

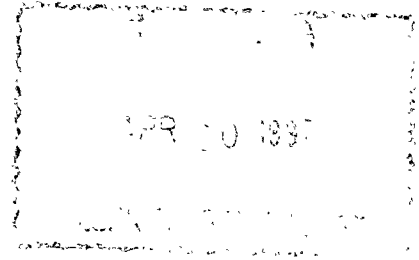
IN THE COURT OF APPEALS OF IOWA

No. 7-057 / 95-1883

**IN RE THE MARRIAGE OF CYNTHIA A. ESSEX
AND WILLIAM J. ESSEX**

Upon the Petition of
CYNTHIA A. ESSEX,
Petitioner-Appellant,

And Concerning
WILLIAM J. ESSEX,
Respondent-Appellee.



Appeal from the Iowa District Court for Polk County, Robert J. Blink , Judge.

Petitioner appeals from the entry of the dissolution decree. **AFFIRMED.**

Robert D. Hall, Ankeny, for appellant.

Kolleen K. Samek, Des Moines, for appellee.

Heard by Habhab, C.J., and Huitink and Streit, JJ.

STREIT, J.

Petitioner appeals from the entry of the dissolution decree. She contends the district court erred in its division of the parties' marital property and failed to address temporary alimony that was not paid by respondent. Respondent requests appellate attorney fees and costs.

Cynthia and William Essex were married on August 7, 1987. Cynthia has two children from a previous marriage, and both children lived with the parties. Cynthia and William brought assets into the marriage valued at approximately \$76,600 and \$76,000 respectively. Among Cynthia's assets were the marital home and her beauty salon. William brought a trucking business, Gatorland Express ("Gatorland"), into the marriage.

During the marriage, Cynthia either retained all of the assets that she brought into the marriage, or they were traded for assets of equal or greater value. The assets that Bill brought into the marriage were, in large part, converted to cash and utilized for marital expenses during the marriage.

In February 1995, Cynthia filed a dissolution petition. The court ordered William to pay Cynthia \$200 per month as temporary alimony (because Cynthia was paying their insurance premiums) commencing March 13, 1995. In the August 1995 trial, Cynthia was forty-four years old and William was fifty-four. Cynthia was operating her beauty salon, and William ran a trucking business, but had not worked

the previous months due to depression. In 1994, Cynthia had a net income of \$26,848.93, and William had a net income of \$22,665.78. The only disputed issues involved division of the marital assets, specifically the valuation of Gatorland.

Cynthia testified Gatorland had a premarital value of \$23,000 based on the value of the tractor and trailer owned by the business prior to marriage.¹ She also argued its present net value was \$60,750, absent any “blue sky” value or value of a new truck delivered the day before trial. She presented evidence of a loan application dated May 1, 1995, in which William had represented the value of Gatorland at \$150,000.

William claimed Gatorland was worth \$25,000 at the time of the marriage based on the value of the tractor and trailer worth \$15,000 and \$10,000 respectively. At trial he claimed Gatorland had a present net value of \$23,096. William also testified he repaid the \$13,000 loan by making deposits into the parties’ personal account from the Gatorland account. He further testified Cynthia had never claimed he still owed her the money until the dissolution proceedings commenced.

On October 2, 1995, the court entered the dissolution decree. The court determined Cynthia has assigned Gatorland a value of \$16,000 and William had assigned it a value of \$15,000. The court averaged the parties’ figures, and determined Gatorland’s premarital value was \$15,500. The court found Cynthia’s current valuations not credible, and accepted William’s valuation of \$23,095. The premarital

¹ Cynthia claims the tractor was worth \$7000 (\$30,000 less \$10,000 loan from Hawkeye Bank, less \$13,000 loan from her). She claims the trailer was worth \$16,000.

value was subtracted leaving \$7595 to be divided between the parties. It also determined William repaid the \$13,000 loan during the marriage. Based upon these valuations, it determined the total value of marital property was \$79,383.50, of which William received property amounting to \$16,796. After equal division, the court ordered Cynthia to pay William \$22,895.75.

Cynthia appeals. She contends the court erred in (1) its valuations of Gatorland, (2) its determination that William repaid the \$13,000 loan, and (3) its failure to address the issue of temporary alimony. She urges the property division should be adjusted to reflect the total value of the marital assets was \$125,186.50, and William received property valued at \$62,599. She contends William should be ordered to pay her \$5.75 (the difference of $\$125,186.50/2 - \$62,599$) and \$600 in unpaid temporary alimony. Alternatively, she requests the court adopt her proposed distribution of property submitted at trial.

I. Standard of Review In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Property Distribution. Property which a party brings into the marriage is a factor to be considering in making an equitable division. Iowa Code § 598.21(1)(b) (1997); *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996). Property brought into a marriage by one party need not necessarily be divided. *In re Marriage of Johnson*, 499 N.W.2d 326, 328 (Iowa App. 1993). Premarital equity may be set off to the party bringing the property into the marriage at time of dissolution. *See In re Marriage of Lattig*, 318 N.W.2d 811, 815-16 (Iowa App. 1982) The partners to a 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 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. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

At the time of the marriage, William owned Gatorland. The equity in Gatorland at the time of the parties' marriage should be set off to William. Cynthia argues the trial court incorrectly found the premarital value of the trucking business owned by William was \$15,500 by averaging the values contended by the parties. Further, she claims the value of the trucking business at the time of dissolution was \$60,750,

excluding any “blue sky” value and the value of a new truck William had taken delivery of the day before trial.

We recognize that the findings of the trial court on the credibility of witnesses are given considerable weight in an equity case. When the trial court's valuation is well within the permissible range of evidence we generally are not inclined to disturb it. *In re Marriage of Hoak*, 364 N.W.2d 185,192-3 (Iowa 1985). The valuation of a family business is difficult. *See Dennis*, 467 N.W.2d at 808. Because of the difficulty of the task of valuation, the law provides much leeway to the trial court. *Id.* Neither party provided expert witness testimony regarding the value of the business. The court found based on the testimony and exhibits provided the premarital equity in Gatorland was \$15,500. It also found Bill’s testimony, as to the current value of Gatorland, to be credible and the current net value is \$23,096.

We affirm the trial court’s premarital and current valuation of William’s trucking business.

III. The \$13,000 Loan. Prior to their marriage, Cynthia loaned William \$13,000 to purchase a truck for his business. The trial court found William has since repaid those funds to Cynthia. The parties had been married eight years at the time of the dissolution. Most of William’s premarital assets had been liquidated and used for marital expenses. Cynthia’s two children from her previous marriage lived with the parties. William helped support these children. Cynthia was not collecting any child

support from their father. William also testified he made deposits to the joint marital account and wrote "loan payment" on the deposit slips. Although there does not exist any specific evidence the loan has been repaid, equity compels us to find Cynthia has received over the years of marriage \$13,000 from William for repayment of the loan.

IV. Temporary Alimony. The court did not address the issue of the payment or nonpayment of temporary alimony. Cynthia claims William still owes her three months in back alimony. The court ordered William to pay \$200 per month as temporary alimony to Cynthia for the payment of insurance premiums. Temporary orders entered pursuant to Iowa Code section 598.11 are final judgments and are appealable as a matter of right. *In re Marriage of Campbell*, 451 N.W.2d 192, 195 (Iowa App.1989); *In re Marriage of Springer*, 538 N.W.2d 897, 900 (Iowa App. 1995). Although it may have been better for the trial court to address this issue in its final order, failure to do so leaves the parties in the same position they were in prior to the final decree. The final judgments for temporary alimony will not now be disturbed.

V. Attorney Fees. William requests this court direct Cynthia to pay his attorney fees and costs on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. *In re Marriage of Kern*, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making

the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa App. 1981).

We find the parties shall pay their own attorney fees on appeal and court costs are taxed to the appellee.

AFFIRMED.