IN THE SUPREME COURT OF IOWA

NO. 15-0011

BERNARD J. WIHLM AND
PATRICIA M. BALEK

Appellee

vs.

SHIRLEY A. CAMPBELL, individually and as Executor
Of the ESTATE OF JOHN JOSEPH WIHLM, and as Trustee
Of the JOHN JOSEPH WIHLM REVOCABLE TRUST dated April 2,
2012 and PARTIES IN POSSESSION

Appellant

APPEAL FROM CERRO GORDO COUNTY DISTRICT COURT
THE HONORABLE JUDGE DEDRA SCHROEDER

APPELLANT'S BRIEF – FINAL AND REQUEST FOR ORAL ARGUMENT

Michael G. Byrne
WINSTON & BYRNE, P.C.
119 - 2nd St. N.W.
Mason City, Iowa 50401
Telephone: (641) 423-1913
Fax: (641) 423-8998
winstonbyrne@mchsi.com
ATTORNEYS FOR APPELLANT

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TABLE OF AUTHORITIES

Cases:

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

COMES NOW, the Appellant and hereby states that the basis of the subject matter jurisdiction is the direct appeal of a final judgment. Trial on the merits was submitted to the judge on September 24, 2014. On November 7, 2014 Order was rendered on trial and on December 3, 2014 the Order on Motion for Enlarged and Amended Findings of Fact and Conclusions of Law and Modified or Substituted Decree was filed. Notice of Appeal was filed January 2, 2015.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. **The Trial Court erred as a matter of law in applying the burden of proof to a partition defendant to obtain a division in kind.**

Cases:

Harding v. Willie, 458 NW 2d 612, 613 (Iowa App. 1990).

In re: Marriage of Decker, 666 NW 2d 175, 181 (Iowa App. 2003).

In re Marriage of Muelhaupt, 439 NW 2d, 656, 661 (Iowa 1989).

Spies v. Rybil, 160 NW 2d 505, 507 (Iowa 1968.)

II. **The Trial Court erred in finding of fact that the defendant had not met her burden of proof in establishing at trial the equitable and practical**

elements of her proposed division in kind by preponderance of the evidence.

Cases:

Consumer Advocate v. Iowa Utilities Bd, 454 NW2d 883 (Iowa 1990)

III. **The Trial Court failed to properly consider evidence of certified real estate appraisals as sufficient to establish Defendant's burden of proof as more than mere "guesswork" and requirement the "true market value" be determined through sale only.**

Cases:
Iowa Power & Light Co v. Stortenbecker, 334 NW 2d 326, 330 (Iowa 1983).

IV. **That the trial court ordered the witness auctioneer to become the receiver of the property showing his bias in testimony and creating a conflict of interest issue for the receiver, or the appearance thereof.**

Cases:
Schrieber v. Ault, 419 F. Supp 2d 1089, 1101 (S.D. Iowa 2006)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals under applicable criteria in Rule 6.1101 as this is a case primarily presenting application of existing legal principles as set out by the Iowa Supreme Court requiring clarification but not new law, and the application of

sufficiency or weight of the evidence standard to the shifting burden of proof.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

The original Petition for Partition of Real Estate and Personal Property by Sale was filed January 31, 2014. Answer acknowledging the right to partition, but demanding "in-kind" and not by sale was filed March 12, 2014. Trial was held on September 24, 2014. The court's Order on Petition was issued November 7, 2014. Motion for reconsideration was filed on November 21, 2014. Order denying reconsideration was filed December 3, 2014. This appeal was filed January 2, 2015.

STATEMENT OF THE FACTS

This is a partition action among three siblings involving 300 acres of land inherited from their parents with 220 acres in Cerro Gordo County and 80 acres in Franklin County. (App. pp. 331,332) The partition actions were consolidated for purposes of trial. (App. pp. 327, 328, Exhibits 1, 2, 3, 4.(App. pp 80-103)

The children inherited active possession of the land following their father's death on November 17, 2012. See appraisals effective

dates for Franklin County of July 16, 2014, (Exhibit 7, App. pp 259-305) and Cerro Gordo County effective date November 17, 2012 (Exhibit 6, App. pp 191-258).

Upon their father's death, the children became tenants in common each holding undivided one-third interest in an undivided one-half interest owned by their father on his date of death. Father's life estates were terminated on a 60 acre parcel in Cerro Gordo County and two 40 acre parcels in Franklin County and the remaining one-half interest of the 160 acre parcel in Cerro Gordo County (see Exhibit 1, App. p.80) and they had inherited from their mother's estate earlier subject to father's life estate. The partition action was filed January 31, 2014. (App. p. 1-9).

Following father's death, the parties have been unable to agree on partition by sale or partition in kind. The Plaintiffs-Appellees desired sale of all the property in question. Appellant Shirley desired an in-kind division of property so that she could retain her ownership in kind. She proposed at trial retaining 60 acres that she had growing up owned by her mother and the homestead building site three generations going back to her grandfather on her father's side. (App. pp. 329, 346).

In addition, Shirley was motivated to avoid capital gains taxes estimated at $81,600 upon sale of her interest in the property (Exhibit 101, App. p.68)

The parties agreed on an appraisal of the property using the services of a certified appraiser, Fred Greder, (App. pp. 326,337, 344)

None of the siblings farm and the farming real estate had been leased for several years prior to their father's death. (App. p. 333.)

All issues of personal property set out in the Petition were resolved prior to trial which involved only the question of real property. (App. pp. 334-335, 340.)

Prior to trial, Shirley stipulated that the partition should in fact be granted, although she requested a partition in kind where she would be able to retain the unique and special property with personal involvement and family history. (Answer, App. pp. 14-15; App. pp. 340,425)

At trial, Shirley requested a specific in-kind division of real estate as outlined in Exhibit 107 (App. p.77), requesting the 60 acre parcel from Cerro Gordo County and a total of 4.4 acre building site and an additional 14.06 acres adjacent to and squared off from the yet to be surveyed building site. (Exhibit 108, App. p.79) This constituted

1/3 of the total value of the real estate involved in appraisals done by Fred Greder's firm of Benchmark Agribusiness in original appraisals and subsequent emails regarding valuations (Exhibits 6 –App. p. 191-258 (Exhibit 7 – App. p. 259-305) (Exhibit 104 -App. p.73) Exhibit 105, App. p.74) or $1,048,000 of $3,144,000 (Exhibit 108, App. p. 79).

Mr. Greder testified that he is a licensed certified appraiser for 25 years and certified to appraise by the State of Iowa since 1991. (App. p. 409). His office, Benchmark Agribusiness, Inc., conducted two appraisals on the property, one dated July 18, 2014 for two parcels in Franklin County totaling 80 acres (Exhibit 7) and a second dated February 13, 2014 for 220 acres in Cerro Gordo County as Exhibit 6, He further provided a breakdown between the two parcels identified in Exhibit 6 by his email of July 28, 2014 where he divided the 220 acre parcel into three separate components. (Exhibit 105. App. p. 74)

The comparable property was addressed inside the appraisals by rendering the dollar value for each of the parcels, including any with buildings, clearing required, or variations in soil type, point rows, and CSR values.

The essence of the dispute at trial arose not as to Greder's appraisals, but whether or not appraisals themselves could constitute a basis of an equitable division. Appellee argued only delayed auction of the properties involved could produce a fair and equitable division. Mr. Reed Kuper argued that the appraisal was 100% guessing game and the property worth only what someone actually pays for it on a particular day.

Mr. Greder's appraisal gave a total value of 300 Acre parcels as $3,144,000, Exhibits 6 and 7. All variables of the property were considered and reduced to a common denominator of fair market value in dollars. This included considerations of point rows, creek or waterway, soil type, CSR, and location of property in strongly competitive areas. (App. pp. 394-395, 411) Exhibit 6, p. 3 of 49, (App. p. 195) and Exhibit 7, pp. 4 and 5 of 32 (App pp. 263-264)

The two witnesses called by the Appellees accepted the credentials of Mr. Greder, (App. pp. 377, 389) but did not so much dispute his findings as contest the very premise of appraisal issues – meant as a means of determining an equitable division of real estate. Their key emphasis was that an appraisal was an educated guess of values while an auction was a precise and definite realization of value.

(App. pp. 122, 144, 145, 162). The concern in challenging Mr. Greder's appraisals was no so much the values assigned as the absence of a guarantee that the appraisal value could be reliably obtained at a later sale by public auction. (App. pp. 353-354,372, 379). Neither Mr. Kuper nor Mr. Cory Behr extensively reviewed Benchmark appraisals (App. pp. 369-370). Kuper admits he could not accurately predict sales either. (App. p. 368)

Mr. Greder conceded that no appraisal could read the future as markets change and educated estimates of value must be based upon the known past sales and the identification and correlation of truly comparable sales with adjustment dollar between properties to compensate for differences. (Exhibit 6, Exhibit 7, App. p. 413.) He testified auctions may yield more or less than FMV. (App. p. 417.)

No challenge was made to the comparative analysis used by Greder. No witness of the Appellees had the qualifications or expertise to attack or undermine the appraisals stipulated into evidence. All issues raised by Kuper and Behr as determining factors of sale interest were considered by Greder's appraisals. (App. pp. 382,389, 394-395) Behr acknowledged he only disputes valuations of property after July 24, 2014 date, not as of that date. (App. p. 405)

Kuper was self-employed in a variety of businesses ranging from farm management to frozen yogurt business. (App. p.367).

Finally, Kuper conceded that he had done no reports on the property and his testimony was essentially anecdotal involving his own experience in other sales which were not shown to have any comparative analysis necessary for relevancy. Kuper acknowledged predictions of value could not be guaranteed by anyone, including him. (Tr. p. 368). He had never testified as an expert witness. (App. p. 376.

Cory Behr, a licensed auctioneer, acknowledged the credentials of Mr. Greder. He testified auctions were a preferable method of valuation because it is based on the result, not the prediction. Behr is neither licensed or certified as a real estate appraiser.. Behr did offer some range of values of real estate based solely on corn suitability ratings. (App. p. 401). He offered no evidence of final values and no written report had been requested of him. (App. p. 404)

Greder testified that auctions do not necessarily achieve a FMV precisely due to the limited time frame of sale and the unknown variable contained on the ultimate day of sale. (App. p. 416-417). Greder testified that sale by auction could both exceed or fail to

realize FMV but established only a finality of sale price, not value. (App. p. 421) Greder illustrated the danger of an absolute auction could result in a sale below FMV to the detriment of all sellers. (App. p. 417). Greder testified that as of the date of trial given all variables, the market for these particular pieces of real estate were the same on the date of trial as on July 28, 2014. (App. p. 423).

Greder testified he proposed division of "in kind" property set out in Exhibit 107 and Exhibit 108 is fair and equitable to all three siblings. (App. p. 413-414).

The Trial court found in favor of Appellees holding despite undisputed appraisal values as of July 28, 2014 anything short of sale on the free market may or may not be equitable and "like taking a shot in the dark" to the parties. (Order, November 7, 2014, pp 5, 7) (App. pp. 28, 30)

ARGUMENT

STANDARD OF REVIEW STATEMENT OF ISSUE PRESERVATION

A. Scope and Standard of Review.

Standard of review is de novo as to establishment of the facts and legal conclusions based as a case tried in equity Gustafson v. Fogleman, 551 NW 2d 312 (Iowa 1996), Iowa Rules of Appellate

Procedure Rule 6.907, and asserted errors at law are also reviewable de novo. Mosebach v.Blythe, 282 NW 2d 755.

B. Preservation of Error.

Issues on interpretation of the law and weight of the evidence raised at trial, reviewed in post-trial motions and preserve by direct appeal.

I. The Trial Court erred as a matter of law in applying the burden of proof to a partition defendant to obtain a division in kind.

The thrust of Appellees' position is that no appraisal can establish the basis for an equitable division of real estate. (App. p. 343,346, 353-363, 365,372, 383, 387). They argue fixed values assigned as an "educated guess" and comparable sales are less reliable than actual auction prices. The trial court accepted that the delay between division of property and sale may entail risk of price variation by time of sale could take place thus rendering the division of property inequitable. (Order, p. 6, App. p. 29) The Court in accepting future volatility of the market as basis in equity accepts that Plaintiffs have a right to value the real estate not on date of trial but some future event. (Order p. 5, App. p. 28)

The Appellees' position ignores that evidentiary value that values are set at date of trial, not some future unspecified event. In re: Marriage of Decker, 666 NW 2d 175, 181 (Iowa App. 2003). Evidence of valuation is as of time of trial. In re Marriage of Muelhaupt, 439 NW 2d, 656, 661 (Iowa 1989).

The circular logic employed by Appellee is that if Appellees desire to sell their ownership interests to a third party by auction, equity demands that all the land owned by the siblings be sold at auction so all bear the same risk, and realize the same profits. (App. p. 346) This is not the law. Yet the court accepted the logic by looking to future uncertainty of sale prices rather than the direct available evidence on date of trial.

Shirley has the right to retain a division in kind provided she can establish a division both equitable and profitable. Spies v. Rybil, 160 NW 2d 505, 507 (Iowa 1968.)

Exhibit 107 (App. p. 107) provides the means of an equitable division by dividing the real estate into two portions based on certified appraisals. (Exhibit 6 and Exhibit 7)

Shirley requested the 60 acre parcel reflected in Exhibit 7 which was inherited from her mother subject to father's life estate, a

property she had worked in her childhood. (App. p. 426). This property has a separate and distinct history from the adjoining 160 acres to the north. (Exhibit 1, p, 1 and Exhibit 2, p. 1, App. p. 80, 89). She desires partition in kind because a forced ale may preclude her from being able to purchase any 1/3 value of the property. (App. p. 422). Appellees were unwilling to stipulate to sell even the 60 acre parcel separately from the adjoining 160 acres. (App. p. 347-348.)

In deciding sale by auction is the only equitable division of real estate possible, the trial court defeats Shirley's right to the very protections partition is intended to allow. Iowa Rules of Civil Procedure 1.1201 recites that if the defendant can establish as of day of trial equitable and practical relief, judgment must be awarded in her favor.

The trial court fails to consider that if division in kind is equitable based upon existing values, the impact of a future sale intended by the Plaintiffs becomes moot. It is the choice of Plaintiffs to insist upon a sale for cash. They retain the right to hold the property for better future markets. Similarly, the courts desire to impose the same capital gains consequences on all parties is misplaced. The trial court again must consider that the choice of

Plaintiffs to sell and incur the tax burden of capital gains (Exhibit 101, App.p 68) of approximately $81,600 is their own. (App. p. 346). Shirley, who desire to avoid the tax and pass the property to the next generation, should not be forced to incur the tax merely because her siblings will incur the tax because of their decision to exchange the real estate for tax.

The trial court uses the future tense "will" be equitable and practice, rather than the present tense day of trial determination of "is" equitable and practical as of the day of trial. The burden on the Defendant at trial is only required to show by preponderance of the evidence that land division in kind is practical and equitable, not that it is any absolute guarantee of future speculation.

The weight of the evidence between a certified appraisal and speculative future consequences as a required guarantee to Plaintiffs is inconsistent with the law and the evidence. This court should examine the entire record and adjudicate de novo rights on the issues properly presented. Harding v. Willie, 458 NW 2d 612, 613 (Iowa App. 1990).

II. The Trial Court erred in finding of fact that the defendant had not met her burden of proof in establishing at trial the equitable and practical elements of her proposed

division in kind by preponderance of the evidence.

The practicability of Appellant's proposed division in Exhibit 107 (App. p. 77) is demonstrated by the fact that even Appellee's auctioneer testified the 60 acre parcel can and should be sold or must be sold separately from the adjoining 160 acres to the north (App. p. 405-406). Both auctioneer Behr and appraiser Greder agree the separation of 14 acres from 160 acre parcel will not adversely affect sale price of remaining 134 tillable acres. (App. 407, 414, Exhibit 105, App p 74-75)

As to practicability Defendant's evidence was that Shirley asked the court to award partition by legal title and description already established in 3 of the 4 properties. No new abstract or new legal description, or new farm history on FSA productivity or soil types would be required.

The only division of an existing property would be the home farm of 160 acres in Cerro Gordo County. Both sides agreed even upon sale, the acreage should be sold separately. Therefore, the only disagreement on practicability was the issue of surveying the home building site from the whole of the 160 acres at 18.46 acres versus the

existing 4.4 acres in order to equalize established valuation of the property. (Exhibit 107, App. p 77)

Certainly it must be practical to divide the homestead building site from the homeplace by survey if that is going to be required for auction anyway. The only distinction is extending the survey lines to make property awards in kind equitable in value based upon appraisals made.

The preponderance of the evidence on the point of practicability of extending the homeplace building site was not challenged by anyone. The fact is a survey could be done as outlined by defendant. The rules on partition allow for expenses to be assessed including surveys as needed. Iowa Rules of Civil Procedure 1.1215.

The Iowa Rules of Civil Procedure 1.1215 specifically allows the court equity as of day of trial is not the same as guaranteed equality in sale proceeds in the future. Blacks Law Dictionary 6th Edition, defines "equity" as "fairness" versus "strictly formulated rules".

"Practicality" arguably includes more than the mechanism of division. The question is whether it should be extended to include the volatility of the market into the future. This would be so only if "practicality" included the concept of equal realization of value upon

sale. This cannot be the case. Practicality must consider the actual division of property as set out in Rule 1.1215 where it is by establishment of visible monuments and the assistance of a surveyor a referee may establish a division in kind. Here, exactly those issues were addressed by the Defendant, Shirley Campbell, and established by the preponderance of the evidence. See Exhibit 107, page 2, and Exhibit 108 (App p. 78-79).

Establishing equitability can only be done by an existing present day valuation. At page 6 of its Ruling, the Court uses the future tense "will be" in establishing the burden of proof of the Defendant as to equitability. Defendant asserts the Court erred as a matter of law and that the equitability needs to be established on the day of hearing based upon the valuation evidence offered and established on the day of trial. Rule Civ. Proc. 1.1201(2) uses the present tense "is" rather than a speculative future date to establish Defendant's burden.

The logic of this approach is that if the Court is going to enter a decree in kind, it can only be based upon a current showing of equitability, and all its factors, including, but not limited to economic. For that purpose, the court must set appraisal testimony as to each of

the parcels of real estate involved and consider if based upon the testimony in evidence, equitability has been established.

Having established the burden of proof by equitable and practical standards, the burden shifts to Plaintiffs /Appellees to defeat this evidence. Consumer Advocate v. Iowa Utilities Bd, 454 NW2d 883 (Iowa 1990) This burden requires proof of facts not mere speculation or simple assertion that any appraisal is without evidentiary authority.

The focus of argument by the Plaintiffs Patricia and Bernard against the Defendant Shirley's request for in-kind division was that at a sale sometime hence, the value of the sale may be above or below, but most likely distinct and separate from the value assigned by Fred Greder's testimony. The concern was not what "is" present value, but what "will be" an equitable or equal division upon a future sale. This distinction between future tense and present tense was repeated by the Court at the bottom of page 5 of its ruling.

The nature of Plaintiff arguments was that they were entitled to "equal" (not equitable) realization of income because of their desire and intent to sell the property and not retain continuing ownership with the Defendant Shirley. However, this is not the question

presented in evidence. The values that can be awarded "in-kind" are equitable and practical as of the date of hearing before the Court and the presumption in favor of sale no longer exists. There is not an appropriate consideration for the Court to make in trying to equalize a future division of the property by sale versus an immediate equitable division on the day of trial.

Volatility of land prices has actually nothing to do with the equitability of conducting a partition in kind. Rather, it affects only future partition by sale issues. The volatility reflects changes in value over time, and the issue before the Court is the value of the property on the day of trial for partition in kind. Mr. Behr was unable to assign any value whatsoever to the five parcels (setting out the building site as its own parcel) simply indicating that in a volatile market, it could not be determined except by auction. This again is a confusion of equitable division and equal division.

The only attack was one of auctions versus appraisals and the impact on Mr. Greder's professional assessment of values of each parcel based upon the fluctuating grain prices. However, Mr. Greder affirmed the value of the appraisals separately in Exhibit 104 dated August 6, 2014 and July 8, 2014 as to Exhibit 105. In addition, he

testified on date of hearing of September 24, 2014 that the values were still consistent with existing market conditions when balancing grain markets against other factors such as location of the property.

Mr. Greder's primary reply to this was that while there is a softening of the market it has been several years since the income approach valuation has been primary, and that the investment has, for a number of years, under-performed other forms of investment of a similar size based upon simple availability of assets obtained by buyers and the availability of real estate.

III. The Trial Court failed to properly consider evidence of certified real estate appraisals as sufficient to establish Defendant's burden of proof as more than mere "guesswork" and requirement the "true market value" be determined through sale only.

The Court's reluctance to rely upon the certified appraisal as no more than mere guess work is contrary to the requirements of the law. The trial court is required to consider the facts forming the basis of the opinion and methods of evaluating. Iowa Power & Light Co v. Stortenbecker, 334 NW 2d 326, 330 (Iowa 1983). The Court notes in her Ruling that she would still appoint three disinterested freeholders to appraise the property under Rule 1.1210 absent the concurrence by

the parties further appraisal is unnecessary as "appraisals of the properties have been previously completed." (Order. P. 8, App. p. 31).

Fred Greder testified that moving from a present value with solid numbers based on stated comparables to an auction on a "to be decided" date with unknown terms and participants actually increases the uncertainty and speculation before the Court. (App. p. 421) There merely substantiates "equality" for "equity."

The Court noted concerns in relying upon appraisal values in part as noted at page 6 of its Ruling,

> "As previously stated, this Court is not confident that appropriate and correct values can be assigned to these properties due to the nature and quality of the land involved."

Earlier, the Court had noted in page 5 of its Ruling:

> "....The Court so finds that a determination of the various parcel's value due to the volatility of the market, and for the reasons set forth herein would be like taking a shot in the dark. Contributing to this are the various soil qualities, the waterway, the various types of soils, that some parcels are poorer land than others and more adversely affected by the market's fluctuations, the decrease in grain prices, and the size of the Franklin County parcels, perhaps being too small, thus limiting their salability."

What the Court has ignored in concluding the Defendant has failed to establish by preponderance of the evidence a comparability in terms of equitable division for all of the land subject to partition is

that all factor cited by the court are addressed in the written appraisals of Mr. Greder.

The very nature of an appraisal is to establish a common denominator of exchange (dollar value) or values for real estate both as a whole and in subject parts. The catalog of issues identified by the Court are each and all taken into consideration and factored into values of a certified appraisal. Each of the variables outlined by the Court is included in the appraisal and was amplified and further discussed by certified appraiser, Fred Greder, at time of hearing.

No other credible testimony was offered as to valuations as of the date of hearing.

If the Court dictates that public sale, particularly "auction" , is the best determination of value and the most equitable manner of dividing real estate, this precludes any Defendant from ever succeeding in an in-kind partition.

None of the parties disputed that appraisals are calculated fair market values to be expected upon sale. No one argued that actual sales on property has been appraised may be higher, lower, or within a narrow range of equality. Sales have a finality and certainty of values, however this is based only upon the limited condition

preceding the sale including advertising, attendance of bidders, and future economic factors affecting the day of sale bidding.

Appraisals, on the other hand, offer an immediate reasonable value for the Court to consider based upon a three-prong analysis using cost approach (only for improved properties, as unimproved properties have no depreciable improvements), income approach, and sales comparison approach. (See page 16 of 32, Exhibit 7 and page 22 of 49, Exhibit 6. App. p. 275, 214)

The comparable sales are selected by similarities of soil types, CSR valuation, location, improvements, as well as other factors listed in the appraisal. The appraisals from Benchmark Agribusiness selected by all parties jointly reference CSR values. The Franklin County property appraisals list both CSR and CSR-2 values because this appraisal report was written and compiled in July 2014 after compilation of CSR-2 values was regularly integrated in uniform appraisals reports. Exhibit 7 shows both CSR and CSR-2 values for the land in question. The soil type analysis on Exhibit 6 reflects only CSR because at the date of appraisal, November 2002 it was not customary for CSR-2 numbers as they were not available. However, Fred Greder testified the valuation of the property not being affected

by transition between CSR-2 and plain CSR values, the land remains the land. (App. p. 424) Issues of CSR-2 not factored oldest appraisals only due to the fact that this is a transitional change recently implemented. (App. p. 360) No separate value analysis was shown how the change in CSR-2 would actually impact this particular land. There was no testimony whatsoever contesting Fred Greder's reliability as an appraiser, nor the comparable sales and circumstances from which he drew his valuations.

IV. That the trial court ordered the witness auctioneer to become the receiver of the property showing his bias in testimony and creating a conflict of interest issue for the receiver, or the appearance thereof.

In ordering the witness auctioneer for the Appellees / Plaintiffs to become the court appointed receiver of the property creates an apparent conflict of interest issue. Clearly, Mr. Behr has a bias in favor of auctions versus appraisals generally as a way of establishing value. It is his primary occupation. His bias as witness is further brought into question by his appointment as a paid officer of the court to manage the sale by auction which he has supported. As receiver, and auctioneer, Cory Behr is placed in a conflict of interest

situation by the Court and determining recommendation for his own compensation and proposing terms of sale which will appear to favor Plaintiff / Appellees for whom he testified to the expense of Defendant/Appellant Shirley Campbell. This highlights other areas of concern for conflict of interest with Mr. Reed Kuper who "may or may not" be interested in being an active bidder if the property were put up for sale. (App. p. 377.)

Only Mr. Greder has the professional independence and lack of any potential financial interest in the outcome of the sale or partition.

Even an apparent conflict of interest, as opposed to an actual conflict of interest is sufficient grounds to assign an independent third party to the position of receiver if one was assigned. Schrieber v. Ault, 419 F. Supp 2d 1089, 1101 (S.D. Iowa 2006). Shirley Campbell has already testified that she desires an in-kind division because it is the only assurance she has that she will get any property. (App. p. 425.) Her desire is to shelter the family history of tradition in retaining the property (App. p. 426) and her concern is that an auction forces her to compete with highly financed potential buyers willing to pay more than fair market value simply to acquire the real

estate. (App. p.432.) Shirley should not be required to bid against non-owners as well as co-owners. (App p. 432.)

CONCLUSION

Defendants resisting a partition by sale are only able to present evidence of equitable division in kind by use of expert testimony establishing appraisal values in terms of comparable dollars. To reject Defendants use of appraisal testimony by a certified appraiser excludes the best available evidence and defeats the statutory right of the defendant to retain property without sale by meeting practical and equitable rules for a proposed division. This Court should exercise its review of the facts and evidence in this case de novo and determine the weight of the evidence is proven by preponderance of the evidence in favor of Defendant Campbell.

The speculation that the future sale of property may not equal the appraised value on date of trial eliminates any standard of certainty and obligation of the trial court to establish present values for the real estate as of the date of trial based upon credible evidence submitted.

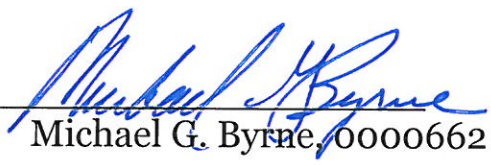
NOTICE RE ORAL ARGUMENT

Notice is hereby given that upon submission of this cause, counsel for Appellant requests to be heard in oral argument. The primary issues for oral argument are the basis for a trial court to reject the valuation of a certified real estate appraiser with written reports as "mere guesswork" and the requirement of present day values at day of trial for determination of equitable division of the real estate.

CERTIFICATE OF COST

We certify that the cost of printing Appellant's Brief - Final and Argument was the sum of $_____0_____.

Respectfully Submitted,
WINSTON & BYRNE
Lawyers
A Professional Corporation

By: 
Michael G. Byrne, 0000662

CERTIFICATE OF SERVICE

I, Michael G. Byrne, hereby certify that filed by EDMS to the Clerk of Court, Supreme Court, the Appellant's Brief- Final on the 7th day of July, 2015.

Michael G. Byrne , 00000662
WINSTON & BYRNE, P.C.
119 - 2nd St. N.W.
Mason City, IA 50401
Telephone:(641) 423-1913
ATTORNEY FOR APPELLANT

Proof of Service

I, Michael G. Byrne, hereby certify that I served by EDMS Appellant's Brief - Final, with copies to the following attorney of record on the 7th day of July 2015:

Collin Davison
P.O. Box 1567
Mason City, IA 50402

Michael G. Byrne, 00000662

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Dated July 07, 2015

Michael G. Byrne