



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF MARY ALICE NORDBY
AND ROBERT GENE NORDBY

191

Upon the Petition of	)	
MARY ALICE NORDBY,	)	
Petitioner-Appellee,	)	Filed October 28, 1987
And Concerning	)	
ROBERT GENE NORDBY,	)	<u>7-202</u>
Respondent-Appellant.	)	86-903

Appeal from the Iowa District Court for Harrison County (No. DD-950),
Leo Connolly, Judge.

Respondent husband appeals from a substituted dissolution decree which changed the award of the marital residence from the husband to the wife contending that the property distribution of assets and debts ordered by the court was inequitable and that the dissolution decree substituted by the trial court violated the Iowa Rules of Civil Procedure and was therefore invalid. The husband wants attorney fees on appeal. **AFFIRMED IN PART AND REMANDED.**

Don M. Peterson, Council Bluffs, for respondent-appellant.

Kathleen Kohorst and Robert Kohorst of Louis, Moore, Kohorst, Louis.
Murtaugh & Kohorst, Harlan, for petitioner-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ. Snell, J.,
takes no part.

PER CURIAM**192**

The parties to this appeal, Mary and Robert Nordby, were granted a dissolution of their marriage by the District Court for Harrison County on April 15, 1986. Following Mary's submission of posttrial motions, the district court filed a substituted decree which granted these motions "to the extent that this [substituted] Decree modifies the original Decree" The substituted decree substantially altered the division of marital property made by the original decree. Robert brings this appeal in order to challenge the substituted property division. Our review is de novo. Iowa R. App. P. 4. Although we are not bound by the district court's fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I.

Robert confronts us initially with an issue of civil procedure. He maintains the substituted decree was obtained in violation of our rules of civil procedure and is therefore invalid. Mary's posttrial motion sought relief under rules of civil procedure 179(b) and 252. The former rule provides for the enlargement or amendment of a trial court's fact findings; the latter rule provides for the vacation or modification of judgments. Robert claims Mary's motion was untimely under rule 179(b). In addition, he claims no petition was filed or notice given under rule 252 and that such failure violated his right to due process as well as the rule.

A motion under rule 179(b) is timely if filed within ten days of the filing of the challenged decision. Doland v. Boone County, 376 N.W.2d 870, 876 (Iowa 1985); Iowa R. Civ. P. 179(b), 244, 247. Iowa Rule of Civil Procedure 82(d) provides, in pertinent part, that whenever a rule of civil procedure "require[s] a filing with the district court or its clerk within a certain time, the time requirement shall be tolled when service is made, provided the actual filing

is done within a reasonable time thereafter." In the present case, the original decree was filed on April 15; service of Mary's motions was made via mail on April 25; the motions were filed on April 28. We think this procedure complied fully with the requirements of rule 179(b). See Budde v. City Dev. Bd., 276 N.W.2d 846, 849 (Iowa 1979) (seven-day period between mailing service of motions and filing of same held "reasonable" within rule 82(d)).

Rule 179(b), by its terms, provides that if a district court enlarges or amends its findings "the judgment or decree [may be] modified accordingly or a different judgment or decree substituted." Accordingly, this rule authorized the district court to provide relief which, given the posture of this case, was substantially similar to that available, and requested, under rule 252. As a result, any procedural shortcomings in connection with the latter rule were, if error, harmless. We accordingly reject Robert's procedural arguments.

II.

Robert maintains the district court ordered an inequitable property division. In reviewing a district court's division of marital property, we are guided by the criteria set out in Iowa Code section 598.21(1) (1985). We reaffirm our rejection of any rule based upon a percentage division of the assets. In re Marriage of Lattig, 318 N.W.2d 811, 814 (Iowa App. 1982). We are not bound to achieve a precisely equal division in awards of marital property. In re Marriage of Anderson, 243 N.W.2d 562, 564 (Iowa 1976). In general, the division of property is based upon each marital partner's right to a just and equitable share of the property accumulated as a result of the efforts of both parties. In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1976). The controlling mandate is that courts achieve an equitable and just award under the circumstances. In re Marriage of Wallace, 315 N.W.2d 827, 831 (Iowa App. 1981).

The district court noted in its substituted decree that "the parties have incurred certain debts and liabilities during the marriage which should be divided between the parties." The substituted decree contains, however, no such division, nor does it contain an itemization of these debts and liabilities. We do not believe the present record is sufficient to support an attempt by this court to equitably assess and distribute these debts and liabilities. Accordingly, this case should be, and is, remanded to the district court with directions to make findings as to the parties' marital debts and liabilities. These debts and liabilities should then be equitably distributed by the district court. If, in light of this distribution, the district court believes a realignment of marital assets is appropriate, that court shall do so. In this vein, the district court shall bear in mind that the marital residence, awarded by the substituted decree to Mary, has subsequently been sold and the proceeds, pursuant to this court's order, have been placed in escrow. The district court shall hear all evidence it deems appropriate for the resolution of this matter. See In re Marriage of Hitchcock, 265 N.W.2d 599, 606-07 (Iowa 1978).

Each party shall be responsible for his or her own attorney's fees connected with this appeal. Costs are assessed one-half to each party.

AFFIRMED IN PART AND REMANDED.