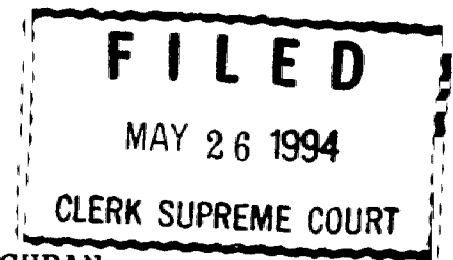


IN THE COURT OF APPEALS OF IOWA

No. 4-144 / 93-754



IN RE THE MARRIAGE OF TERRY COCHRAN AND JOHN J. COCHRAN

Upon the Petition of
TERRY COCHRAN,

Appellee,

And Concerning
JOHN J. COCHRAN,

Appellant.

Appeal from the Iowa District Court for Johnson County,
Kristin L. Hibbs, Judge.

John appeals the district court ruling he had waived
his right to proceeds from Terry's sale of the house in May
1987. **REVERSED AND REMANDED.**

Robert W. Conrad, Knoxville, for appellant.

Robert W. Jansen, Iowa City, for appellee.

Heard by Donielson, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

The marriage of John and Terry Cochran was dissolved in December 1984. The dissolution decree incorporated a stipulation providing Terry was to be awarded the parties' house. The stipulation further provided John was to make weekly payments to Terry, but Terry was to pay him one-half of the net proceeds upon selling the house.

John moved from Iowa and did not remain current in his payments to Terry. In May 1987 she sold the house. However, John did not learn of the sale until the fall of 1987. Later that year he contacted the lawyer who had represented Terry in the dissolution proceedings, Stephen Gerard. Gerard testified John stated he would just let Terry keep any money due under the dissolution decree because of what he had put her through.

In November 1991 John filed an application for rule to show cause why Terry should not be held in contempt for failing to abide by the dissolution decree. The parties subsequently agreed to proceed as a petition for accounting and not a contempt action.

After a hearing the district court found the net proceeds from the sale of the home were \$27,422.35 but, because of John's outstanding liens and missed payments to Terry, he was due \$5672.53 under the dissolution decree. The court found, however, John had taken no steps to collect this money for four years after his discussion with Gerard and determined John had waived his right to the money.

On appeal John contends the trial court erred in determining he waived his right to collect the money and contends he is entitled to an order for accounting and payment of \$5,672.53 plus interest at ten percent from May, 1987.

John's petition for accounting was originally brought as an application for rule to show cause in the original divorce action. Actions for dissolution of marriage are equitable proceedings. Iowa Code § 598.3 (1993). The review in equity cases is de novo. Iowa R. App. P. 4. In equity matters, such as this, it is our responsibility to review the facts, as well as the law, and determine from the credible evidence rights anew on those propositions properly presented, provided the issue has been raised and error, if any preserved in the trial proceedings. While weight will be given to findings of the trial court, this court will not abdicate its function as triers de novo on appeal. In Re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977).

The trial court in the case determined John had given up his right to the proceeds from the sale of the house. The court indicated John knew he had a right to the proceeds and failed to pursue any action until four years following the sale of the home. Based on this failure to act, the court determined John waived his right to the proceeds. We determine John did not waive his right to these proceeds and reverse and remand to the trial court

for entry of judgment consistent with this opinion. We do not retain jurisdiction over this matter.

The trial court found the testimony of Steven Gerard to be particularly persuasive in this case. Gerard testified John told him he had put Terry through enough and was not going to pursue the matter any further. Gerard also then telephoned Terry and indicated the figures dictated the situation "was a wash and was not worth squabbling about." Gerard testified he was not representing either party in this situation and was only acting as an intermediary. However, Gerard did represent Terry in the dissolution proceeding, and it is this court's opinion Gerard should have referred John to another attorney for the handling of this matter. Additionally, John did hire two different attorneys to attempt to handle this matter for him. He also made attempts to contact Terry and discuss this matter with her. However, the evidence indicates Terry was angry with John and was not interested in discussing the matter. Terry's own testimony indicated she did not know if she would pay John the money, even if he demonstrated with proper calculations the money Terry owed John.

Iowa courts have discussed waiver saying, the evidence establishing waiver must be clear, satisfactory, unambiguous, and the intent to waive must be free from doubt. Banker's Trust Co. v. Economy Coal Co., 224 Iowa 36, 276 N.W. 16 (Iowa 1937). It has further been stated generally, to make out a case of implied waiver of

a legal right, there must be a clear, unequivocal and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. O'Connor v. Knights & Ladies of Secur., 178 Iowa 383, 158 N.W. 761 (Iowa 1916).

We find no evidence to show John decisively acted to waive his rights to the proceeds from the sale of the home. To the contrary, he actively made attempts to recover the funds, fully recognizing the funds would be reduced by the amounts he failed to pay under the dissolution order. The order of the trial court is reversed and remanded for entry of judgment consistent with this decision.

REVERSED AND REMANDED.