

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JACK DARREL MOSHER AND
CYNTHIA JO MOSHER n/k/a CYNTHIA JO BRYANT

FILED

JUN 4 1986

CLERK SUPREME COURT

193

Upon the Petition of)

JACK DARREL MOSHER,)

Filed June 4, 1986

Petitioner-Appellee,)

And Concerning)

CYNTHIA JO MOSHER,)

6-57
84-1989

Respondent-Appellant.)

Appeal from the Iowa District Court for Polk County (No. 46-27310) -
M. C. Herrick, Judge.

Respondent wife appeals from the judgment and decree dissolving the
parties' marriage. **AFFIRMED.**

Victoria L. Herring, Des Moines, for respondent-appellant.

Robert H. Laden of Hyland, Laden & Pearson, P.C., Des Moines, for peti-
tioner-appellee.

Considered en banc. Hayden, J., takes no part.

DONIELSON, J.

Respondent wife appeals from the judgment and decree dissolving the parties' marriage. Respondent asserts: (1) that the alleged total lack of independent judgment by the trial court judge prevented her from receiving due process, a fair hearing, and an equitable decision in the case; (2) that marital property was not equitably distributed between the parties due to the fact that the petitioner husband failed to establish clear, sole title to jointly-held property; and (3) that attorney's fees be awarded on appeal.

Respondent, Cynthia Jo Mosher, age 28, and petitioner, Jack Darrel Mosher, met and began dating in 1980. Together they purchased a house in July 1981 and were cohabitants there through their marriage in March 1982 and until their eventual separation in May 1984. No children were born to the couple. Prior to their marriage, they pooled their financial resources and shared joint checking and savings accounts. Jack entered the relationship with more property than did Cynthia, including a substantial interest in real estate with an estimated net value at the time of trial of over \$27,000. Jack lost his left eye in 1980 during a work-related accident. During 1982 and 1983 Jack's income from earned wages and worker's compensation payments was \$70,000, while Cynthia's was \$35,000. At trial, Jack was employed as a diesel mechanic while Cynthia was earning \$6.68 per hour as a night janitor. Prior to meeting and marrying the petitioner, Cynthia lived in an apartment, did not own an automobile, and owned few possessions except for some antique furniture and certain items of Indian jewelry.

The trial court judge requested that both parties submit proposed findings and conclusions at the close of the two-day trial, which both counsel did. The presiding judge then used the petitioner's findings as his own and issued a ruling which was virtually identical to the proposed findings submitted by petitioner's

counsel. The trial court awarded Jack two cars, his motorcycle, a \$5,000 treasury bill, real estate acquired after meeting but before marrying the respondent, and an IRA account valued at \$1,500. The court awarded Cynthia a truck, the antiques and jewelry she had prior to the marriage, and any money which remained in the joint checking and savings accounts. The decree essentially returned the parties to the status quo which existed prior to the marriage, with neither party receiving any alimony.

I.

On February 22, 1985, the parties filed a document entitled "Memorandum of Agreement as to the Contents of Appendix" which indicated counsel agreed to the transcript pages and exhibits to be included in the appendix. On April 4, 1985, Cynthia's counsel was granted an extension to file her brief until April 22, 1985. On April 26, 1985, Cynthia's counsel was granted another extension to file her brief until May 20, 1985. Cynthia's counsel sought a further extension. On May 21, 1985, Jack's counsel resisted this motion on the ground that the proposed findings of fact and conclusions of law Cynthia's counsel sought to have included with the appeal were not part of the record. Cynthia's counsel's response on May 23, 1985, was that such documents were part of the record. On June 25, 1985, Cynthia's counsel was granted a final extension to file her brief until July 15, 1985.

On July 15, 1985, Cynthia's counsel filed an appellate brief with Jack's proposed findings of fact and conclusions of law and Cynthia's proposed decree attached to it. Neither of these documents were authorized to be submitted in this appeal.

On September 30, 1985, Jack's counsel filed a motion to dismiss Cynthia's counsel's appeal, pursuant to Iowa Rule of Appellate Procedure 19, on the grounds that Cynthia's counsel failed to observe Iowa Rules of Appellate Procedure

10 and 14 by improperly making proposed findings a part of the record without the permission of either the trial court or Jack's counsel. On October 31, 1985, Jack's motion to dismiss and the Cynthia's application for attorney's fees were ordered submitted with the appeal. Cynthia's reply brief, filed on October 17, 1985, resisted Jack's motion to dismiss.

While we reserve comment on the propriety of attaching documents to an appellate brief which are not part of the record on appeal and are not authorized to be submitted by an appellate court, we, nevertheless, decide not to dismiss the appeal under Iowa Rule of Appellate Procedure 19 because such attached documents did not in any manner influence our disposition of this appeal. See Iowa R. Civ. P. 179 comment.

II.

Cynthia claims that the trial court's adoption of all of one party's proposed findings of fact and conclusions of law constitutes an abuse of discretion. We disagree.

Cynthia directs us to Jahraus v. Bergquist, 494 P.2d 110, 111 (Colo. Ct. App. 1971); Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 435 (Iowa 1984); and In re Marriage of West, 661 P.2d 1289, 1290 (Mont. 1983). None of these cases, nor any other authority we have found, indicates that the practice employed by the trial court is an abuse of discretion. While appellate courts discourage the verbatim adoption of findings and conclusions presented by one of the parties, we can appreciate occasions when to do so is neither unreasonable nor unusual. We cannot hold the trial court's actions in this instance constituted lack of independent judgment or an abuse of discretion. Based on our finding that sufficient evidence exists to support the trial court, we do not disturb that decision.

III.

Cynthia contests the property division basically on the ground that because

she earned one-third of the parties' income, she should receive one-third of the parties' assets acquired during the marriage. Consequently, she seeks an additional \$12,000. This argument misses the mark because it ignores the financial situation of the parties before the marriage.

Before addressing Cynthia's contentions regarding the property division, we shall briefly review the salient features of division of marital property in Iowa. Iowa Code section 598.21(1) (1985) does not statutorily sanction a percentage division of property. In re Marriage of Bornstein, 359 N.W.2d 500, 503 (Iowa Ct. App. 1984). Rather, the ultimate issue is whether the distribution is equitable under the circumstances. In re Marriage of Callenius, 309 N.W.2d 510, 514 (Iowa 1981).

Jack brought the following property into the marriage: real estate with a net value of approximately \$27,000 (Greenwood property), a motorcycle, a car, a life insurance policy worth \$2,000, and a bank account. Jack also paid approximately \$4,000 as a down payment to purchase their home (Guthrie property) which is worth \$35,000.

Cynthia brought furniture valued at \$2,000, certain items of Indian jewelry with an undisclosed value, and an undisclosed amount of cash into the marriage. During the parties' marriage, Jack earned nearly twice as much as Cynthia, which includes his worker's compensation payments of \$36,000.

Because of the property the parties brought into the marriage, the court awarded Jack the Greenwood property, the El Camino truck, and the motorcycle; and Cynthia certain items of jewelry and furniture. The following assets can be fairly considered as acquired by the parties during their marriage: Guthrie property worth \$1,931, an individual retirement account worth \$1,500, a treasury bill worth \$4,100, a car worth \$800, a truck worth \$300, an account worth \$400, two rings worth \$2,500, and Indian jewelry worth \$3,000. Jack was awarded

property worth \$8,331, and Cynthia was awarded property worth \$3,200. Even if Cynthia is credited with paying \$1,830 towards the Greenwood property, which represents *one-third of the \$5,500 paid*, her award would be accordingly reduced in value to \$1,370. Although the whereabouts of the Indian jewelry acquired during the marriage worth \$3,000 was disputed, the trial court found Cynthia had possession of such jewelry. Thus, Cynthia received property worth \$4,370 (\$1,370 reduced value + \$3,000 jewelry), which equals *one-third of the property acquired during the marriage*. She was also found to have had possession of two diamond rings valued at \$2,500. After considering the parties' earning capacity, even though Cynthia's income may decrease due to a recent wage cut, and that the parties lived together prior to their marriage, we find this division is equitable.

IV.

Cynthia seeks appellate attorney fees. The primary consideration in awarding attorney fees in a dissolution proceeding is the resources of the parties. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa Ct. App. 1982). The court considers the resources of the party requesting such fees, the ability of the other party to pay, and whether the requesting party was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981).

Given the outcome of this appeal taken by Cynthia and the parties' assets, we do not award attorney fees to Cynthia.

AFFIRMED.

All judges concur, except Sackett and Schlegel, JJ., who specially concur.

This is not the first time this court has heard the complaint Judge Herrick adopted one party's proposed decree in its entirety and in doing so abused his discretion.

In Knoblin v. RDR Motels, Inc., 347 N.W.2d 430, 435 (Iowa 1984) the Iowa Supreme Court said:

Detailed written decisions are often required by court rule, particularly when a judge tries an issue of fact without a jury. See e.g., Fed.R.Civ.P. 52(a); Iowa R.Civ.P. 179(a); Mass.R.Civ.P. 52(a). The purpose of such rules is threefold: (1) the quality of the judge's decision-making process is enhanced by requiring simultaneous articulation of the judge's underlying reasoning; (2) the parties receive assurance that their contentions have been fully and fairly considered; and (3) appellate courts can readily ascertain the specific factual and legal bases for the court's decision. See Roberts v. Ross, 344 F.2d 747, 751-52 (3d Cir. 1965); Cormier v. Carty, 381 Mass. 234, 236, 408 N.E.2d 860, 862-63 (1980). These purposes may not adequately be served to the extent that the trial court delegates to counsel its own responsibility to scrutinize the record, select apt principles of law, and fully articulate the bases for a sound, fair decision.

We believe the better practice is that spelled out in Bradley v. Maryland Casualty Co.:

We venture to suggest that if, because of prevailing custom, or pressure of work, or a case's technical nature, or for other reasons, counsel must be asked to assist in the preparation of findings and conclusions, it is better practice to make this request at or soon after the submission of the case and prior to decision and to make it of both sides. 5 Moore's Federal Practice (2d ed. 1966), par. 52.06(3), page 2665. Then the court may pick and choose and temper and select those portions which better fit its own concept of the case. (emphasis added).

The practice of adopting all of one party's proposed decree suggests to the other party the trial court has abdicated its role of fact-finder as well as decision-maker.

While Judge Herrick did request decrees from both sides, I determine the verbatim adoption of petitioner's decree should be criticized. See U.S. v. El Paso Natural Gas Co., 376 U.S. 651, 656-57, 84 S.Ct. 1044, 1047, 12 L.Ed.2d 12, 17 (1964).

Schlegel, J., joins this dissent.