

IN THE COURT OF APPEALS OF IOWA

No. 2-324 / 11-0447

Filed July 25, 2012

**IN RE THE MARRIAGE OF DREW RETZ
AND CARMEL RETZ**

**Upon the Petition of
DREW RETZ,**

Petitioner-Appellee/Cross-Appellant,

**And Concerning
CARMEL RETZ,**

Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Benton County, Robert Sosalla,
Judge.

Respondent appeals and petitioner cross-appeals from the economic,
support, and attorney fee provisions of the decree dissolving their marriage.

AFFIRMED AS MODIFIED.

Sheree L. Smith, Cedar Rapids, for appellant.

Jacob R. Koller of Simmons Perrine Moyer Bergman P.L.C, Cedar Rapids,
for appellee.

Heard by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

EISENHAUER, C.J.

Carmel Retz appeals and Drew Retz cross appeals from the economic, support, and attorney fee provisions of the decree dissolving their marriage. Carmel contends she should receive a cash equalization payment, alimony, and attorney fees. Drew contends his child support and child medical support obligations should be recalculated. We affirm as modified.

I. Background Facts and Proceedings

The parties' twenty-two year marriage was dissolved in October 2010. At the time of the decree, Carmel was forty-nine years old; Drew was forty-eight; and the parties' children were nineteen, fourteen, and thirteen. Carmel works as a medical technician and with overtime would earn about \$60,850 in 2010. Drew is vice president of operations for a residential contractor. His base salary is \$62,132, and he receives bonuses of \$5000 for every million dollars in closed sales. He was on track to earn about \$104,000 in 2010. About two-thirds of the parties' assets were in retirement accounts, one-fifth in real estate, and most of the rest in personal property.

The decree provided for an equal division of assets, requiring an equalization payment from Drew to Carmel via transfer of funds between retirement accounts. Drew was ordered to pay child support for the two minor children, and both parents were to contribute to the oldest child's postsecondary education. The court concluded, given the division of property and the child support awarded, "this is not an appropriate case for spousal support," and denied Carmel's request for monthly support of \$1000 for six years. Considering

the division of assets, the court denied Carmel's request for \$2000 in attorney fees.

Both parties filed motions to amend or enlarge the decree. Pertinent to this appeal, Carmel asked the court to make the property equalization payment a cash payment instead of a transfer between retirement accounts. The court agreed and, after making minor adjustments in the amount of the equalization payment, amended the decree accordingly. Drew then filed a second motion to amend or enlarge, asking the court to change the order for a cash equalization payment back to the original order for a transfer between retirement accounts because of the significant tax consequences of withdrawing the money from a retirement account and because Drew had insufficient liquid assets to make a cash payment. Alternatively, Drew asked the court to equalize the parties' retirement accounts first, then have the balance paid in cash. The court struck the first amendment requiring a cash equalization payment and ordered the equalization payment via transfer between retirement accounts. Carmel appeals and Drew cross appeals.

II. Scope and Standards of Review

Review of dissolution cases is de novo. Iowa R. App. P. 6.907; *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.904(3)(g). We review a

district court's decision regarding attorney fees for an abuse of discretion. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003).

III. Discussion

A. *Property Equalization Payment*. Carmel contends the district court erred in granting Drew's second motion to amend or enlarge and striking the amended provision requiring Drew to make the equalization payment in cash. She argues Drew was awarded significantly more disposable property that carried no tax consequences, while she has little disposable property without tax consequences from which to meet future expenses. Drew responds the payment by fund transfer is what Carmel requested in her pretrial statement and agreed to in testimony at trial.

As noted above, nearly eighty-five percent of the parties' assets were in retirement accounts or real estate. The only significant "disposable" property the court awarded Drew was vacation real estate the parties agree was worth about \$62,000. There was no evidence presented as to what tax consequences Drew might incur if he were to sell the property. Without liquidating personal property such as vehicles and selling or mortgaging the vacation real estate, Drew did not have the ability to pay Carmel a cash equalization payment. Iowa Code section 598.21(5)(j) (2009) lists "tax consequences to each party" as one factor to consider when dividing marital assets. The district court considered the tax consequences and the *Witten* case in deciding to strike the amended property-equalization provision that required a cash payment and replace it with the provision for a transfer from Drew's IRA account. In *Witten*, the supreme court determined a cash equalization payment instead of a retirement account transfer

ordered without considering the tax consequences was unfair and remanded the case to have the district court arrange the account transfer. *Witten*, 672 N.W.2d at 783-84.

We conclude the equalization payment of \$74,135 should be made by first balancing the parties' retirement accounts with a transfer of \$41,237 from Drew's "Jerry's Homes, Inc. 401(k)" to Carmel followed by a cash payment of \$32,898 from Drew to Carmel once the net proceeds from the sale of the family home are available. Carmel already will receive half the net proceeds from the sale of the family home, which will provide funds for a down payment on a new home. Until the home sells, she is responsible for only half the expenses associated with the home. A balance transfer avoids tax consequences of withdrawing funds from a retirement account. Carmel, as an alternate payee of Drew's 401(k) account, however, may be able to take a cash distribution without an early distribution penalty, though the distribution would be subject to income tax. See 26 U.S.C. § 72(t)(2)(C). We affirm as modified on this issue.

B. Spousal Support. Carmel asserts the district court erred in not ordering Drew to pay her monthly spousal support of \$1000 for five or six years, until the two minor children graduate from high school. Drew contends the issue is not properly preserved as it was not designated as an issue for trial in the trial order and he objected to its consideration at trial. He also contends spousal support is not appropriate.

The district court expressly stated it was considering the issue, even though Drew objected. The issue was litigated and decided in the district court, so is properly before us on appeal.

An award of spousal support is not an absolute right. *In re Marriage of Becker*, 756 N.W.2d 822, 825 (Iowa 2008). Whether a court awards support “depends on the particular circumstances of each case.” *Id.* We consider the economic provisions of the decree as a whole, considering both property division and spousal support together in determining their sufficiency. *See In re Marriage of O’Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). When the division of assets of the marriage does not equalize any inequities or economic disadvantages suffered in marriage by the party seeking support, and there is a need for support, an award is justified. *In re Marriage of Weiss*, 496 N.W.2d 785, 787-88 (Iowa Ct. App. 1992).

Carmel argues she needs the support to meet her expenses, including caring for the minor children and buying a new home. The court divided the parties’ significant assets equally. *See* Iowa Code § 598.21A(1)(c). It ordered Drew to pay child support for the two minor children. Both parties are well-educated, well-employed, and have significant earning capacity. *See id.* § 592.21A(1)(d), (e). Both are in good health and have at least fifteen years during which they could work before retirement. *See id.* § 598.21A(1)(b). Carmel conceded spousal support was not necessary if the court ordered a cash equalization payment instead of a funds transfer. We agree with the district court’s conclusion this was not a case for spousal support and affirm on this issue.

C. Attorney Fees. Carmel contends the district court abused its discretion in not awarding her \$2000 in attorney fees. The court considered the economic

situation of the parties, noting Carmel “will have substantial assets following the division of marital assets from which she can pay her own attorney fees.”

An award of attorney fees rests in the sound discretion of the district court and will not be disturbed on appeal absent an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Attorney fee awards must be fair and reasonable and based on the parties’ respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994). Both parties have good jobs that pay well. Although Drew earns more than Carmel, the decree placed more financial obligations on him, but divided the marital property equally. We find no abuse of discretion.

D. Child and Medical Support. On cross-appeal, Drew contends the court erred in calculating his child and medical support obligations because it miscalculated both parties’ incomes. He asserts the court should have used his base income instead of including his incentive income. Alternatively, he asserts the court should have used his average income for 2007 through 2009 instead of a six-year average. He argues the court assigned income “substantially higher than his average” to him and did not use Carmel’s “projected income” for 2010, which includes overtime. As a result, he claims his child support obligation is higher than it should be and the corresponding sixty-one/thirty-nine percent allocation of uncovered medical expenses for the children between Drew and Carmel is inequitable.

To calculate a noncustodial parent’s child support obligation under the guidelines, the court must determine the net monthly income of both parents. See Iowa Ct. R. 9.5 (defining “net monthly income”). “We recognize that in some

cases the only equitable way to determine income for purposes of child support is to average income over a period of time.” *In re Marriage of Hagerla*, 698 N.W.2d 329, 332 (Iowa Ct. App. 2005); *see also In re Marriage of Powell*, 474 N.W.2d 531, 534 (Iowa 1991) (“Where the parent’s income is subject to substantial fluctuations, it may be necessary to average the income over a reasonable period when determining the current monthly income.”). Courts have used varying periods to try to ascertain a good average income for child support purposes. *See, e.g., Powell*, 474 N.W.2d at 534 (seven years); *In re Marriage of Mayfield*, 477 N.W.2d 859, 862 (Iowa Ct. App. 1991) (two years); *In re Marriage of Hoag*, 380 N.W.2d 8, 10 (Iowa Ct. App. 1985) (five years).

Drew’s bonus or incentive pay is tied to sales in residential construction. The housing market declined in 2008 and has not fully recovered. Drew’s income also declined, but has not followed the housing market closely. The district court was faced with calculating Drew’s income, which fluctuates from year to year. Using a six-year average, the court encompassed both good and bad years. To use just Drew’s base income would not accurately reflect his income and would be inequitable to the children. To average over a shorter period could place too much emphasis on the recent decline in the housing market. We conclude the district court’s approach accurately assesses Drew’s income and provides best for his children.

Carmel left a salaried position for a lower-paying hourly position to reduce stress, but conceded it allowed for increasing her income by working overtime. Drew contends the court did not accurately calculate her income. The court determined her income to be \$60,852. Drew asserts it is between \$70,000 and

\$75,000 when overtime is considered. The record does not contain enough evidence of Carmel's overtime hours and whether they are consistent or to be expected. The district court did not err in calculating Carmel's income. See *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005) (including such income as overtime and bonuses "if reasonably to be expected").

We affirm the district court's determination of the parties' respective incomes and its calculation of Drew's child support obligation and his responsibility for a portion of uncovered medical expenses.

E. Appellate Attorney Fees. Both parties request awards of attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). We must consider the needs of the requesting party, the other party's ability to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Davis*, 608 N.W.2d 766, 773 (Iowa 2000). Both parties have the ability to pay attorney fees, and both were obligated to defend the district court's decision on appeal. We award no attorney fees. Costs on appeal shall be divided equally between the parties.

AFFIRMED AS MODIFIED.