**IN THE COURT OF APPEALS OF IOWA**

No. 0-346 / 99-1524
Filed December 13, 2000

**IN RE THE MARRIAGE OF JOANN SNELL AND PAUL W. SNELL**

**Upon the Petition of**
**JOANN SNELL,**
**Petitioner-Appellant,**

**And Concerning**
**PAUL W. SNELL,**
**Respondent-Appellee.**

FILED
DEC 13 2000
CLERK SUPREME COURT

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Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

The petitioner appeals the division of marital property provisions of the parties' dissolution decree. Petitioner contends the district court erred in: (1) failing to take into account respondent's dissipation of marital assets; (2) failing to find that respondent violated a court order forbidding the disposal of marital assets during the pendency of the dissolution proceedings; and (3) awarding her an inequitable division of marital property. Petitioner requests an award of appellate attorney fees. **AFFIRMED AS MODIFIED.**

Dennis D. Jasper of Stafne, Lewis, Jasper, Preacher & Rowe, Bettendorf, for appellant.

Arthur L. Buzzell, Davenport, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

**MILLER, J.**

Petitioner Joann Snell appeals the trial court's division of marital property in the decree dissolving her marriage to respondent Paul W. Snell. Joann contends the district court erred in: (1) failing to find that Paul disposed of marital assets during the pendency of the dissolution proceedings in violation of a prior court order; (2) failing to take into consideration Paul's dissipation of marital assets; and (3) awarding her an inequitable division of marital property. Joann also seeks an award for appellate attorney fees. We affirm as modified.

## I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

Joann and Paul Snell were married on June 9, 1971. This was the first and only marriage for both parties. The two children born from this marriage were adults at the time of trial. Joann was forty-nine years of age at the time of the dissolution trial and Paul was forty-six. At the time of trial Joann was taking courses at a community college and working toward a degree in social work. Paul worked as an upper level executive at Earnest Machine Company, where he has been employed throughout the parties' twenty-eight year marriage. During the marriage Paul obtained two Ph.D.'s, one being in Theology. Paul also served part-time as a pastor for several small local churches during the late 1970s and early 1980s. While the parties had very little at the outset of their marriage, Paul has worked hard to advance himself professionally and during the last few years has done very well, with his gross annual salary and bonuses in the last few years being approximately $160,000.

Paul moved out of the marital home in June 1997 and Joann filed a petition for dissolution of marriage in October 1997. The district court entered an

order the same day the petition was filed, prohibiting either party from selling or disposing of any marital property during the pendency of the dissolution action. In December 1997 the court entered a second order requiring Paul to pay $2,500 per month temporary spousal support and to make the monthly house payments on the marital home of approximately $1,351 per month until further order by the court.

The dissolution trial was held on April 28, 1999. The main dispute between the parties at trial centered on the division and dissipation of marital assets. Joann argued Paul had dissipated marital assets despite the court order by withdrawing large sums of money from their financial accounts, including a $10,000 withdrawal to pay taxes, another $10,000 for living expenses, and a $7,000 loan to his new girlfriend. Joann also alleged Paul had, and continues to have, a serious drinking problem which over the years of their marriage had cost the parties over $64,000.

The trial court entered its decree on June 2, 1999 awarding Paul assets of $453,621 and Joann assets of $445,853 (in addition each was to receive one-half the net proceeds from the sale of the parties' residence). The court made Joann responsible for the parties' one debt of $700, which was for medical bills incurred by her. The court also ordered Paul to pay Joann $1200 per month in alimony from his base pay of $78,000 per year, plus additional alimony based on any yearly bonuses he may receive and any salary or wages from any other sources, until Joann remarries or until three years after Paul begins to draw Social Security benefits. Paul was further ordered to pay $1000 toward Joann's

attorney fees and continue to pay the mortgage on the marital residence from June through September 1999, or until the residence was sold.

Joann filed a 179(b) motion on June 10, 1999. The district court partially granted the motion on August 19, 1999, ordering Paul to obtain and pay for Joann's medical insurance, with coverage equivalent to his own, for a period of three years or the maximum period under which COBRA coverage was available. Paul was further ordered to continue to pay the monthly mortgage payment on the marital residence until March of 2000. Joann filed timely notice of appeal of all adverse rulings and orders on September 17, 1999.

## II. SCOPE OF REVIEW

In this equity case our review is de novo. Iowa R. App. P. 4. We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

## III. MERITS

As stated above, Joann alleges three general grounds for appeal: (1) the court erred in failing to find Paul's expenditure of marital assets was in violation of the court order; (2) the court awarded her an inequitable division of marital property; and (3) the court erred in failing to take into account Paul's dissipation of marital assts during the marriage. Under each of the first two of these grounds she raises several claims. We will address each of her claims separately.

### A. Violation of Court Order

There is no question that a valid court order prohibiting the expenditure of any marital assets during the dissolution proceedings was in effect from October 24, 1997 until the district court's final judgment in the matter on June 2, 1999. It is equally clear there was also in effect a temporary court order requiring Paul to pay $2500 per month to Joann for support and an additional $1351 in mortgage payments on the parties' marital home, for a total of $3851 per month from December 5, 1997 until the entry of the final dissolution decree. During this time Paul was making an annual base salary of approximately $78,000, or approximately $4600 per month after taxes. Joann alleges Paul violated the court order prohibiting the expenditure of marital assets during the pendency of the dissolution proceedings in two ways.

**1. $20,000 withdrawal from Ultra Fund.**

Paul made two withdrawals of $10,000 each from the parties' joint Ultra Fund account, one on March 9, 1998 and one on April 10, 1998. Paul asserts one of the $10,000 withdrawals was necessary to pay the parties' 1997 income taxes and the other was for his general living expenses. We find Paul's assertions to be supported by the record and credible.[1]

The temporary support order was in effect from December 5, 1997 until the decree was entered on June 2, 1998. Although Paul received substantial bonuses, he was not entitled to any until on or after May 1, 1998, substantially after the two withdrawals in question, and his net income during the six months of the temporary support order was thus $4600 per month. Out of this amount he was required to pay $3851 in combined temporary spousal support and

[1] We note that the district court did not address the parties' competing allegations regarding the $20,000 withdrawal from the Ultra Fund and thus there is no credibility finding for us to weigh.

mortgage payment for the home in which Joann was living. This left him with $749 per month for the payment of income taxes due with the income tax returns and payment of his living expenses.

It is clear from the record that the parties did owe over $10,000 in federal and state income taxes for calendar year 1997. Further, on Joann's affidavit of financial status that she filed in support of her request for temporary spousal support, she swore to monthly expenses of over $3700. This figure *does not include* the monthly mortgage payment for the parties' home in which she was living. It is thus hardly surprising that for the six-month period of the temporary support order Paul needed about $2417 per month ($749 salary plus one-sixth of the one $10,000 withdrawal) for his living expenses, a figure that *does include* any housing expense that he had.

The trial court's order of October 24, 1997 restrained the parties from disposing of any of the marital property and from expending any of the marital assets during the pendency of the dissolution proceeding. Paul's two withdrawals can most reasonably be seen as violating that order by expending assets that might otherwise have been available for the property division by the trial court. It nevertheless satisfactorily appears that the one withdrawal was necessary to pay income taxes and the other was reasonably necessary for Paul's living expenses. Although Paul should have sought a court order before making the withdrawals, under the particular facts and circumstances of this case the trial court did not act inequitably in not finding an additional $20,000 asset to be divided as part of the property division.

**2. $7,000 loan.**

Joann requests an additional property settlement of $3500 based on a $7000 loan made to Terry Bancroft, the girlfriend of Paul at the time. Joann alleges Paul violated the court order by assisting Ms. Bancroft with this money and that he tried to conceal this loan by not including it in his financial statements. Paul explained at trial that he was "assisting" Ms. Bancroft in the down payment on her car and he expected she would pay the money back. The loan was listed as an asset on the list of assets and liabilities filed by the parties with the district court. The trial court recognized the loan as an asset of the parties and awarded it to Paul as part of the property division, listing it as the "Bancroft loan." We conclude the $7000 loan was properly treated as part of the property division. The trial court's treatment of the loan was not inequitable or improper and we have no reason to change it.

**B. Division of Marital Property**

Our analysis of the property division is governed by Iowa Code section 598.21(1) (1999). The ultimate question is whether the distribution of property is equitable under the specific facts of the particular case. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *Id.* However, Iowa courts do not require a mathematically equal division or percentage distribution. *In re Marriage of Richards*, 439 N.W.2d 876, 880 (Iowa App. 1989). *See also In re Marriage of Conley*, 284 N.W.2d 220, 223 (Iowa 1979). All economic aspects of the divorce decree must be viewed as an integrated whole when considering the equity of the distribution. *In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976).

As set forth above the district court's decree awarded Paul a net property award of $453,621 and Joann $445,153. In addition, Joann received $1200 per month in alimony. Paul was also ordered to pay the mortgage on the marital home for several months, pay $1000 toward Joann's attorney fees, and provide health insurance for her. Joann asserts three grounds on which she claims the trial court's property division was inequitable. The first is in regard to the district court's valuation of Paul's 1997 Pontiac, while the other two deal with her allegations there is other money Paul has secreted from the court which should properly have been taken into account and divided between the parties in order to make an equitable property distribution.

**1. Auto valuation.**

In the joint statement of assets and liabilities the parties provided to the district court a 1997 Pontiac was listed as an asset at a value of $19,500. That value had been agreed to by the parties. There was no further evidence offered at the dissolution trial regarding the value of this car. The trial court awarded the Pontiac to Paul at a value of $14,000 "as valued by the court." This is $5500 less than the value the parties had agreed upon.

The trial court gave no indication that it believed the parties' stipulation to be unfair or contrary to law. Nor is there anything in the record indicating what the court may have based its determination of value on, for there was no evidence offered as to the value of the car other than the joint statement of assets and liabilities which sets forth the value agreed to by the parties. We find there is no basis shown here, in fact or law, as to why the parties' stipulated value was unfair or contrary to law, why the court decided to find a different

value, or how it arrived at such value. We determine the value assigned to the 1997 Pontiac awarded to Paul should have been the stipulated value of $19,500. The trial court's contrary valuation is not supported in the record. Because the trial court determined the parties' assets and debts "should be divided more or less equally," Joann is entitled to an additional $2570 representing one-half the additional value of the Pontiac.

**2. Financial statement- $37,500 in cash.**

Joann claims Paul's financial statement dated January 13, 1999 lists an asset of $37,500 in cash that was not included in the list of assets presented to and used by the court in making its property division. Joann alleges Paul withdrew this money from his account and now has it, but is secreting it from the court. She claims this money is an asset which is available "somewhere" and should thus be divided between the parties entitling her to an additional $18,750.

On a "Net Worth Report" dated January 13, 1999 Paul listed $37,500 in "cash." He testified he had funds of $40,000 to $43,000 in a Brenton Bank account on that date and the $37,500 in cash listed on this statement was part of this estimated $40,000 in the Brenton Bank account at that point. Paul stated he later closed the Brenton account and transferred all of the funds from it to an account at IH Mississippi Valley Credit Union. He subsequently closed out this account as well by withdrawing the entirety of the funds from that account in cash, an amount of $71,000, on or around January 12, 1999. Paul then apparently spent some of this cash between January of 1999 and June 2, 1999 when the joint statement of assets and liabilities was filed with the district court.

On this list Paul shows cash in the amount of $68,000 and a checking account with Metrobank with a balance of $6575.

It is clear Paul moved funds more than once in a short period of time, and his testimony regarding the sequence of events is somewhat hard to follow. However, what is important is that the full $71,000 in cash was disclosed to the trial court both prior to and during the course of the dissolution trial. Thus, it was known by and available to the trial court in making its property division. It should also be noted that Paul concedes he made an error on the January 13, 1999 financial statement by underestimating the amount of cash he had on hand at that point by $33,500 ($71,000-$37,500).

We find Joann's assertion that Paul has hidden an additional $37,500 somewhere, of which she is entitled to one-half, is not supported by a preponderance of the evidence. Although Paul's testimony regarding the transactions is somewhat hard to follow and the reasons for the transactions are not fully explained, the trial court apparently found Paul's explanation adequate and credible. The trial court implicitly found that the entire amount of cash had been revealed and taken into consideration. The trial court's determination is sufficiently supported by the record, and it did not err in not taking an additional $37,500 into consideration in its property division.

**3. $34,000 in charitable contributions.**

Issues must ordinarily be presented to and passed on by the trial court before they may be raised and adjudicated on appeal. *Benavides v. J.C.Penney Life Ins. Co.,* 539 N.W.2d 352, 356 (Iowa 1995). No issue concerning charitable contributions was addressed in the trial court's June 2, 1999 ruling and decree.

A motion in the trial court pursuant to Iowa Rule of Civil Procedure 179(b) seeking enlarged or amended findings and conclusions is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. *State Farm Mut. Automobile Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206-07 (Iowa 1984). Although Joann filed a rule 179(b) motion, she did not raise this issue in her motion. Although she has not preserved error on this issue, we will nevertheless address the merits.

Joann alleges Paul should pay her one half of the $17,000 in charitable deductions he claimed to have made in cash on income tax returns for both calendar years 1997 and 1998 because the claimed donations were not made. Joann testified that the entire time they were living together Paul always made such contributions by check. Additionally, she stated that in fact Paul quit attending church eight years ago and presumably would not be making any contributions to any churches. Joann therefore argues that Paul did not make charitable contributions either year but instead has secreted the money. Paul testified that, to the contrary, he had always made contributions by both cash and check and that all of his tax returns from years past would reflect a similar percentage of his income going to charitable contributions. He does claim he made all of the contributions in the years in question in cash. The trial court apparently was unconvinced by Joann's assertion that Paul had secreted $34,000. For the following reasons we have no reason to disagree.

First, Paul's 1997 tax returns do in fact show, on "Schedule A," "gifts made by cash or check" in the amount of $16,982. Second, Joann acknowledged in

her testimony that in the past they had consistently donated between eight and ten percent of Paul's income to the church. Third, the parties have a long history of making donations that were about the same percent of their income as those Paul claims for 1997 and 1998. Finally, Joann presented essentially no evidence beyond her bare assertion on the issue.

The trial court did not act inequitably in not taking Joann's unsubstantiated allegations regarding these contributions into account in its property division.

**C. Depletion of Marital Assets**

Joann has also failed to preserve error on this issue, for the same reasons we have found she failed to preserve error concerning the issue at III-B-3 above. Again, we will nevertheless address the merits.

Iowa courts have recognized that some conduct of a spouse which results in the loss or disposal of property which would otherwise be subject to division at the time of divorce may be considered in making an equitable division of property. *In re Marriage of Bell*, 576 N.W.2d 618, 624 (Iowa App. 1998) (*abrogated on other grounds by In re Marriage of Wendell*, 581 N.W.2d 197 (Iowa App. 1998)); *In re Marriage of Burgess*, 568 N.W.2d 827, 828 (Iowa App. 1997). "Moreover, we recognize that dissipation or waste of marital assets by a spouse prior to the dissolution of marriage may generally be considered in making a property division." *Burgess*, 568 N.W.2d at 828.

Here Joann asserts she should be entitled to an additional property settlement of $32,000, representing one-half of the approximately $64,000 she claims Paul spent on alcohol over the last ten years of their marriage. She claims this constitutes a substantial dissipation of marital assets and the assets

available for distribution, and therefore represents an additional asset for distribution. She asserts the trial court erred in failing to take this dissipation into consideration in its property division.

The trial court found there was credible evidence in the record to indicate Paul has, or may have had, a problem with alcohol consumption. We defer to the trial court's determination and accept that Paul may very well have a drinking problem. However, we do not believe that the trial court was required to consider the money he may have spent in supporting his drinking in making a property division.

What Joann is really asking us to do is to review the day to day spending of one of the parties (but not the other) during a lengthy period of the parties' marriage, and in essence assign fault in this matter to Paul. Iowa has had no-fault divorce for some three decades. Fault of the parties is not a factor taken into account in making a property division. *In re Marriage of Williams*, 199 N.W.2d 339, 345 (Iowa 1972). We have previously noted that delving into an accounting of the parties' income and expenses during their marriage is an impossible task, uncalled for under Iowa law. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa App. 1997). The facts before us do not involve a loss or disposal of property otherwise subject to division at the time of the divorce. We conclude it would be inequitable to conclude Joann is entitled to any additional property settlement due to Paul's alcohol consumption over a period of years *See generally Burgess*, 568 N.W.2d at 828-29; *see also Driscoll,* 563 N.W.2d 643.

## IV. APPELLATE ATTORNEY FEES

Joann asks for attorney fees for this appeal. Appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). We are to 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 trial court's decision on appeal. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa App. 1998). Joann is attending school and has health problems, and thus has a need for an award of attorney fees. Paul has an adequate ability to pay such fees. Joann is awarded $1000 in appellate attorney fees.

## V. CONCLUSION

We conclude the trial court did not err in not finding that Paul violated the court order prohibiting the disposal of marital assets during the pendency of the dissolution proceedings and not taking into account Paul's "depletion" of marital assets. Furthermore, the trial court did not fail to award Joann an equitable division of marital property. The difference between the amount she received and the amount Paul received is less than one percent of the total net assets, and Iowa courts do not require an exactly equal division or percentage distribution, only one which is equitable. We further conclude the court erred in placing its own different, unexplained value on the 1997 Pontiac after the parties had previously stipulated to a value. We conclude the value of the Pontiac awarded to Paul should be $19,500, entitling Joann to additional award of $2750. We modify the district court decree to award Joann a judgment against Paul in the amount of $2750. Joann is awarded $1000 in appellate attorney fees. We have considered other issues and claims raised by Joann, whether specifically discussed herein or not, and find them either not preserved or without merit.

**AFFIRMED AS MODIFIED.**