

IN THE COURT OF APPEALS OF IOWA

No. 2-395 / 91-1574

IN RE THE MARRIAGE OF EVELYNE M. BURGER AND
CLIFFORD JOHN BURGER

Upon the Petition of

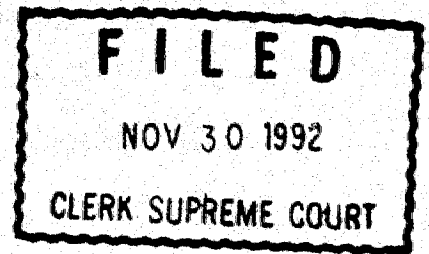
EVELYNE M. BURGER,

Appellee,

And Concerning

CLIFFORD JOHN BURGER,

Appellant.



Appeal from the Iowa District Court for Appanoose
County, Phillip R. Collett, Judge.

Clifford John Burger appeals from the district court's
dissolution decree. **AFFIRMED.**

Vern M. Ball, Bloomfield, for appellant.

Thomas M. Walter of Johnson, Hester & Walter, Ottumwa,
for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

HABHAB, J.

FACTS

Evelyne and Clifford Burger were married on January 25, 1958, and divorced on October 9, 1991. Both parties had been married once before and have children by those previous marriages. No children were born of the marriage, but Clifford adopted Evelynne's adult son William (Bill) in 1984.

Evelyne was born on November 5, 1930. She is totally disabled and in poor health. She is a diabetic and has suffered two heart attacks and a stroke within the past few years. She is taking various medications. Clifford was born on December 10, 1915. He is in good health but suffers from mild diabetes.

Evelyne receives \$337 per month in supplemental security income. She also receives \$48 per month in food stamps and \$242 per month in rental assistance. Clifford is retired and receives \$445 per month in social security. He is eligible for Medicare and food stamps, but he refuses to participate in these programs.

During most of the marriage, Clifford and Evelynne engaged in farming and livestock production. In addition to taking care of the household and handling the family finances, Evelynne participated in the farm labor. Clifford farmed his land and contracted his labor out to others. In 1986, the parties ceased farming and declared bankruptcy under Chapter 7. In the nonjudicial foreclosure and sale

that followed, Bill purchased the farm and some machinery, including a tractor and a combine. The parties continued to live in the home on the farm and Clifford assisted Bill in farming. Clifford claims Evelyne began to funnel substantial marital funds to Bill from this time onward. However, Evelyne denies this allegation and claims the first time Clifford raised this accusation was after she filed for dissolution.

The parties also entered into mineral exploration and leasing in the mid-1970s. The parties created a closely-held corporation for this purpose, Ottumwa Stone. The company ceased operations in 1983 due to a decline in demand for high-sulphur coal. In late 1983, the parties transferred their shares in the corporation to Bill to shelter it from farm creditors. In June 1988, Evelyne acquired stock in the corporation as a gift from a former business partner.

On July 6, 1990, Evelyne filed a petition for dissolution. Following a hearing, the district court entered a decree dissolving the parties' marriage. It concluded the credibility of both parties left much to be desired. It concluded there was insufficient credible evidence to support either party's claim of the other's theft, concealment, and improper conveyance of marital assets. In this respect, we note the following findings of the district court:

The credibility of both parties leave much to be desired when considering the history of questionable dealings such as failure to report income from the sale of cattle, disposing of assets shortly before filing for bankruptcy, and creating fictitious corporations, all appearing to be designed to hide assets from creditors or income from the Internal Revenue Service.

The district court found the fair market value of the parties' assets and liabilities existing at the time of trial to be as follows:

ASSETS

1. Farm machinery/equipment	\$16,720
2. Ottumwa Stone stock	7,800
3. Unionville lots	200
4. Household goods/furnishings	6,585
5. Antique marble collection	8,885
6. 1982 Chevrolet	500
7. Jewelry (Cliff)	1,000
8. Jewelry (Evelyne)	1,000
9. Norwest bank account (Cliff)	360
10. Bill Burger debt to Evelynne	2,121
11. Missouri bank account (Cliff)	6,000
12. Two handguns	130
13. Joint account with friend (Evelyne)	7

LIABILITIES

1. J.T. Collections	\$2,858
2. Wolfe Eye Clinic	223
3. Dean Thoman Insurance	429
4. Rathbun Rural Water	54
5. Rin Tin Tin	327
6. Rudd Tire	151

The district court divided the marital assets between the parties as follows:

EVELYNE

1. Household goods/furnishings
2. Those items of farm machinery and equipment requested by Petitioner that are listed in Exhibit A of Petitioner's Exhibit 8
3. Bill Burger indebtedness
4. Evelynne's joint bank account with her friend

5. Evelyn's shares of Ottumwa Stone
6. Jewelry (Evelyn's)
7. One hand gun

CLIFFORD

1. Marble collection
2. Unionville lots
3. 1982 Chevrolet
4. Farm machinery and equipment not awarded to Evelyn
5. Clifford's bank accounts
6. Jewelry (Clifford's)
7. One hand gun

The district court ordered the parties to each pay one half of the indebtedness to J.T. Collections. It ordered Evelyn to pay the indebtedness to Wolfe Eye Clinic, Dean Thoman Insurance, Rin Tin Tin, and Rudd Tire. It ordered Clifford to pay the indebtedness to Rathbun Rural Water. It also ordered each party to pay his or her own indebtedness not mentioned in the decree. The court did not award alimony. It ordered each party to pay his or her own attorney fees and equally divided the court costs between the parties.

Clifford appealed. We affirm.

SCOPE OF REVIEW

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision

primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

ANALYSIS

I. Property Distribution.

Clifford argues the district court's division of the marital property was inequitable. We disagree. We find the value placed on the assets by the trial court to be well within the permissible range of evidence and will not disturb them on appeal. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). We find the distribution of the marital property by the district court to be equitable under the circumstances.

The appellant, in his brief, explains with honesty and frankness the dilemma facing the district court when it ordered the division of marital assets. On page 28 of the appellant's brief, he states:

As the trial court pointed out, the parties may have conspired among themselves to hide assets before filing for bankruptcy, failed to report income from the sale of cattle, and created fictitious corporations for their own personal gain. These actions taken over a period of years and the confused recollections of the parties, whether by design or not, have so muddied the waters that it is nearly impossible to sort out what actually did take place. We agree that there are also times when Cliff's testimony is contradictory, or perhaps even hard to believe. However, as the Court can see from the preceding pages, Evelyne and Bill must surely have perjured themselves in an attempt to hide the many

thousands of dollars, both in cash and assets, that Evelyne funneled to Bill.

We affirm the district court on this issue.

II. Fraudulent Concealment and Wrongful Transfer of Marital Assets.

Clifford argues Evelyne fraudulently concealed and wrongfully transferred marital assets. The district court held "insufficient credible evidence exists to support either party's claims of the other's theft, concealment, and improper conveyance of marital assets." After reviewing the record de novo, we are unable to find sufficient credible evidence to support Clifford's claim of fraudulent concealment and wrongful transfer of marital assets. We affirm the district court on this issue.

The appellant as one of his alternative prayers asks us to enter an order authorizing Clifford to sue Evelyne and Bill for conspiracy and fraudulent transfer. Under the issues as joined, we lack the necessary jurisdiction to enter such an order. The viability of such an action is not for us to decide now.

III. Attorney Fees.

Evelyne and Clifford each claim he or she is entitled to appellate attorney fees. We disagree.

An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties'

financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). Awards of attorney fees must be for fair and reasonable amounts, In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977), and based on the parties' respective abilities to pay. In re Marriage of Lattig, 318 N.W.2d 811, 817 (Iowa App. 1982).

We hold each party shall pay his or her own appellate attorney fees.

CONCLUSION

After considering all issues presented, we affirm the district court.

Costs of this appeal are taxed to the appellant.

AFFIRMED.