

IN THE COURT OF APPEALS OF IOWA

No. 9-493 / 08-1807
Filed November 25, 2009

**IN RE THE MARRIAGE OF JYL DENISE WATERS
AND DONALD JAYE WATERS**

**Upon the Petition of
JYL DENISE WATERS,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
DONALD JAYE WATERS,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Cass County, James M. Richardson, Judge.

Donald Waters appeals and Jyl Waters cross-appeals from the economic provisions of the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

Bryan D. Swain and J. C. Salvo of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellant.

Joanne C. Lorence of Otto & Lorence Law Firm, P.C., Atlantic, for appellee.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

MANSFIELD, J.

Donald Waters appeals and Jyl Waters cross-appeals from the district court's decree dissolving their marriage. Both parties claim the property division was not equitable, Donald challenges the award of alimony to Jyl, and Jyl asserts she should have been awarded trial attorney fees. With the exception of a single modification described below, we affirm the decree as it was entered.

I. Background Facts and Proceedings

Donald and Jyl were married in February 1988. Donald, born in January 1962, is a high school graduate and was a farmer before the marriage. Jyl, born in October 1964, had attended one semester of community college and worked as a CNA before the marriage.

During their marriage, the couple lived in rural Cumberland, Iowa. Donald maintained the family's grain farm operations, while also running a seed business. Jyl was a homemaker and helped Donald, particularly in the seed business. They had two children born in September 1991 and November 1994.

On May 5, 2002, Jyl was working in the seed business at their home, loading seed for customers. While climbing out of the forklift, she fell and landed sideways on the concrete floor. The impact fractured her C-6 vertebra, paralyzing her from the chest down and resulting in her having only limited use of her hands and arms. Jyl requires daily assistance from nurses and home health care aides to care for herself and her home. She has low blood pressure that, if left uncontrolled, can cause unconsciousness. Her diaphragm is paralyzed, and she cannot cough. She periodically uses antibiotics to fight recurring bladder infections and pneumonia. Sores frequently appear on her body.

The couple amassed considerable assets during their marriage. The marital estate primarily includes four tracts of farmland, various pieces of farm equipment and crops, and cash in several investment and savings accounts. Donald claims to have brought \$237,000 worth of assets into the marriage, mostly from farm equipment and crops.

On December 31, 2007, Jyl filed a petition in Cass County District Court for dissolution of their marriage. At this time, Donald controlled virtually their entire marital estate. When they separated, Donald purchased a home for Jyl in Griswold. Donald paid no temporary spousal support during the separation, but gave Jyl \$48,000 to pay for remodeling to her new home and for her living expenses.

Before the trial, Donald deliberately concealed \$350,720 by hiding it in an undisclosed bank account and in cashier's checks made out to himself. Donald also failed to timely answer an interrogatory concerning his financial records, forcing Jyl to file a motion for order to compel discovery. Donald admitted concealing assets after Jyl's counsel found the discrepancies in their bank records. At trial, Donald claimed he hid the money to ensure he would have the funds necessary to continue farming.

Trial was held on August 22 and August 27, 2008. Both parties introduced evidence of their living expenses. Jyl's expenses, which Donald contested, were much higher due mostly to her extensive medical needs. The parties also disagreed over Donald's future income and over how to value the crops that were nearing harvest. An appraiser provided sale and rental values for the four tracts of farmland.

The district court valued their total estate at \$3,959,924. It assigned a value of \$90,000 to that year's crops, which was consistent with the couple's farm income from the past few years. Based on the values given to the couple's assets, the court split the estate almost evenly between the two. Donald received two tracts of farmland, the farm equipment, the growing crops, some retirement accounts, and all of their debt for a total of \$1,980,502. Jyl received the other two tracts of farmland, the house Donald purchased for her after separation, most of the couple's cash and investments, and stored crops for a total of \$1,979,422.¹

The court affirmed the parties' agreement for Jyl to have physical care of their children with Donald to have frequent visitation rights. The court also ordered Donald to pay child support.

Jyl's income at the time of trial was approximately \$330 per month or \$4000 annually from Social Security disability payments. In 2007, the couple had farm income of approximately \$87,000, and investment income of approximately \$17,000. Jyl conceded that her share of the farmland under the property settlement would generate annual rental income to her of approximately \$40,000. In addition, the district court ordered Donald to pay \$2450 per month to Jyl as lifetime alimony.

¹ Following Jyl's accident, the community donated approximately \$60,000-\$70,000 to her. Approximately \$29,000 of that was left at the time of trial, and the district court awarded all of that to Jyl on the basis that it was not a marital asset. The district court rejected Donald's contention that the donations were a gift to the family.

The court reasoned that Jyl's expenses were \$4891.89 per month. Her income from renting the farmland would cover about half of those expenses, so the court ordered Donald to pay the other half of those expenses in alimony.²

On October 3, 2008 Donald filed a motion for reconsideration, and a motion for a new trial. Donald claimed that the district court erred in awarding alimony and failed to divide the parties' property equitably. Specifically, Donald claimed Jyl's expenses had been overstated, his income had been overstated, and he should have been given credit for his premarital assets. Jyl filed her own motion for reconsideration. Like Donald, Jyl claimed the district court failed to divide the parties' property equitably. She also claimed she should have been awarded attorney fees. Specifically, Jyl asserted that the growing crops were undervalued and that Donald's attempts to hide assets had forced her to incur extra attorney fees he should bear.

The district court denied all post-trial motions. Concerning Donald's premarital assets, it found that they "were minimal and co-mingled as to become indistinguishable and a marital asset."

Donald appeals the district court's ruling, and Jyl cross-appeals. Both parties essentially renew their claims from their post-trial motions. For reasons stated below, we affirm the decree as modified.

² The district court referred to Donald's testimony that he would be willing to pay one-half of Jyl's monthly expenses as spousal support. However, Donald's exact testimony was that he would be willing to pay one-half of Jyl's expenses "if they were accurate, but they're not." In any event, neither party contends Donald should be bound by a stipulation to pay half of Jyl's expenses as spousal support.

II. Standard of Review

We review a dissolution of marriage action de novo. Iowa R. App. P. 6.4; *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Even though the standard is de novo, we give weight to the factual findings of the district court, especially concerning the credibility of witnesses. *Sullins*, 715 N.W.2d at 247; *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). We review the district court's denial of attorney fees for an abuse of discretion. *Sullins*, 715 N.W.2d at 247.

III. Analysis

A. Whether the District Court Equitably Divided the Parties' Property

Iowa Code section 598.21(5) (2007) requires that "all property, except inherited property or gifts received by one party" be equitably divided between the parties. Section 598.21(5) then lists several factors to consider when dividing property, including:

- (a) The length of the marriage.
- (b) The property brought to the marriage by each party.
- (c) The contribution of each party to the marriage
- (d) The age and physical and emotional health of the parties.

- (f) The earning capacity of each party

- (m) Other factors the court may determine to be relevant in an individual case.

As noted, the district court tried to make an even division of property, despite Donald's arguments that he should receive a larger share. During their twenty-year marriage, the parties are presumed to have contributed at a comparable level. See Iowa Code § 598.21(5)(a), (c). Donald performed the bulk of the farm operations, while Jyl raised the children and helped on the farm.

Notably, Jyl suffered her disabling injury while working in the farm enterprise. Jyl's fragile physical condition, her inability to hold employment, and her extensive medical costs all support a finding that she should receive at least half the parties' marital property. See *id.* § 598.21(5)(d), (f), (m). We also note that Donald hid assets before trial, and the district court found that his actions damaged his credibility.

Donald argues that he should be given credit for \$237,000 in assets he brought into the marriage twenty years ago. These assets consist of some used farm equipment, approximately 20,000 bushels of corn, and approximately 1000 bushels of beans. Under Iowa law, premarital property is not automatically excluded from the marital estate, but its status is one factor to be considered when dividing the marital property. *Id.* § 598.21(5)(b); *Sullins*, 715 N.W.2d at 247. We agree with the district court's decision not to give Donald credit for these assets. As the district court found, these assets were commingled with the couple's farming operation after marriage. Furthermore, we agree with the district court that the value of these assets was less than Donald claims. For example, in his one-page handwritten exhibit that attempts to summarize those assets, Donald claims his 20,000 bushels of corn were worth \$100,000 at \$5.00 a bushel. We take judicial notice that the market price of corn was far less than \$5.00 a bushel in 1988.

Donald also claims the \$48,000 paid out of marital assets for remodeling and furnishing Jyl's home in Griswold should have been charged to her under the property settlement. Jyl conceded in her testimony that she had previously told Donald these expenses would come out of her share of the property settlement.

However, we agree with the district court's treatment of that expense. According to the evidence, much of this remodeling was intended to make the house suitable for Jyl given her physical limitations. It would not necessarily enhance the house's value in the eyes of a third party. The district court's decision to treat the house as worth no more than the \$170,000 purchase price was fair and reasonable. Like the district court, we do not believe any alleged verbal agreement between Donald and Jyl on the subject should be binding, particularly because Donald held all the cards at the time because he controlled almost all the bank accounts and sources of income.

In her cross-appeal, Jyl argues that the district court undervalued the growing crops. Jyl computed the value of the growing crops by estimating the yield for each tract of farmland. She then multiplied her estimated bushel harvest by the crop prices on the day of the trial and subtracted the previous year's harvest cost to arrive at an estimated net crop value of \$493,354.44. Donald did not offer estimated harvest costs, but he performed similar calculations with his estimated yields to arrive at an estimated gross crop value (before expenses) of \$408,233.52.

The district court noted that "[i]n any farm operation, the most difficult task is to ascertain a value of growing crops in the field." The district court found Jyl's estimate of the net value of the growing crops was not reliable, and instead estimated the net value to be \$90,000, an amount approximately equal to the previous year's taxable farm income.

We agree with Jyl that there is a potential flaw in the \$90,000 figure. By the time of trial, late August, most of the crop expenses for that year ordinarily

would have been incurred. In his testimony, Donald agreed that to arrive at the value of the growing crops, one should only deduct the expenses that had yet to be paid. The district court's determination, on the other hand, assumed that none of the farming expenses for that year had been incurred. That may not have been correct. The common method of valuing growing crops is to estimate the probable yield, calculate the value of that yield, and subtract reasonable harvest costs. *In re Marriage of Martin*, 436 N.W.2d 374, 376 (Iowa Ct. App. 1988). Having said that, we agree with Donald that no reliable evidence was presented as to the farm expenses that had yet to be incurred as of August 2008. Donald did admit on cross-examination that he had already paid a "substantial amount of the farm expenses for the year," so it is likely that the \$90,000 figure is a good deal lower than the actual net crop value. However, the district court, as it put it, was placed in a position of having "to ascertain the unknown."

While we approve of the district court's objective of dividing the parties' property equally, the law does not require perfect attainment of that objective. Donald may have benefited from Jyl's failure to present more persuasive proof as to the net value of the growing crops; Jyl may have benefited from the district court's treatment of Donald's premarital assets and the remodeling/furnishing expenses on her home. Particularly in light of the overall size of the marital estate, we decline to disturb a property settlement that we believe to be fair taken as a whole. A division of property need only be equitable, not precisely even. See Iowa Code § 598.21(5); *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001) (stating Iowa courts do not require an equal division or percentage distribution). This division meets that standard. We affirm it here.

B. Whether the District Court's Award of Alimony Was Appropriate

"Alimony is not an absolute right; an award depends upon the circumstances of each particular case." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). Iowa Code section 598.21A sets the criteria for determining support, including

- (a) The length of the marriage.
- (b) The age and physical and emotional health of the parties.
- (c) The distribution of property
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- (e) The earning capacity of the party seeking maintenance
- (f) The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage
- (g) The tax consequences to each party.
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- (j) Other factors the court may determine to be relevant in an individual case.

[T]he spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible, to the extent that that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well.

In re Marriage of Hayne, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983).

A number of the statutory factors support an award of spousal support in this case. This was a lengthy marriage; Jyl is physically disabled; and she has virtually no ability to perform an occupation. Thus, we agree with the district court that alimony is appropriate here.

In determining spousal support, the district court found Jyl's monthly expenses were at least \$4891.89. The court concluded that Jyl's farm rental income would cover about half of that expense, and it ordered Donald to pay \$2450 per month to cover the rest of her expenses. Although (as explained

below) we differ with the district court's reasoning to some extent, we ultimately hold modification of its award is not necessary to "do equity." See *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005) (quoting *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996)) (reiterating the rule that appellate courts "accord the trial court considerable latitude in making this [alimony] determination and will disturb the ruling only when there has been a failure to do equity"). Therefore, we affirm on this issue.

In estimating Jyl's post-dissolution income, the district court correctly took into account the \$39,838 estimated rent Jyl will receive from her share of the farmland. However, the district court did not consider any of the income she could receive from other, cash-type investments.³ From the settlement, Jyl received \$727,830 in bank and investment accounts, checks, and grain that was readily convertible to cash. If Jyl were to invest this money at a three percent rate of return, she could earn an additional \$21,835 per year. Jyl received Social Security disability benefits at the time of trial, but she introduced evidence that she would not qualify for those benefits after the dissolution. We thus find Jyl's post-dissolution income will be approximately \$61,673 per year.

Jyl faces substantial living expenses, mostly resulting from her health care needs. Most of her stated expenses appear to be supported by the record,⁴

³ The district court stated:

Jyl will need to apply her farm rentals to her monthly living expenses, [which] will cover approximately one-half of the needed \$4891.89 per month. Therefore, this Court finds that Donald should be required to pay \$2450 per month as spousal support.

⁴ Donald quibbles with Jyl's decision to increase the compensation of her home health aides from nine dollars per hour to fifteen dollars per hour around the time of the parties' separation, but the evidence shows these raises were requested by the aides themselves and were being paid at the time of trial.

although some expenses (e.g., clothes for kids and school lunches) relate to the children. These expenses will not continue indefinitely, and in any event Jyl also receives child support. However, Jyl's counsel correctly pointed out at oral argument that her list of personal expenses may omit some items, such as property taxes and homeowner's insurance. Accordingly, we will not disturb the trial court's finding in this area. We believe the record generally supports the district court's determination that Jyl will have personal living expenses of approximately \$4891 per month or \$58,692 per year.

Turning to Donald, his previous year's (2007) taxable farm income was \$82,114 for the grain operations, and \$4866 for the seed operations, for a total farm income of \$86,980. Testimony established that this was a typical year, and we find it a suitable base to estimate his income. He paid \$25,000 in deductible employee benefits that year, of which approximately \$12,000 was for family health insurance, and \$13,000 was for medical expenses (mostly for Jyl). Based on the evidence presented at trial, we conclude his medical benefit expense will decline by approximately \$12,500 in light of the dissolution. This means that his projected income should be adjusted upward by \$12,500. However, Donald loses land in the settlement, so we subtract \$39,838 from his income as the amount he will need to pay to rent equivalent farmland. Therefore, we find Donald's post-dissolution income, without a depreciation adjustment, to be approximately \$59,642 per year.

Following the guidance established by the supreme court in *In re Marriage of Gaer*, 476 N.W.2d 324, 326-29 (Iowa 1991), we also review Donald's tax returns for accelerated depreciation. It appears that Donald historically has been

able to claim accelerated depreciation of new farm equipment pursuant to 26 U.S.C. § 179. In 2007, for example, this accelerated depreciation amounted to \$74,200. However, Donald points out, and upon our review we agree, that this accelerated depreciation mostly gives him timing benefits. Even with straight-line depreciation, Donald would still have a substantial yearly depreciation deduction, given his volume of equipment purchases over the years. After trial commenced, Donald prepared a detailed exhibit showing what the depreciation deduction would have been if straight-line depreciation had been used. This showed a deduction of \$95,957.89 in 2007, \$95,902.46 in 2006, and \$77,683.03 in 2005. Donald's actual depreciation deductions in 2007, 2006, and 2005 were \$101,229, \$135,995, and \$120,396 respectively. After considering the foregoing, we believe Donald's annual income should be increased by approximately \$30,000, the average difference between the standard depreciation and the accelerated depreciation figures. This results in annual income for Donald of \$89,642, which is similar to the amount he claimed on the child support guidelines worksheet he submitted at trial.

Donald put in only minimal evidence of his living expenses (i.e., non-business expenses). This evidence suggested annual expenses of approximately \$15,000, plus \$7200 per year for "recreation," but like Jyl he failed to list some items such as homeowner's insurance and property taxes. We believe the record generally supports yearly expenses of approximately \$22,000.

Thus, before considering alimony, Donald's projected income is \$89,642, and Jyl's is \$61,673. Under the district court's spousal maintenance award, Donald will have to pay \$29,400 annually to Jyl. This results in Donald's income

being reduced to \$60,242, and Jyl's being increased to \$91,073. Ordinarily, we would not uphold such an award. In granting alimony, a court should not destroy the right of the party providing the income to enjoy at least a comparable standard of living as well. *In re Marriage of Stark*, 542 N.W.2d 260, 262 (Iowa Ct. App. 1995).

However, once personal living expenses are taken into account, the picture changes. Pre-alimony, Donald's income exceeds his expenses by \$67,642 (\$89,642 minus \$22,000). However, because Jyl has far greater living expenses due to her disability, her pre-alimony differential is \$2981 (\$61,673 minus \$58,692). Post-alimony, this results in Jyl's income exceeding her expenses by \$32,381 (\$2981 plus \$29,400), and Donald's income exceeding his expenses by \$38,242 (\$67,642 minus \$29,400). Although this is still a generous award from Jyl's perspective, we do not believe, under the specific circumstances of this case, that modification of the award is necessary to "do equity." A spouse's medical conditions and anticipated medical expenses are relevant considerations in awarding alimony. *Olson*, 705 N.W.2d at 316. District courts have "considerable latitude" in this area. *Id.* at 315. Accordingly, we affirm the district court's award of spousal maintenance.

C. Whether Attorney Fees Should Have Been Awarded

Jyl requests that Donald pay her attorney fees of \$24,142.92. She argues that Donald concealed and lied about approximately \$357,000 worth of cash assets during the course of the dissolution proceedings. Knowingly false statements were made both in interrogatory answers and in the affidavit of financial status. Donald essentially admits this conduct:

Q. Now, on the third page, you signed these interrogatories under oath, under penalty of perjury. Was that an accurate reflection of the bank accounts that you had? A. No

Q. You admit you were trying to hide the money; correct? A. Correct

Q. Do you disagree that you were attempting to hide assets? A. No, I don't disagree.

Jyl argues that this concealment caused her to incur substantial attorney fees. She was forced to subpoena various financial institutions in order to locate missing assets. However, Jyl offered no specific proof of the amount of time devoted to uncovering these hidden assets. Nor has Donald offered an estimate of his own, although Jyl's itemized bills were placed into evidence and thus were available for his review. Regardless, we believe some attorney fee sanction is necessary in this case.

The district court has considerable discretion in awarding attorney fees. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). An award of attorney fees depends on the abilities of each party to pay. *Id.* Attorney fees must be fair and reasonable. *Id.* To prevail, Jyl must show that the district court abused its discretion in refusing to award her attorney fees. *Id.*

Without doubt, we are troubled by Donald's attempts to conceal assets.

We previously held that:

A party who has not been fair and accountable with property under his or her control during the dissolution process must be charged accordingly. To hold otherwise would in numerous instances weigh heavily against the marriage partner not in business. The courts of this state have an obligation to require accountability. Failure to disclose, sequestration of assets, or transfer of assets during the dissolution process must be dealt with harshly. Otherwise the process becomes an uncivilized procedure and the issues become not ones of fairness and justice but which party can outmaneuver the other.

In re Marriage of Williams, 421 N.W.2d 160,164 (Iowa Ct. App. 1988).

Given Donald's admitted misconduct during the course of the dissolution proceedings, we hold that the district court abused its discretion in not awarding any attorney fees to Jyl. Donald's concealment and false statements involved hundreds of thousands of dollars worth of assets. His misconduct was only uncovered by the diligence of Jyl's representatives, and went directly to the hotly disputed property settlement issues that were being litigated. We order Donald to pay Jyl \$10,000 of her \$24,142.92 trial attorney fees in this case. We believe an award could have been justified either under the district court's general authority to sanction misconduct in the dissolution proceeding, including failure to comply with Iowa Code section 598.13(1), see *In re Marriage of Williams*, 595 N.W.2d 126, 128-29 (Iowa 1999), or simply as a partial award of Jyl's attorney fees in the dissolution proceeding, given Donald's undisputed ability to pay her fees, *Sullins*, 715 N.W.2d at 25, and the undisputed fact that his wrongdoing increased her fees. We believe the principles we set forth two decades ago in *Williams* are sound and should continue to be followed.

Finally, both parties request appellate attorney fees. "[O]ur decision is guided by the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal." *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). Both parties have sufficient resources to pay attorney fees, and although we ultimately sustained only one ground for appeal, we believe that both parties raised colorable issues on appeal. These ultimately non-meritorious issues raised by both parties consumed substantial judicial

resources. In our discretion, we decline to award appellate attorney fees. The costs of appeal are assessed to Donald.

IV. Conclusion

We affirm the property division and the award of spousal maintenance. However, we hold the district court abused its discretion in failing to award Jyl any attorney fees, considering Donald's concealment and false statements concerning his assets. Therefore, we order Donald to pay \$10,000 of Jyl's trial attorney fees. With this one modification, we affirm the parties' decree of dissolution.

AFFIRMED AS MODIFIED.