

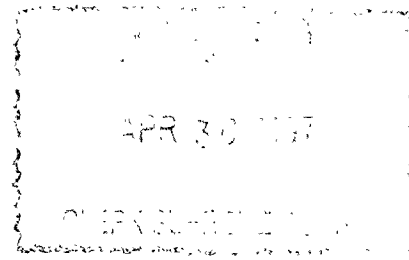
IN THE COURT OF APPEALS OF IOWA

No. 7-009 / 95-1842

**IN RE THE MARRIAGE OF MILDA MARY HALL
AND JAMES LEE HALL**

Upon the Petition of
MILDA MARY HALL,
Petitioner-Appellee,

And Concerning
JAMES LEE HALL,
Respondent-Appellant.



Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Respondent appeals from the entry of the dissolution decree. He contends the district court erred in (1) dividing the marital property, and (2) failing to change the parties' child's last name. **AFFIRMED.**

Thomas P. Schlapkohl, Des Moines, for appellant

Chris Hunziker and Margaret M. Rhodes of Payer, Hunziker & Oeth, Ames,
for appellee.

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

HUITINK, J.

Respondent James Lee Hall appeals the property division set forth in the decree dissolving his marriage to the petitioner Milda Mary Hall. He also challenges the trial court's denial of his request to change the last name of the parties' minor child to Hall. We affirm.

I. Background Facts and Proceedings.

James, age forty-five, and Milda, age forty-one, were married in July 1992. Both parties had been previously married and each has a child from other relationships. Milda's daughter Laura, age nineteen, lives with Milda, and James' son Jonathan, age five, lives with his mother. The parties have one child together, Brandon, age three. Brandon suffers from a rare skin disease and requires regular medical care. His future prognosis is unknown.

James has an associate degree from Des Moines Area Community College and a bachelor's degree from Iowa State University. He has been employed full-time with John Deere in Ankeny, Iowa, since 1988 and is a certified welder. James' average net monthly income is approximately \$2339 after deducting support payments for his son Jonathan.

Milda is a registered nurse and is pursuing a bachelor's degree in nursing at Drake University. She has been employed at Mary Greeley Medical Center in Ames,

Iowa, since 1986 and currently is the director of critical care services. Her net monthly income is approximately \$2496.

When the parties married, they agreed to sell James' home in Clive and deposit the net sale proceeds of approximately \$20,500 in the parties' joint bank account. A portion of these funds was applied to various marital debts. James moved into Milda's home and she sold most of her household items and furniture in order to make room for James' furnishings. She received approximately \$290 from the sale of these items.

The parties separated in July 1993 and Milda filed a petition for divorce in September 1993. Milda withdrew \$4200 from the parties' joint savings account at that time and James withdrew \$1600. These proceeds were used by both parties to pay living expenses. During their brief cohabitation, Milda deposited all of her payroll checks into the parties' joint checking account while James deposited a portion of his paychecks. The parties applied these monies to the payment of family living expenses. James also relied on the joint account for funds to operate his lawn care and snow removal business.

Milda was pregnant with Brandon at the time of the parties' separation. After he was born, James requested paternity testing. In June or July of 1995, the parties received the test results confirming James as Brandon's biological father. After

paternity was established, James began to see his son on a regular basis for short periods of time.

The parties agreed to joint custody of Brandon with Milda serving as the primary physical caretaker. They also agreed on a visitation schedule for James. The court attributed a gross annual income of \$47,629 to James and included bonus income for the years 1995 and 1996. James was ordered to pay child support in the amount of 19.7 percent of his net monthly income. The court denied James' request that Brandon's name be changed from "Mullesch" to "Hall."

As part of the property division, James sought a \$27,000 judgment against Milda to compensate for the significant assets he brought into the marriage. However, the court declined to award either party a judgment for property division purposes. The court cited, among other factors, the marital funds allocated to James' efforts to obtain custody of Jonathan and also to his lawn care and snow removal business, as grounds for denying his request.

The parties agreed Milda would retain the home in Ames. The court awarded James several enumerated items of personal property and household goods. All other property was allocated to the party currently in possession of the property. The court noted that most of the wedding gifts were in Milda's possession.

Finally, each party was ordered to pay his or her own attorney fees. The court costs were assigned one-half to each individual.

II. Standard of Review.

Our review of this equitable action is de novo. Iowa R. App. P. 4. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). We are not bound by the district court's findings of fact, but we do give them deference because the district court had the opportunity to view, firsthand, the demeanor of the witnesses when testifying. *Id.*; *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992).

III. Property Division.

James challenges the property division ordered by the trial court arguing that (1) he was not allocated an equitable share of the household furnishings and personal property accumulated during the marriage; (2) he was not awarded all of the items of personal property he owned before the marriage; and (3) he should have received a cash award to compensate for the significant assets he brought into the marriage

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); *see In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983). We reject precise percentage divisions because “[t]he question is always what is an equitable and just

award in a given set of circumstances.” *In re Marriage of Cooper*, 225 N.W.2d 915, 919 (Iowa 1975).

Iowa law does not give credit to a party for the value of the property owned prior to the marriage. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). Instead, the property brought to the marriage by each party is a factor to consider together with the other relevant factors in determining an equitable property division. *Id.*; Iowa Code § 598.21(b) (1995). However, if the marriage is of short duration, the claim of either party to the property owned by the other party is minimal at best. *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa App. 1995).

James contends the district court’s allocation of personal property to the party currently in possession of the property in effect awarded all furniture and household furnishings to Milda. James requests certain items belonging to him before the marriage be returned to him, including a dresser and mirror set, lazy susan, ironing board and iron, spice rack, and a table and chairs. He has also proposed he be awarded the night stands, prints, camper, and camping equipment.

The record indicates Milda sold much of her own household furnishings for a modest sum in order to accommodate James’ furnishings. We also note a pretrial temporary order as well as the decree itself awarded James several items of household and personal property. Under the circumstances, we do not find the district court’s distribution to be inequitable and we accordingly deny James’ request.

James sought a \$27,000 judgment against Milda as reimbursement for the assets he brought into the marriage. He claims entitlement to a cash award in light of the parties' brief cohabitation and also the retirement of \$8500 in debts brought into the marriage by Milda.

We agree James brought more assets into the marriage. However, the record indicates a portion of these resources was dissipated throughout the marriage to finance James' efforts to obtain custody of his son Jonathan and also his lawn-care and snow removal business. In addition, James testified substantial funds were transferred from the parties' joint account to James' father. The joint account was also used to pay for various family expenditures. Furthermore, Milda made her own significant contributions with the earnings she deposited into the parties' joint accounts throughout the marriage. We conclude James has not shown he is entitled to a cash award reflecting the amount of assets he contributed to the marriage.

IV. Surname of the Minor Child.

James asserts the trial court improperly refused to change Brandon's last name to "Hall." He argues Brandon's best interests would be better served by observing the customary practice of a child bearing his father's surname. James also cites to the meaningful relationship that has been established between himself and the child, and the present confusion and delay created relative to Brandon's medical coverage under James' insurance plan at Deere as reasons supporting the name change.

The trial court in a dissolution action has subject matter jurisdiction to consider changing a child's name. *In re Marriage of Gulsvig*, 498 N.W.2d 725, 726 (Iowa 1993). In *Gulsvig*, the court held the presumption that a child bear the surname of his father is outdated and therefore rejected. *Id.* at 729. On appeal James requests that we revisit the holding in *Gulsvig* by reinstating a presumption in favor of the father's surname rebuttable by a best interests of the child standard.

We decline to disturb the holding set forth in *Gulsvig*. Neither parent has the absolute right to name the child. *Id.* We have considered the reasons cited by James in support of the name change and conclude Brandon's best interests will be better served by retaining the name "Mullesch." Brandon currently resides with his mother and his half-sister Laura who also carries the name "Mullesch." Furthermore, he has been receiving medical care under the that name. We agree with the trial court that it is appropriate under the circumstances for Brandon's birth certificate to list his last name as "Mullesch."

IV. Attorney Fees.

Milda has requested appellate attorney fees. An award for attorney fees is not a matter of right but rests with the court's discretion and depends on the parties' respective financial circumstances and ability to pay. *In re Marriage of Eastman*, 538 N.W.2d 874, 877 (Iowa App. 1995). Milda has successfully defended the district court's decision on appeal. We award her \$1000 for appellate attorney fees.

AFFIRMED.