

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1014 / 13-0356  
Filed December 5, 2013

**IN RE THE MARRIAGE OF STEVEN MICHAEL  
GUST AND LINDA LEANN GUST**

**Upon the Petition of  
STEVEN MICHAEL GUST,**  
Petitioner-Appellant/Cross-Appellee,

**And Concerning  
LINDA LEANN GUST,**  
Respondent-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert B. Hanson,  
Judge.

Husband appeals spousal support provision of dissolution decree, wife  
cross-appeals the property distribution and denial of attorneys fees. **AFFIRMED.**

Kodi Brotherson of Babich Goldman P.C., Des Moines, for appellant.

Michael Oliver of Oliver Law Firm, Windsor Heights, for appellee.

Considered by Doyle, P.J., and Tabor and Bower, JJ.

**TABOR, J.**

Steven Gust appeals the amount and duration of the spousal support ordered in the dissolution decree. He asserts he should pay \$1400 rather than \$2000 per month. He also argues the obligation should stop when he is eligible for retirement. Linda Gust cross-appeals, alleging the district court erred in its distribution of marital property and in denying her request for trial attorney fees. She also requests appellate attorney fees.

Considering the earning capacity of the parties, among other factors, we affirm the district court's spousal support award. We find Linda did not preserve her dissipation of assets challenge because she did not bring it to the attention of the district court. We also affirm the district court's denial of Linda's request for trial attorney fees and order each party to pay their own appellate attorneys fees.

**I. Facts and Procedural Background**

Steven and Linda Gust were married in November 1985. They have two children, ages seventeen<sup>1</sup> and twenty-one at the time of trial. Steven was fifty-seven years old at the time of trial. He has type 1 diabetes which requires him to wear an insulin pump. His diabetes has affected his vision. He also takes medication for high blood pressure. Linda was fifty-one years old at the time of trial. She does not have any health issues that prevent her from working full-time.

Steven has a degree in economics from Iowa State University. He is employed full-time as general manager of MD Construction, LLC. In 2011,

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<sup>1</sup> The parties agreed to joint legal custody of their minor son with Linda having physical care.

Steven's salary and bonuses totaled \$92,551. Linda attended Des Moines Area Community College from 1986 to 1988, but did not earn a degree. In 2008 Linda started working for the Ankeny Community School District as a library assistant. She also barcodes textbooks. Doing these two jobs Linda earns \$15,000 a year. Between 1994 and 2008 Linda was not employed outside the home, staying home to raise the children and manage the household.

During their marriage Steven and Linda owned and operated Sound Real Estate, LLC. Sound Real Estate started as a "house flipping" business, "mak[ing] a profit on the differential between what [they] bought it for and what [they] sold it for." But the company eventually became a subcontractor for Steven's employer MD Construction. The company completed lead-based paint abatement paperwork required by the Department of Housing and Urban Development for contracts held by MD Construction. Steven resigned from the company in 2012 and no longer receives compensation from Sound Real Estate. The parties agree that without Steven's labor the value of the company is the amount in its checking account at the time of trial.

Steven filed a petition for dissolution of marriage on June 23, 2011. The court issued a temporary order on August 25, 2011. The court heard the parties at trial on May 22, 2012. On October 1, 2012, the district court entered findings of fact, conclusions of law, and a decree of dissolution. Steven filed a motion to reconsider on October 12, 2012. The court denied that motion on February 11, 2013. Steven filed a notice to appeal on March 5, 2013. Linda filed a cross-appeal on March 12, 2013.

## II. Standard of Review

An action for the dissolution of marriage is an equitable proceeding. Iowa Code § 598.3 (2011). Therefore, our review is de novo. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 484 (Iowa 2012); see Iowa R. App. P. 6.907. Although we give weight to the factual determinations of the district court, its findings are not binding upon us. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We give the district court considerable discretion in awarding spousal support and will disturb its award only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

## III. Analysis

### A. Was The District Court's Award Of Spousal Support Excessive In Amount Or Duration?

Spousal support, commonly called alimony, is a stipend to one spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). No former spouse enjoys an "absolute right" to alimony; any award depends upon the circumstances of the particular case. *Schenkelberg*, 824 N.W.2d at 486.

Traditional alimony is payable for life or for as long as a spouse is incapable of self-support. *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989). "Rehabilitative alimony was conceived as a way of supporting an

economically dependent spouse through a limited period of re-education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting.” *Id.* at 63. Reimbursement alimony “is predicated upon economic sacrifices made by one spouse during the marriage that directly enhance the future earning capacity of the other.” *Id.* at 64.

The monthly amount and duration of spousal support “is always calculated equitably based on ‘all of the following’ factors contained in Iowa Code section 598.21A(1). *Schenkelberg*, 824 N.W.2d at 486. The factors include:

- a. The length of the marriage.
- b. The age and physical and emotional health of the parties.
- c. The distribution of property made pursuant to section 598.21.
- d. The educational level of each party at the time of marriage and at the time the action is commenced.
- e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.
- g. The tax consequences to each party.
- h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.
- i. The provisions of an antenuptial agreement.
- j. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A(1).

The district court awarded Linda alimony of \$2000 per month<sup>2</sup> until Linda remarried or either party died. Steven challenged this ruling with a motion to reconsider and modify under Iowa Rule of Civil Procedure 1.904(2). The court denied that motion saying “those aspects of its ruling are fair and equitable and supported by a preponderance of the evidence produced at trial.”

Steven argues the monthly amount of alimony is excessive given his annual income. He cites his medical conditions and contends the stress of working additional projects negatively affects his health. Steven acknowledges a disparity between the parties’ earning potentials, but claims the gap is not as wide as measured by the district court. He points to a vocational evaluation he offered at trial to show Linda could earn as much as \$31,400 per year. Steven also claims he will not have the assets to pay this level of alimony once he retires. He contends the alimony should be reduced to \$1400 per month and end when he reaches the age of sixty-six, either of the parties die, or Linda remarries.

Observing the wide latitude afforded the district court in determining an alimony award, we find no failure to do equity in this case. Steven and Linda were married for more than twenty-five years—a length of time clearly meriting an award of support. See *Schenkelberg*, 824 N.W.2d at 486. The parties are both in their fifties. While Steven has health problems, they do not currently curtail his earning capacity. In the property division Steven received significantly

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<sup>2</sup> The decree ordered Steven to pay \$1400 per month in alimony so long as he was responsible for child support. When their youngest son turned eighteen and graduated from high school, which was in May 2013, the alimony increased to \$2000 per month.

more assets and significantly more liabilities, with the couple's net equity being divided virtually down the middle.

The spousal support award is firmly supported by the divergence in the education, work history, and earning capacity of the parties. Steven has a bachelor's degree in engineering from Iowa State University compared to Linda's community college credit from the late 1980s. Steven was the primary income earner for the family and for much of the marriage, Linda stayed home with the children. As the district court determined, at the time of trial, Linda earned just sixteen percent of what Steven was paid annually. The district court acknowledged Linda was "likely underemployed"—earning \$15,000 per year working two part-time jobs. But the court reasoned: "[I]t is unrealistic given Linda's age and lack of education and training, to expect her to earn more than 25% of what Steven earns." The court pegged her earning potential at \$22,500 per year. The court then determined \$2000 in monthly alimony was necessary for her to maintain a standard of living comparable to the one she had during the marriage. When we consider the testimony of the parties, as well as the vocational evidence, we find no reason to disturb the district court's calculations.

On the duration issue, Steven contends he did not receive substantial assets that would allow him to pay alimony indefinitely into the future. He urges his situation is different from the facts analyzed by our supreme court in *Schenkelberg*. In that case the court determined a wife was entitled to traditional spousal support payable until her death or remarriage. *Schenkelberg*, 824 N.W.2d at 487.

While we appreciate Steven's attempt to distinguish recent precedent, we return to the caution that "prior cases are of little value in determining the appropriate alimony award." *Id.* at 486. Each case rises and falls on its own facts. Here, we do not find the duration of the alimony to be inequitable. At this point in time we are not convinced Steven will be unable to pay the alimony ordered beyond his retirement. The decree awarded him \$167,125 in assets, including \$135,000 in his retirement accounts. Moreover, the evidence suggested Steven may have some involvement in a fledgling lead-based paint abatement venture.

Given this evidence, we find spousal support appropriate as awarded by the district court.

**B. Did Linda Properly Raise Her Dissipation Claim Before The District Court?**

Linda's cross-appeal challenges the district court's division of marital property; specifically she claims the court erred in not including in the marital estate \$64,000 from Sound Real Estate's business account. Linda reasons that had the court considered those funds, she would have received more in the property division. She concludes "because Steven dissipated the majority of the business' funds prior to trial, [she] was not awarded her fair share of the parties' assets."

It is undisputed that in 2011, after divorce proceedings had begun, Steven withdrew \$64,000 from the business account. Steven testified he used the money to pay credit card debt and monthly expenses he was required to cover



under the district court's temporary order. Steven claims Linda did not preserve error on her claim that he dissipated funds from that account.

Issues must be both raised by a party and decided by the district court before we can consider them on appeal. *In re Marriage of Gensley*, 777 N.W.2d 705 (Iowa Ct. App. 2009) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)). If an issue is raised, and the district court fails to rule on it, the party advancing the issue must file a motion under rule 1.904(2) to request a ruling. *Id.*

In her briefing Linda asserts she preserved error by timely appealing from the district court's ruling. A timely notice of appeal "has nothing to do with error preservation." *State v. Lange*, 831 N.W.2d 844, 846–47 (Iowa Ct. App. 2013). Linda fails to show us where in the district court record she raised this issue.

Moreover, when we review the district court record we find Linda did not mention Sound Real Estate or any bank accounts associated with that business in her financial affidavit to the court. She also did not list the \$64,000 in her proposed property distribution. Her testimony did not assert dissipation. She did not file a rule 1.904(2) motion asking the court to rule on this point. Because she failed to raise this issue before the district court, we find she did not preserve error.

**C. Should Linda be awarded attorney's fees?**

Linda argues the district court abused its discretion in denying her attorney's fees. She contends she did not receive assets in the distribution that allow her to pay her attorney. She also argues actions by Steven after trial increased her attorney fees. Linda also requests attorney fees for this appeal.

The district court directed the parties to pay their own attorney fees. The court expressed its understanding that Linda intended to use proceeds from the sale of the marital home to cover the costs of her representation. Against the backdrop of the property division and alimony award, we find no abuse of discretion in the district court's attorney fee order. See *In re Marriage of Kimbro*, 826 N.W.2d 696, 704 (Iowa 2013).

In considering Linda's request for appellate attorney fees, we balance her financial needs, Steven's ability to pay, and the relative merits of their positions on appeal. See *In re Marriage of McDermott*, 827 N.W.2d 671, 687 (Iowa 2013). When we factor in the alimony payments, we find the parties have similar ability to pay for their attorney fees on appeal. Each party prevailed in part on appeal. In our discretion, we find Steven and Linda should pay their own attorneys. Linda's request for appellate fees is denied. Costs are divided half to each party.

**AFFIRMED.**