**IN THE COURT OF APPEALS OF IOWA**

No. 1-502 / 10-1909
Filed August 10, 2011

**IN RE THE MARRIAGE OF DIANE ADAMS
AND PAUL ADAMS**

**Upon the Petition of**

**DIANE ADAMS,**
Petitioner-Appellee,

**And Concerning**

**PAUL ADAMS,**
Respondent-Appellant.

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Appeal from the Iowa District Court for Winnebago County, James Drew, Judge.

Paul Adams challenges the economic and child support provisions in the decree dissolving his eighteen-year marriage to Diane Adams. **AFFIRMED.**

John G. Sorensen of Sorensen Law Office, Clear Lake, for appellant.

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

**TABOR, J.**

Paul Adams challenges the economic and child support provisions in the decree dissolving his eighteen-year marriage to Diane Adams. He contends the district court miscalculated the amount he owed to Diane as a cash equalization payment and wrongly considered his farm rental income when determining his child support obligation. Because the decree equitably divided the parties' assets and appropriately determined Paul's net monthly income for purposes of the child support guidelines, we affirm the district court.

## *I. Background Facts and Proceedings*

Both graduates of Buffalo Center High School, Paul and Diane were married in 1992. They have two sons, born in 1994 and 1996, and a daughter born in 2000. At the time of the dissolution trial in 2010, Paul and Diane were both forty years old. Diane works four days per week as the city clerk of Thompson, earning approximately $25,000 annually after the deduction for her health insurance. Paul works at Winnebago Industries, receiving an annual salary of approximately $23,500.

Paul also owns a farm consisting of 130 acres of land, 122 of which are suitable for crops. He raises livestock and rents the tillable ground to his father. He purchased the acreage in 1990 for a little more than $90,000. The district court found that before the marriage

> there was equity in the farm. The down payment was $10,000 and two principal payments of $9,000 each had been made. Additionally $26,000 worth of tiling had been done.

Diane filed a petition for dissolution of marriage on January 19, 2010. The parties filed a stipulation resolving the child custody and visitation issues. On September 10, 2010, the parties appeared for a trial on the remaining issues: child support, property division, alimony, and attorney fees.

The district court issued its decree on October 28, 2010. The court noted: "There is no dispute regarding how the assets will be divided." The court awarded Diane her Iowa Public Employees Retirement System (IPERS) account valued at $20,404 and a 2003 minivan worth $951.90. Paul received the real estate, livestock, machinery and equipment, as well as his 401K account, a Ford F350 diesel pickup truck, and a Harley Davidson motorcycle, all of which had a combined total of $623,325. The court decreed Paul responsible for a $195,784.74 debt to the Titonka Savings Bank.

The parties' dispute was over the equalization payment. Diane requested a cash payment of $225,000; the court ordered Paul to pay her $175,000.

The court also set Paul's child support obligation at $871.30 per month for the three children. The court did not order alimony and directed both parties to pay their own attorney fees. Paul appeals, contesting the district court's property settlement and child support calculations. Diane asks for appellate attorney fees.

## *II. Standard of Review*

In dissolution appeals, we exercise de novo review. *In re Marriage of Sullins,* 715 N.W.2d 242, 247 (Iowa 2006). We give weight to the findings of the district court, especially to the extent credibility determinations are involved. *Id.* To the extent that interpretation of the child support guidelines is a legal question,

our review on that issue is for errors at law. *In re Marriage of McCurnin,* 681 N.W.2d 322, 327 (Iowa 2004).

## *III. Discussion*

### *A. Property division*

Paul contests the economic provisions of the decree. He specifically asserts the district court did not give him credit for approximately $152,000 in gifts received from his family, for $54,000 in premarital equity in the farmland, and for $122,000 in tax consequences. By his calculations on appeal, the court should have reduced his share of the marital assets from $427,541 to $99,541. After deducting Diane's $21,356 share of the marital assets, he arrives at a difference of $78,185 in assets, requiring an equalization payment of $39,092.00. This amount contrasts with the $175,000 payment to Diane ordered by the district court.

Iowa courts must divide property equitably between divorcing parties. *In re Marriage of Robison,* 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). An equitable division does not necessarily mean an equal division of each asset. *Id.* This equitable division is governed by the factors set out in Iowa Code section 598.21(5) (2009), which include: the length of the marriage, the property brought to the marriage by each party, the contribution of each party to the marriage, the age and health of the parties, the contribution by one party to the earning power of the other, the age and earning capacity of each party, whether any alimony is awarded, other economic circumstances of each party, tax consequences, as well as other relevant factors.

### *1. Family Gifts and Premarital Contributions*

Paul avers that his parents advanced him "at least $152,000.00" in either loans or gifts and he claims that amount should be set off from the amount awarded to him in the property settlement. He argues that under Iowa Code section 598.21(6), the gifts he received from his family before or during the marriage are his property and not subject to division.

Paul also contends the district court failed to give him full credit for the premarital contributions he made to the acquisition of the farm. According to his figures, he invested $54,000 in the property before the marriage, including a $10,000 down payment, $18,000 in principal payments, and $26,000 toward drainage improvements. He notes that the court purported to give him "credit for those amounts" but submits that it is "difficult to see in the court's ultimate cash award to Diane."

Gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division except when the district court finds that refusal to divide the property is inequitable to the other party or to the children of the marriage. *See* Iowa Code § 598.21(6). This statutory provision does not require that all property acquired by gift must be set aside for the donee and omitted from consideration in the division of property. *In re Marriage of Muehlhaupt*, 439 N.W.2d 656, 659 (Iowa 1989). When it is necessary to avoid injustice, gifted property may be divided. *Id*.

A premarital asset is not otherwise set aside like gifted property. *See In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa Ct. App. 1996); *see also* Iowa

Code § 598.21(5)(b). Instead, it is one factor to consider together with all other circumstances in making the overall property division. *Miller*, 552 N.W.2d at 465.

The district court considered the financial help from Paul's parents to be a gift to both Paul and Diane:

> During the marriage Paul's parents provided substantial financial assistance for the farming operation. Although Paul claims the advances were loans there is no documentation to support his position. There have been no attempts to repay his parents (other than favorable rental terms on the farm) nor any attempts to collect the alleged debt. It is also noteworthy that Paul did not show any debt owing to his parents on his Affidavit of Financial Status. Given the lack of evidence the court is unable to conclude that a valid debt is owing as opposed to the advances having been gifts to the couple.

We agree with the district court's conclusion. The credible evidence does not support Paul's allegation that the financial help provided by his family was intended as a series of gifts, or if the expenditures did constitute gifts, that the gifts were solely to Paul and not to both spouses. *See id.* at 463.

In answering an interrogatory concerning gifts or inheritances, Paul responded that he and Diane "received $7,000.00 from my parents and grandparents to finish the basement of our house for our sons' bedroom." Paul did not claim to have received more than $152,000 in gifts and advances from his family during the marriage until a settlement conference on the day before the dissolution trial. Paul presented an exhibit at the trial that purported to recapitulate the amounts paid by his father for his benefit. The exhibit, signed by Paul's father Daryl Adams, was entitled "Bills I Paid" and included the following:

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|---|---|
| Farm Down Payment | 9490 |
| 6 cows | 4660 |
| Bull | 1300 |

| | |
|---|---|
| 5 yearling cattle | 5,400 |
| Cows | 25,000 |
| Money in House | 7,900 |
| Yard Rock | 1,000 |
| Expenses for tile and tiling machine | 26,000 |
| Expenses for bins and machine shed | 20,000 |
| Expenses for trenching water lines | 2,000 |
| | 102,750 |

The exhibit also included a list of loans totaling $23,648; taxes paid in the amount of $3,111; seed valued at $5310.60; hay and baling for $5805.40; and other miscellaneous checks adding up to $11,647.07. The grand total of all the bills allegedly paid by Paul's father was $152,271.60.

We note the district court found it "appropriate that Paul receive a credit" for the $10,000 down payment on the farm, the $26,000 in tiling that was done on the farm, as well as $18,000 in principal payments. The court categorized these amounts as Paul's premarital equity in the farm. But whether the amounts are counted as premarital equity or as gifts from his father, the decree already accords Paul "credit" for this $44,000 "solely attributable to his efforts and those of his family."[1]

We determine that the remaining amounts listed in Paul's exhibit, even if sufficiently documented at trial, were not gifts to Paul alone. Daryl described the amounts listed in the recapitulation as "money that they've gotten from me over the years"--indicating that the financial assistance was intended for both Paul and Diane. Accordingly, the district court had no reason to exclude those amounts

[1] The district court evidently subtracted $44,000 from Paul's net assets ($427,541-$44,000=$383,541). From that amount, the district court subtracted Diane's assets. ($383,541-$21,355=$362,186). Dividing that amount by two equals $181,093. The court awarded Diane an equalization payment of $175,000.

from the property division. We find that the district court's property distribution was equitable to both parties.

***2. Tax consequences***

Paul also complains that the district court did not address the tax consequences of the property awarded to him. *See* Iowa Code § 598.21(5)(j). He reasons that "Paul's farm should be valued at what it is worth to him and that amount should include the $122,000 liability if and when the asset is liquidated." The district court recognized in the decree that if Paul sold the farm, "it would generate a $122,000 tax liability." But in the very next sentence, the court found: "It is important to both Paul and Diane that the farm be passed to their children."

Courts consider the "tax consequences to each party" as one of the many factors driving the equitable division of property. *See In re Marriage of Keener,* 728 N.W.2d 188, 198 (Iowa 2007). But "where there is no evidence to support a discounting based on a sale and the trial court has not ordered a sale, the effect of considering income tax consequences on a sale" diminishes the value of the asset to the non-owning spouse. *In re Marriage of Friedman,* 466 N.W.2d 689, 691 (Iowa 1991). Therefore, where a sale of an asset is ordered, necessary, or otherwise relatively certain, consideration of tax consequences is appropriate. *See In re Marriage of Hogeland,* 448 N.W.2d 678, 680-81 (Iowa Ct. App. 1989). Where a sale will not occur or is rather doubtful, consideration of tax consequences is inappropriate. *See Friedman,* 466 N.W.2d at 691.

Paul alleges on appeal that sale of the farm is a "likely scenario." We disagree. The dissolution record does not show that a sale of the farm was

ordered, necessary or otherwise relatively certain. In fact, the parties appear to agree that a sale should be avoided so that the property can be preserved as a legacy for their children. The district court rejected Diane's request for a cash payment of $225,000.00, explaining

> Her position is consistent with the typical approach of simply dividing the marital assets relatively evenly based on their fair market value. However, it is not clear that Paul has the ability to make such a payment given his current income, the child support obligation, and the debt he will retain. Diane must recognize that if the court were to order liquidation of the farm her share would be reduced by at least $61,000 due to the tax consequences (say nothing about a realtor's commission and other sale-related expenses). Fairness requires that these factors be given consideration. With these matters in mind the court concludes Diane should receive a cash payment of $175,000.

The court appropriately considered the tax consequences when declining to order liquidation of the farm assets and when determining the equalization payment to Diane. Paul is not entitled to an additional offset for the tax liability.

### *B. Child support*

When calculating Paul's gross monthly income for child support purposes, the district court ignored his losses from livestock farming and factored in his "net rental income" on the farmland, in addition to his regular wages from Winnebago Industries. The court arrived at a net monthly income of $2773.64 for Paul. This amount contrasts with Paul's calculation of his net monthly income as $1642.02.

On appeal, Paul agrees with the exclusion of the livestock losses from his annual income. But he criticizes the court's addition of the "net rental income" as "speculative" given the uncertainties of his farming operation. Diane responds that the court was justified in considering Paul's rental income to calculate his

child support obligation. Diane further contends that Paul sets a "very favorable rent" for his father and could be generating considerably more income from the farm property. The record supports her contention.

"All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligations." *In re Marriage of Nelson*, 570 N.W.2d 103, 105 (Iowa 1997). We do not believe that Paul's farm rental receipts fall into the category of uncertain income. Paul insists in his brief that he is not a hobby farmer and has been involved in the agriculture business since his youth. Accordingly, he should not be surprised that the district court concluded that the farm was a source of income for him. *See generally In re Marriage of Starcevic*, 522 N.W.2d 855, 856-57 (Iowa Ct. App. 1994) (finding husband was not entitled to deduct depreciation expenses from income for purposes of calculating child support because farm was "at best, a hobby and, at worst, a tax shelter"). The district court appropriately calculated Paul's annual gross income based on his off-the-farm wages, as well as the farm rental income reflected in the couple's tax return. We will not disturb the court's calculation of Paul's child support obligation under these circumstances.

***C. Appellate attorney fees***

During the pendency of this appeal, Diane filed an application for appellate attorney fees in the amount of $3412.50. Paul filed a resistance. Our supreme court submitted the issue for consideration with the appeal. An award of appellate attorney fees is not a matter of right but rests within our discretion. *In re Marriage of Erickson,* 553 N.W.2d 905, 908 (Iowa Ct. App. 1996). In

determining whether to award appellate attorney fees, we 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 decree on appeal. *Id.* Given the roughly equivalent financial positions of the parties in this action, we find each party should pay his or her own appellate attorney fees.

Costs are assessed half to each party.

**AFFIRMED.**