

IN THE COURT OF APPEALS OF IOWA

No. 7-897 / 06-2068
Filed February 13, 2008

**IN RE THE MARRIAGE OF TRACY LYNN HOFFMAN
AND ERNST FRANKLIN HOFFMAN**

**Upon the Petition of
TRACY LYNN HOFFMAN,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
ERNST FRANKLIN HOFFMAN,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson,
Judge.

The respondent appeals and the petitioner cross-appeals from the decree
dissolving their marriage. **AFFIRMED AS MODIFIED.**

Catherine Levine, Des Moines, for appellant.

Alexander Rhoads and Stacey Warren of Babich, Goldman, Cashatt &
Renzo, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

Ernst Hoffman appeals and Tracy Hoffman cross-appeals from the decree dissolving their marriage. Both parties argue the district court erred regarding the economic provisions of the decree. Because we find that the economic provisions of the decree are equitable, we affirm. We modify other provisions the parties have agreed to since the filing of the appeal.

I. Background Facts and Proceedings

In October of 1996, Ernst and Tracy were married in Altoona, Iowa. The marriage resulted in two children: Madyson (born in 1999) and Zane (born in 2002). On August 19, 2005, Tracy filed a petition seeking to dissolve the marriage. A hearing was held on the petition on July 18 and 19, 2006. The record revealed the following facts.

At the time of the parties' marriage, Ernst had completed medical school and was beginning his first year of residency in emergency medicine in Tulsa, Oklahoma. Tracy, who prior to the marriage obtained a nursing degree from Iowa Methodist School of Nursing, worked full-time as a registered nurse. Once Ernst completed his residency, he obtained employment as an emergency room physician and his income increased substantially. After the parties' first child was born in 1999, Tracy reduced her schedule to working two or three days a week. The parties also owned several horses throughout their marriage and were involved in rodeo, barrel racing, and roping activities.

Due to Ernst's employment, the parties relocated several times. In 2003, Ernst and Tracy returned to Iowa, to be closer to family. Upon their return, Ernst obtained employment as an emergency room physician, which requires him to

work twelve-hour shifts approximately twelve times a month. Tracy obtained part-time employment as a registered nurse. She works two or three days a week, which allows her to care for their children. Each party remained employed in these positions at the time of trial. Evidence demonstrated that Ernst's gross income was \$273,281.06 in 2005 while Tracy's gross income was approximately \$14,000 but anticipated to increase to \$25,000 in 2006.

The district court entered temporary orders regarding child and spousal support, custody of the children, and visitation. Additionally, the court ordered the family home to be sold, which was accomplished in February of 2006. Subsequently, Tracy purchased a new house on five acres that is located near the elementary school Madyson attends. The property includes a barn large enough to accommodate the horses and pony.

Before trial, the parties stipulated to joint legal custody with Tracy having physical care. They agreed to a visitation schedule, which granted each the "right of first refusal" to care for the children when the other was unavailable. They further agreed that Ernst was to pay \$2000 per month for child support and Tracy was to claim the two income tax exemptions allowed for the children. On September 18, 2006, following a two-day trial, the court entered a decree dissolving the parties' marriage. An amended and substituted decree was entered on October 17. Among other things and pertinent to the issues raised on appeal, the district court divided the joint property and debt between the parties, ordered Ernst to pay spousal support to Tracy in the amount of \$2000 per month for five years, and awarded Tracy \$20,000 in trial attorney fees.

II. Scope of Review

We review the provisions of a dissolution decree de novo. Iowa R. App. P. 6.4; *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). “Although we decide the issues raised on appeal anew, we give weight to the trial court’s factual findings, especially with respect to the credibility of the witnesses.” *Sullins*, 715 N.W.2d at 247 (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003)). We review the district court’s award of attorney’s fees for an abuse of discretion. *Id.*

III. Spousal Support

An award of spousal support is not an absolute right, but instead depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). When determining whether spousal support is appropriate, the court must consider the statutory factors enumerated in Iowa Code section 598.21A (Supp. 2005). These factors include: (1) the length of the marriage, (2) the age, physical, and emotional health of the parties, (3) the property division, (4) the educational level of the parties at the time of the marriage and at the time the dissolution action is commenced, (5) the earning capacity of the party seeking support, and (6) the feasibility of the party seeking support becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. Iowa Code § 598.21A. The court also considers each party’s earning capacity, and each party’s present standard of living and ability to pay balanced against the relative needs of the other. *In re Marriage of Hitchcock*,

309 N.W.2d 432, 436-37 (Iowa 1981). “Although our review of the trial court’s award is de novo, we accord the trial court considerable latitude in making this determination and will disturb the ruling only when there has been a failure to do equity.” *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996) (citations omitted).

Ernst asserts that the district court erred in awarding Tracy spousal support of \$2000 per month for five years. Specifically, he contends that he should not have to pay spousal support, or in the alternative, the amount and duration of the spousal support should be reduced. The district court’s decree reflects consideration of the appropriate factors in making the award. The parties were married nine years. Tracy has not been employed on a full-time basis since 1999 as she has been the primary caretaker of the parties’ children. Even if Tracy worked full-time at her current position, the disparity between Tracy and Ernst’s gross income would be over \$200,000. Currently, Tracy is unable to meet her monthly expenses. She does not have a bachelor’s degree but testified that she had investigated obtaining additional education to become either a physician’s assistant or nurse practitioner while continuing to work part-time. This additional education would increase her income and allow her to become self-sufficient. The district court also considered the property division in awarding Tracy spousal support. Under these circumstances, spousal support that allows Tracy to increase her earning potential, become self-supportive, and is limited to five years is reasonable. Based upon our de novo review of the record, we conclude the award of spousal support was appropriate under the circumstances.

The district court also ordered that the spousal support shall terminate upon the death of either party while also ordering that Ernst “shall maintain said life insurance policy, naming [Tracy] as a beneficiary thereof an amount equal to [Ernst’s] remaining spousal support obligation” Ernst claims this was a scrivener’s error, inferring the provisions are inconsistent.

First of all, Ernst did not raise this issue in his post-trial motion pursuant to Iowa Rule of Civil Procedure 1.904(2) to allow the district court the opportunity to consider his objection and it is therefore not preserved for appeal. See *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) (“It is well settled that a [Iowa R. Civ. P. Rule 1.904(2)] motion 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.”). Additionally, had it been preserved, Ernst waived the issue on appeal as he did not cite to any legal authority supporting his position. Iowa R. App. P. 6.14(1)(c).

Even if he had preserved and not waived the issue, we would affirm both provisions of the district court’s decree as we do not agree that this was a scrivener’s error. The provisions of spousal support terminating on the death of the payor while the remaining obligation is secured by a life insurance policy are not inconsistent. See *In re Marriage of Debler*, 459 N.W.2d 267, 270 (Iowa 1990) (reversing an award of alimony post-dating death of the payor but requiring the payor to name his former wife as a beneficiary on his life insurance policy as long “as he has an obligation to pay alimony under the decree”).

Finally, Ernst points to another error in the decree. The conclusions of law portion of the decree stated that alimony terminated upon the death of either

party or Tracy's remarriage. However, the order portion of the decree omitted reference to Tracy's remarriage. Both parties agree that Ernst's spousal support obligation shall terminate upon Ernst's death, Tracy's death, or Tracy's remarriage. Therefore, we affirm the alimony provision with this modification.

IV. Property Division

Upon the dissolution of a marriage, the court must divide the property of the parties equitably, taking into consideration a number of factors, including the length of the marriage, property brought to the marriage by either party, each party's contribution to the marriage, and the parties' ages, physical health, and earning capacities. Iowa Code § 598.21(5) (Supp. 2005). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996).

Ernst asserts the district court erred in valuing the parties' property. Upon our de novo review of the record, we find there is support for the district court's valuations and therefore conclude the values assigned to the property were within the permissible range of evidence. *See In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) ("A trial court's valuation of an asset will not be disturbed when it is within the permissible range of evidence.").

Ernst asserts on appeal and Tracy on cross-appeal that the property distribution was inequitable. The district court valued and distributed assets such that Ernst received greater net assets, and Tracy received greater liquid assets. Tracy was awarded \$37,148.84 of liquid assets where Ernst was awarded

\$20,790.28 of liquid assets. Additionally, Ernst was ordered to pay \$20,000 of Tracy's attorney fees within one hundred and twenty days from the entry of the amended and substituted decree. Tracy also received certain tax benefits as she is entitled to claim both children as exemptions for federal and state income taxes every year and received the benefit of not paying income taxes on the temporary alimony she received before the decree was entered. Furthermore, Tracy received spousal support in the amount of \$2000 per month for five years. See Iowa Code § 598.2A; *In re Marriage of Griffin*, 356 N.W.2d 606, 609 (Iowa Ct. App. 1984) (“[Alimony and property distribution] are neither made nor subject to evaluation in isolation from one another.”). Upon our de novo review and considering all the appropriate factors which the district court applied in setting forth comprehensive economic terms, we conclude the property division was equitable.

V. Visitation

The district court order contained a detailed “Holiday and Special Day Visitation Schedule.” Although originally an issue on appeal, the parties have since come to an agreement regarding visitation during the children’s birthdays and winter break. Therefore, according to that agreement, we modify the visitation schedule to provide that Tracy shall have Madyson on her birthday in odd-numbered calendar years and Zane on his birthday in even-numbered calendar years; and Ernst shall have Madyson on her birthday in even-numbered calendar years and Zane on his birthday in odd-numbered calendar years. We further modify the visitation schedule to provide that Tracy shall have what they term “the front half” of winter break in even-numbered years and the Ernst shall

have “the front half” of winter break in odd-numbered years; Tracy shall have the “back half” of winter break in odd-numbered years and Ernst shall have the “back half” of winter break in even-numbered years.¹

VI. Attorney Fees

Ernst argues that the district court erred in awarding Tracy \$20,000 in trial attorney fees.² An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Wessels*, 542 N.W.2d 486, 491 (Iowa 1995). Awards of attorney fees 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). There is a great disparity in the current income and earning capacity of the parties. Upon review of the record and consideration of the appropriate economic factors, we find no abuse of discretion in the award of trial attorney fees.

Tracy requests attorney fees on appeal. An award of appellate attorney fees is not a matter of right, but rests within the court’s discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of

¹ This ensures that each party will have either Christmas Eve or Christmas Day with the children. The “Holiday and Special Day Visitation Schedule” grants Christmas Day (December 24th at 7:00 p.m. to December 25th at 7:00 p.m.) to Ernst in even-numbered years and to Tracy in odd-numbered years. Therefore, in an even-numbered year, Tracy will have the children for the “front half” of winter break which includes Christmas Eve and Ernst will have the children for Christmas Day; in an odd-numbered year, Ernst will have the children for the “front half” of winter break which includes Christmas Eve and Tracy will have the children for Christmas Day.

² Tracy argues that Ernst waived his right to appeal this award because he paid the judgment for trial attorney fees in full. See *Hense v. G.D. Searle & Co.*, 452 N.W.2d 440, 443-44 (Iowa 1990) (“This court has consistently held that the payment of a judgment signals a litigant’s acquiescence in the court’s ruling and operates as a waiver of the right to appeal.”). However, we need not determine whether this issue was waived, as we affirm the district court’s award.

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 district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We deny Tracy's request for appellate attorney fees. Costs on appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED