert in its overall property distribution was not inequitable in this regard.

In addition, Robert asserts he "does not plan to file for bankruptcy" and argues the district court improperly factored the possibility that he would do so into its debt distribution. Robert testified he previously considered filing for bankruptcy, but opted against it because his tax liabilities would not be discharged. Regardless of Robert's disinclination to file for bankruptcy, we believe the district court's debt allocation is equitable given Robert's dissipation of assets and violation of the court order.

Finally, Laura asserts she should receive Robert's entire IRA. Because Laura did not cross-appeal, her request is not properly before us. *See In re Marriage of Novak*, 220 N.W.2d 592, 598 (Iowa 1974) (holding "principle of not allowing greater relief to appellee not appealing" applies to equity actions including dissolution proceedings).

### B. Is Laura Entitled to Appellate Attorney Fees?

Laura also requests $3800 in appellate attorney fees. Such an award is not a matter of right, but lies within our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We consider the needs of the party requesting fees, the other party's ability to pay, and the merits of the appeal. *Id.*

While we affirm the district court's distribution, we do not believe Robert's challenges were frivolous. Moreover, given his apportionment of debt and Laura's retention of assets, we believe she is capable of paying her own appellate attorney fees. We therefore deny her request.

**AFFIRMED.**