JUN 30 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JAMES L. TRAVIS AND JEANNE TRAVIS

UPON THE PETITION OF	)	
JAMES L. TRAVIS,	)	
Appellee,	)	Filed June 30, 1978
AND CONCERNING	)	
JEANNE TRAVIS,	)	527 / 2-59510
Appellant.	)	

Appeal from Dickinson District Court - James H. Andreasen, Judge.

Respondent appeals the property division aspects of the dissolution decree and the ruling of the trial court on her motion for new trial. AFFIRMED with Modification.

Harold W. White and Leo E. Fitzgibbons, of Fitzgibbons Brothers, of Estherville, counsel for appellant.

Frank B. Nelson, of Greer, Nelson, Bertell, Montgomery & Barry, of Spencer, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Respondent Jeanne Travis appeals the property division made by the trial court in dissolving her 29 year marriage with petitioner James L. Travis. She appeals also the denial of her motion for new trial based on the allegation that James had failed to make full disclosure of marital assets. We affirm with modification.

Our de novo review persuades us that Jeanne should receive a setoff of $52,000 for her "gift" from her parents used to acquire the drive-in theatre and racetrack. The marital assets should include the amounts James failed to disclose at the original trial of the dissolution action. These approximately $15,800 additional assets (representing the 49% interest in Lapeo and the purchase option on Micro-Enzyme) when added to James' share brings his amount of the marital assets, exclusive of the theatre racetrack property, to an amount ($49,740) almost equal to the amount awarded Jeanne ($53,842). Although Jeanne seeks an increased amount for the interim management of the theatre and racetrack property, we believe the $5000 fee allowed by the trial court should stand. At the time of sale any amount of the net operating losses attributable to the property which were expenses incurred and paid by Jeanne from her own funds should be repaid to her from the sale proceeds.

At the time of the sale provided for in the trial court decree the following amounts shall be deducted: 1) expenses of sale, 2) attorney fees designated in the trial court decree, 3) net operating loss expense incurred and paid by Jeanne from her own funds, and 4) $52,000 to Jeanne for her parent's gift. The remaining proceeds shall be divided equally between Jeanne and James.

Our disposition of the property division issue renders any determination of the new trial claim unnecessary.

Affirmed with modification and remanded for entry of these provisions in the dissolution decree.

All judges concur, except ALLBEE, C.J., and DONIELSON, J., who dissent.

DONIELSON, J. (dissenting)

My review of the record in this case convinces me that the property division ordered by the trial court achieved an equitable division of the marital assets. Even after considering the "gift" of $52,000 from Jeanne's parents, I consider her award of 56 percent of the assets to be extremely fair and justified by the evidence.

As a result of the modification ordered by the majority, Jeanne will receive approximately 62 percent of the marital assets. In my mind, such a share is not warranted in this case. Further, I believe that the trial court correctly overruled Jeanne's motion for new trial inasmuch as I am unable to say that James' apparent misconduct materially affected her substantial rights. See rule 244, Rules of Civil Procedure. I would affirm the judgment of the district court in its entirety.

Allbee, C. J., joins in this dissent.