

IN THE COURT OF APPEALS OF IOWA

No. 1-401 / 10-2026

Filed July 13, 2011

**IN RE THE MARRIAGE OF JAMES EARL HYMBAUGH
AND MITZI JO HYMBAUGH**

Upon the Petition of

MITZI JO HYMBAUGH,
Petitioner-Appellee,

And Concerning

JAMES EARL HYMBAUGH,
Respondent-Appellant.

Appeal from the Iowa District Court for Ringgold County, Gary D. Kimes and David L. Christensen, Judges.

Appeal from the economic provisions of a decree of dissolution of marriage. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Leanne M. Striegel-Baker of Booth Law Firm, Osceola, for appellant.

Carol A. Clark of Clark Law Office, Lamoni, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

SACKETT, C.J.

James Earl Hymbaugh appeals from the decree dissolving his twenty-five year marriage to Mitzi Jo Hymbaugh. He contends (1) the district court failed to value the parties' assets and debts correctly, (2) the property division made by the district court was inequitable, and (3) the district court abused its discretion in awarding Mitzi trial attorney fees. We affirm in part, reverse in part, and remand.

SCOPE OF REVIEW. Our scope of review in appeals from dissolution decrees is de novo. Iowa R. App. P. 6.907; *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). We give weight to the fact-findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. 6.904(3)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Parties to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Rebouche*, 587 N.W.2d 795, 801 (Iowa Ct. App. 1998).

BACKGROUND AND PROCEEDINGS. Mitzi, born in 1960, and James, born in 1954, were married in November of 1985. Their only child born to the marriage is an adult as are two children from James's first marriage who lived with Mitzi and James for part of their childhood. The parties have accumulated substantial assets and substantial debt. Mitzi worked at the Ringgold County Hospital in the department of human resources during the marriage and was still so employed at the time of the dissolution hearing. James is the owner of and

employed by Hymbaugh Construction Company, a company he owned at the time of the marriage.

The parties separated in June of 2009. Mitzi filed a petition seeking dissolution of the marriage on August 14, 2009. After several continuances and discovery disputes the dissolution action came on for hearing before the Honorable Gary Kimes on September 23 and 24 of 2010. There was a two-day hearing where it was revealed the parties had retirement accounts, substantial real estate and businesses in various locations and considerable personal property including bank accounts. They also had substantial debt, federal income tax deficiencies, as well as several pending law suits and obligations for attorney fees.

At the close of the evidence Judge Kimes made oral findings as to distribution of the property and ordered a decree be prepared by Mitzi's attorney in accordance with those findings. The findings recognized the parties disputed the extent of their property, as well as property values and debt, but failed in most cases to identify the property, give the property and businesses a value, determine the amount of the debt, or indicate the value of the equities distributed to each party. Among other things the court (1) ordered James to pay an Internal Revenue Service lien and other deficiencies including amounts due under a 2008 tax return, (2) accepted the values on Mitzi's financial statement for real estate without specifying the date of the statement and the values used on the financial statement, (3) gave all real estate to James but did not describe the real estate, (4) granted a lien of \$185,000 to Mitzi on all real estate but did not set forth how

the amount of the lien was determined, and (5) made no finding of the ultimate value of the equities assigned to each party.

The district court further provided that a decree be prepared by Mitzi's attorney and it should be approved by both attorneys as to form and content, but the court told the attorneys, "You don't need to run it by your respective clients." There was calendar entry that noted, "Decree as per Record by October 11th". There followed several filings by Mitzi's attorney, noting she had prepared and sent a copy of several decrees and two with changes to James's attorney.

The matter came before Honorable David Christensen for what was termed a compliance hearing¹ on October 8, 2010. At the time of the hearing Judge Christensen signed a Decree of Dissolution of Marriage, finding the case had come before the court on September 23 and 24, 2010, and the court having examined the record, file, and hearing testimony found certain things. The decree was approved as to form but not content by both attorneys. We assume the decree was prepared by Mitzi's attorney but the record is not clear on this point. The decree (1) provided the court accepted tax assessment values from Mitzi's financial statement without specifying the values, (2) provided James should have all the real estate without describing it,² (3) gave Mitzi a cash settlement of \$185,000 to be a lien on all land, without explaining how the amount of the settlement was reached, (4) gave the parties the personal property in their possession and ordered that they assume the indebtedness thereon

¹ It appeared the hearing sought approval of one of Mitzi's attorney's proposed decrees.

² Iowa Code section 598.21(1) (2009), provides:

Upon every judgment of . . . dissolution . . . the court shall divide the property of the parties and transfer the title of property

without defining or valuing the property or debt, (5) ordered James to pay the Internal Revenue Service any unpaid taxes for 2005 and 2008 and all credit card debt except a Commerce Bank card found to be Mitzi's, (6) gave James all of his business entities and their debts—neither of which was defined. James was ordered to pay \$7500 of Mitzi's attorney fees.³

VALUE OF ASSETS AND LIABILITIES. James contends the division of assets was inequitable and the district court did not properly value the parties' property and consider the parties' debt. He argued the court used the tax-assessment value of real property that did not include mortgage debt, and the securities were not fairly and equitably divided. He also contends the court abused its discretion in awarding attorney fees to Mitzi because both parties delayed the trial with discovery disputes and continuances and Mitzi's income on their respective 2009 income tax returns was higher than his. He also contends the district court, while finding Mitzi was involved in the businesses, did not value the business assets and did not assess her with any business debt or Internal Revenue Service deficiencies. He further contends the court failed to address Mitzi's hiding of assets, dissipation of assets, and transferring assets to her son.

James contends Mitzi's cash payment should be no more than \$27,464.50. And while he attempted in his appellate brief to presents numbers to

³ Neither party objected to the fact the judge signing the decree did not hear the case and we were told at oral arguments that Judge Kimes agreed to this procedure. Because the parties agreed to Judge Christensen signing the decree and we are modifying and remanding on another basis, we do not address whether a decree signed by a judge who did not hear the evidence or review a transcript of the evidence should be set aside. However our failure to address the issue should not be construed as our approval of such a process.

justify this demand—what is presented is not clear and appears to contain error. Mitzi makes no attempt in her brief to set forth numbers showing how the district court arrive at its conclusion, contending only that the district court's division is equitable and reciting some the disagreements the parties have as to identity of property and valuation of the same.

Iowa is an equitable division state. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). An equitable division does not necessarily mean an equal division of each asset. *Id.* Rather, the issue is what is equitable under the circumstances. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). 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 Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa Ct. App. 1993). The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(5) (2009). *See In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). While an equal division of assets accumulated during the marriage is frequently considered fair, it is not demanded. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007).

This is a marriage of over twenty years. Neither party contends he or she brought assets of value to the marriage, nor does either party claim there are assets that were inherited or gifted. Therefore, it appears that a nearly equal division of the assets and liabilities would be equitable. *See id.* Yet any attempt

to determine whether such a result was reached here is rendered impossible by (1) the parties' disagreement as to their property and debt and their failure to provide clear financial information, and (2) by the district court's failure to show the values it established in dividing assets and liabilities,⁴ and (3) its failure to set forth the net equities its decree distributed to each party. We underscore the importance of assigning values and setting forth the net property distributions in a dissolution decree to enable us to assess whether an equitable division of property was made and to aid the parties in better understanding their respective property awards, which would, in some cases, dispense with the need for an appeal.

We recognize that our review is de novo. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). However in our de novo review we make it clear that we give weight to the district court's findings especially with respect to the credibility of witnesses. *Id.* Furthermore, we defer to the district court when valuations are accompanied with supporting credibility findings or corroborating evidence. *See In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999). When the district court denies us these tools, which we have the right to expect, it is difficult if not impossible for us to determine whether there is an equitable distribution in a dissolution case—particularly as here where the parties failed to agree on the property owned and elected not to have appraisals but gave their own differing opinions as to values of assets and the amount of debts.

⁴ The court established values for two vehicles, furniture and appliances in Mitzi's possession, and several securities. However these values in isolation give us little guidance.

James contends the division of the parties' property resulted in Mitzi receiving \$549,189.04 and his receiving \$137,252.04, and he sets out two statements putting numbers to the distribution. He captions one statement as "Division According to Decree" and the second "Division According to Trial Testimony" ("trial"). In some cases the trial shows higher values for property and other times shows lower values. The first thing we glean from the two statements is that James is attempting to show the district court failed to consider there were some \$375,000 in mortgages on the real estate he received, and he contends this is not equitable. Mitzi contends the division is equitable and goes through an extensive discussion of the real estate and the various disputed values and disputed encumbrances. James also contends the personal property given to Mitzi was undervalued, she should share the business debt, and she received a greater share of other assets—including the exclusive right to her retirement accounts. Again Mitzi contends the division is equitable, and she points out that financial statements given to various financial institutions from 2004 to 2008 showed a net worth of between approximately \$1,200,000 and \$1,400,000. James contends this is understandable because it reflects there has been a substantial decrease in value of residential and business real estate in the past several years.

James contends the district court abused its discretion in ordering him to pay \$7500 of Mitzi's attorney fees, and in doing so, noted that it considered the discovery disputes and difficulty in getting the case to trial. He contends delays in reaching trial were the result of delays on the part of each party, the discovery

disputes were mutual, and neither party was more successful than the other. He also points out that Mitzi is gainfully employed and that he earns \$1390 bi-weekly, while he had a loss of \$28,189 in 2009.

Mitzi contends the district court did not err in awarding attorney fees to her, noting that her fees increased because James did not follow an injunction or comply with discovery requests and the district court ordered him to comply and earlier awarded Mitzi \$300 in attorney fees. Mitzi also contends she should have appellate attorney fees.

Iowa trial courts have considerable discretion in awarding attorney fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). To overturn an award the complaining party must show the trial court abused its discretion. *Id.* Awards of attorney fees must be fair and reasonable in amount, *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. *In re Marriage of Lattig*, 318 N.W.2d 811, 817 (Iowa Ct. App. 1982).

RESOLUTION. With dispute as to values, encumbrances, and property owned, and no specific factual findings by the district court to identify and value property and encumbrances and to guide us as to witness credibility, we reverse the decree entered by Judge Christensen. We affirm Judge Kimes's oral ruling dissolving the marriage but reverse it in all other respects, including the award of attorney fees to Mitzi. We have no choice but to remand this case to Judge Kimes to make the findings he failed to make and to enter his own decree. We remand to Judge Kimes to make the findings he failed to make and, after doing

so, to determine a nearly equal division of the parties' equities as well as a determination of what trial attorney fees if any should be fixed here. We award no appellate attorney fees. Costs of the appeal are divided equally between the parties. We do not retain jurisdiction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.