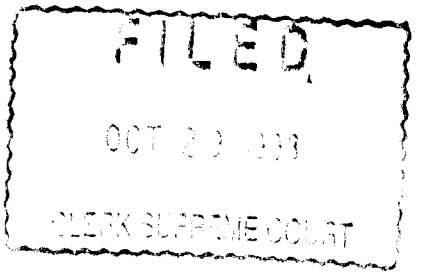
IN THE COURT OF APPEALS OF IOWA

No. 8-163 / 97-0938

IN RE THE MARRIAGE OF ANDREA LYNN SUTTON AND DAVID ALAN SUTTON



Upon the Petition of
ANDREA LYNN SUTTON,
Appellant,

And Concerning
DAVID ALAN SUTTON,
Appellee.

Appeal from the Iowa District Court for Benton County, Lynne E. Brady, Judge.

The petitioner appeals, and respondent cross-appeals, from various economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Michael L. Mollman of Mollman Law Office, Cedar Rapids, for appellant.

Stephen B. Jackson and Stephen B. Jackson, Jr. of Jackson Law Office, Cedar Rapids, for appellee.

Heard by Cady, C.J., and Vogel and Mahan, JJ., but decided by Sackett, C.J., and Huitink, Streit, Vogel, and Mahan, JJ.

VOGEL, J.

Andrea Sutton appeals and David Sutton cross-appeals various economic provisions of the dissolution decree. Andrea claims the district court erred by requiring her to pay child support and in valuing the parties' business. On cross-appeal, David maintains the district court erred by failing to equitably divide the parties' debts. We affirm as modified.

David and Andrea Sutton married in October 1982. They had three children: Melisa, born December 6, 1983, Justine, born February 11, 1986, and Candice, born July 8, 1990.

David and Andrea both worked in the grocery business at the time of their marriage. They subsequently moved to Newhall, Iowa where they purchased a meat locker business for $25,000. Initially, they both worked in the business. David performed the meat cutting, and Andrea kept the books and worked at the front counter.

The parties made significant improvements to the meat locker business. They added new freezers, a sausage kitchen, and a spice room in addition to other remodeling. As the business grew, the gross receipts increased from $98,000 in 1991 to $286,000 in 1996.

Andrea obtained part-time work at Quaker Oats in 1989, but ultimately changed to full-time employment. She currently earns wages of $15.70 per hour, for

an annual income of $46,182. After Andrea obtained full-time work at Quaker Oats, she only assisted David in the meat business during deer season.

David's financial affidavits reveal he earned an annual income of $21,137. Andrea, however, testified as much as $10,000 of his income went under-reported because he received cash from the business. David invoked his Fifth Amendment privilege against self incrimination when questioned about under-reporting his income.

The parties dissolved their marriage in April 1997. The district court awarded the parties shared physical care of the children and directed Andrea to pay child support of $498 per month pursuant to the child support guidelines. The trial court calculated child support by using Andrea's 1996 gross income of $46,182. It attributed gross income to David of $23,637. The district court assumed David was under-reporting his income to some extent and increased his stated income of $21,137 by $2500 for purposes of calculating child support.

The trial court awarded Andrea the family home. The home had a net equity of $84,000. David was awarded the meat locker business. It had inventory valued at $28,683 as well as the equipment valued at $39,205. Including debts, the trial court determined the business had a net value of approximately $46,870. The trial court did not place any value to the business as on ongoing enterprise.

On appeal Andrea claims the district court erred by: (1) failing to accurately determine David's income in setting the child support; and (2) incorrectly valuing the

parties' business. On cross-appeal David contends the district court erred by failing to equitably divide the parties' debts.

I. Standard of Review

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

II. Child Support

The child support guidelines are strictly followed in determining a parent's child support obligation. *State ex rel. Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994); *State ex rel. Miles v. Minar,* 540 N.W.2d 462, 464 (Iowa App. 1995). The scheduled amount, however, is not unassailable, but may be increased or decreased if the court finds it is necessary to provide for the needs of the children or do justice between the parties under the special circumstances of the case. *State ex rel. Miles*, 540 N.W.2d at 464; *see* Iowa Code § 598.21(4)(a)(1997).

In applying the child support guidelines, we must determine the parents' current monthly income from the most reliable evidence presented. *In re Marriage of Hart*, 547 N.W.2d 612, 615 (Iowa App. 1996). This often requires us to consider all of the circumstances relating to the parties' income. *Id.* All income that is not

anomalous, uncertain, or speculative should be included in determining a party's child support obligation. *In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993); *see also In re Marriage of Lee,* 486 N.W.2d 302, 305 (Iowa 1992) (stating the guidelines do not limit the definition of gross income to reportable income for federal income tax purposes). Additionally, in a civil case, the court may infer from a party's refusal to answer based on the Fifth Amendment privilege against self-incrimination the answer would be adverse to the party. *See Eldridge v. Herman,* 291 N.W.2d 319, 322 (Iowa 1980).

Andrea claims the trial court erred by requiring her to pay $498 in child support per month. Specifically, she asserts the district court failed to adequately consider David's refusal to answer questions about his income. He points out the parties could not have accumulated their assets and enjoyed their life style on their stated incomes. She further maintains we should presume David's answers to the question about under-reporting would have been adverse and find his income increased to the point neither party would have to pay child support.

Because David refused to answer questions concerning the under-reporting of his income, we must look to the only other evidence available in the record. Andrea testified she believed he under-reported his income by $5,000 to $10,000. Although she had not worked in the bookkeeping capacity at the business since 1994, her background with the financial aspects of the business as well as her familiarity with the family finances provide us the only reliable basis for evaluating David's under-

reporting. Based on Andrea's testimony and the assets accumulated by the parties, we conclude David under-reported income of approximately $7500. Accordingly, we find David to have a net income of $28,637 and modify the child support award Andrea must pay David to $318.43.

III. Valuation of Business

We value property for division purposes at its value at the time of the dissolution. *See In re Marriage of McLaughlin,* 526 N.W.2d 342, 344 (Iowa App. 1994). It is the net worth of the parties at the time of trial which is relevant in adjusting property rights. *Id.*; *In re Marriage of Muelhaupt*, 439 N.W.2d 656, 661 (Iowa 1989).

The purpose of determining value is to assist the court in making equitable property awards. *In re Marriage of Dennis*, 467 N.W.2d 806, 808 (Iowa App. 1991). The valuation of a small business is frequently difficult. *See id.; In re Marriage of Wiedemann*, 402 N.W.2d 744, 747-49 (Iowa 1987). Consequently, the law gives leeway to the trial court, and even allows the trial court to devise its own scheme for valuation. *Dennis*, 467 N.W.2d at 808.

Andrea claims the trial court erroneously valued the parties' business. She asserts the trial court erred by failing to consider the value of the business as an ongoing enterprise in reaching its valuation .[1]

[1] In its decree, the trial court stated "because the income stream will be used for child support calculations, it should not be factored in to the value of the business."

We believe the trial court should have considered the value of the business as an ongoing enterprise. Andrea's expert, Robert Holland, a senior vice president at Iowa Realty Commercial, testified that he used the stream of business income to determine the value of the business as an ongoing enterprise.[2] He concluded the value of the business as an ongoing enterprise added an additional value of $80,000. David's expert, Rodney Kubicek, did not offer an overall value of the business, but testified as to the bare value of the buildings, inventory and equipment. However, Kubicek acknowledged that one valid way to value the business would be to factor in the stream of income to arrive at a value of the business as an ongoing enterprise. He further testified that using Holland's method would in fact add an additional $70,000 to $80,000 in value, but stated that he thought Holland's valuation was too high overall.

Unlike *In re Marriage of Bethke,* 484 N.W.2d 604, 607 (Iowa App. 1992), where we found no goodwill in a professional corporation involving a sole practitioner, David and Andrea have built a substantial business operation which produces a stream of income related more to market forces and the business itself than the individual operators of the business. We agree with the testimony of Holland and Kubicek that a fair valuation of the business for the purposes of making an equitable division of property requires more than a valuation of the inventory and equipment.

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[2] Holland testified that the value of an ongoing business is typically two to three times its stream of business or net operating income. Holland arrived at the $80,000 value by multiplying the net operating income for the locker, approximately $32,000, by two and a half.

We believe Holland's method is a valid approach; however, his valuation of an additional $80,000 is too high for this business. Instead we assign a $40,000 value for the ongoing enterprise. Accordingly, we conclude the net value of the business is $86,870. We will consider the effect of this increased value in determining the overall property division.

IV. Property Distribution

The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997); *see also In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or a percentage division in determining a just and equitable share of property. *Gonzalez*, 561 N.W.2d at 98. Instead, each particular circumstance determines what is fair and equitable. *Id.* Further, the property distribution should be made pursuant to the criteria codified in Iowa Code section 598.21(1). *Id.*

David claims the district court erred by failing to consider the debt of approximately $16,946 to his father, a debt to Schultz Marine of $934.50, and a debt for a hoist in the amount of $1400.

The district court determined the evidence did not substantiate his claim of indebtedness to his father. The only evidence presented of this debt was a handwritten list of money loaned to David from his father and one check to David's father in the amount of $600. There is evidence this money was intended as a gift rather than

repayment. The record in this case does not support David's contention the money was a loan. We have conflicting testimony from the parties and no testimony from his father. Moreover, if the money was a loan, there would likely be more than one check for repayment. Similarly, we affirm the district court's conclusions concerning the hoist bill. The Schultz Marine bill, however, was debt incurred during the marriage that should be equitably divided. Consequently, we modify the decree to require Andrea to pay $467, half of this bill.

In order to reach an equitable distribution of property, Andrea should receive an additional award of approximately $20,000. Thus, we modify the decree to award Andrea an additional lump sum amount of $,20,000 payable with interest at 7% per annum. The amount shall be paid in four installments of $5,000, plus accumulated interest, beginning six months after the date of the issuance of the procedendo and continuing annually on the same date each year until paid.

AFFIRMED AS MODIFIED.

All judges concur except Sackett, C.J., who partially dissents.

SACKETT, J. (concurring in part; dissenting in part)

I concur in part and dissent in part. The trial court valued the business at the value of the equipment, or $39,205, noting income David earned would inure to the children through child support. The majority has elected to increase the value of the business by $40,000 because it is an ongoing enterprise. It appears in essence the majority, while not saying so, finds good will to be $40,000.

From the *joint* tax returns[1] of David and Andrea, I find the following figures reported as business income from Schedule C:

1995	$20,069
1994	1,764
1993	1,835
1992	(3,712)
1991	(8,499)

Andrea's expert determined a figure he termed "net operating income" to be $31,000 to $32,000 annually, and gave the business a value, which included a value he termed "trade value," of $80,000.

David works in the business on a full-time basis. Even if one were to accept the figures of Andrea's expert for net operating income,[2] it would amount to no more than a modest wage for full-time work, plus an even more modest return on a $39,205 investment. I cannot agree with the majority's decision to increase the value of the business. I would affirm the district court.

Huitink, J., joins in this partial dissent.

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[1] Andrea was involved in the business working as a bookkeeper, and was involved in the preparation of the tax return.

[2] I do not find evidence to support this valuation.