IN THE COURT OF APPEALS OF IOWA

No. 2-172 / 11-0796
Filed May 23, 2012

IN RE THE MARRIAGE OF DAVID M. CASTEN AND SUSANNE ROESCH CASTEN

Upon the Petition of
DAVID M. CASTEN,
Petitioner-Appellant/Cross-Appellee,

And Concerning
SUSANNE ROESCH CASTEN,
Respondent-Appellee/Cross-Appellant.

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

David Casten appeals and Susanne Roesch Casten cross-appeals from the economic provisions of the district court's dissolution decree. **AFFIRMED AS MODIFIED.**

William W. Graham and Aimee R. Campbell of Graham, Ervanian & Cacciatore, L.L.P., Des Moines, for appellant.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellee.

Heard by Potterfield, P.J., and Mullins and Bower, JJ.

POTTERFIELD, P.J.

David Casten appeals and Susanne Roesch Casten cross-appeals from the economic provisions of the district court's dissolution decree. Because the district court achieved an equitable division of property, we largely affirm the economic provisions of the decree. We modify the decree in the following respects: (1) we eliminate the district court's provision that David split with Susanne future distributions from the S corporation of which he is a shareholder and president; and (2) we revalue an account received by Susanne, using its value at the time of trial rather than the time of separation, though we ultimately conclude this modification does not necessitate changes in the district court's overall property distribution, which we find to be equitable.

I. Background Facts and Proceedings

David and Susanne married in November 1993. They had two children during their marriage. The parties separated in late November/early December 2008, and David filed a petition for dissolution of marriage on December 11, 2008. After a trial the district court issued its dissolution decree on October 1, 2010.

At the time of trial in June 2010, Susanne was forty-four years old. She received her master's degree in architecture from Iowa State University in 1995. She was employed as an architect from 1995 until 1999. She left employment at that time after the birth of the parties' second child. She returned to work part-time from 2002-2004 at an architectural firm and again worked part-time at an architectural firm from 2005 to August of 2009, when she was laid off. As of the date of trial, Susanne had been unable to obtain new employment as an

architect. Her unemployment benefits were due to expire in June 2010. Susanne had completed training for an additional accreditation establishing her credentials in the area of sustainable design. She planned to return to school in the fall of 2010 to earn her master's in business administration.

David was forty-six years old at the time of trial. He was the president of Barton Solvents, Inc., a Des Moines based distributor of industrial solvents and chemicals. Barton is a family business where David has worked since 1979, except for a brief hiatus from 1990 to 1993 when he and Susanne lived in Susanne's native country, Germany. David has been the president of Barton since January 1, 2003.

David's wage income from Barton in 2009 was $260,364.45. David also owned 6.7% of Barton's outstanding stock, which he had received as gifts from family members. Both parties presented expert witnesses who testified about Barton's corporate structure. Each expert testified that because Barton is an S corporation, its income and related tax liabilities pass through to its shareholders. The income is allocated pro rata to all of the shareholders, who then pay the taxes related to the corporation's income. David and both expert witnesses further explained that while Barton's income flows through to shareholders for tax purposes, Barton does not actually distribute all of this income. Thus, the experts agreed that although David's 2009 tax return showed an adjusted gross income of $676,808, much of that income was not actually received by David. Rather, much of the income was retained by Barton, although David was required to pay taxes on his share. David testified that income is retained by Barton for upkeep and further expansion.

David testified that when Barton made distributions to shareholders, the distributions fell into one of two categories: (1) distributions to cover the shareholder's tax liability; or (2) additional distributions of profits above the shareholder's projected tax liability. In 2009, the total distribution to David from both categories was $248,960. The income that falls in the first category represents David's share of Barton's estimated tax liability, which David was required to pay and is therefore not income to David. On average, the distribution in the second category amounted to $1.28 per share per year. For David, this would be roughly $46,800 per year. This income is in addition to his wages from employment.

Since the parties separated in 2008, David has provided support to Susanne in the amount of $5000 per month. David testified this was comprised of $3000 per month in temporary child support and $2000 per month in temporary alimony, but Susanne testified she believed the entire payment was temporary child support. After trial, the court ordered David to pay Susanne alimony in the amount of $8000 per month for three years, then $5500 per month for five years, then $2000 per month for four years.

David disputes several economic provisions of the district court's decree, including provisions related to Barton's retained earnings, his alimony obligation, and the district court's division of property. Susanne cross-appeals, disputing the division of property and asserting the district court failed to account for marital assets David dissipated during their separation. Susanne requests appellate attorney fees. Other facts will be discussed as necessary below.

II. Standard of Review

"We review dissolution cases de novo. 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." *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006) (internal citations and quotation marks omitted).

III. Property Division

Both parties assert the district court erred in its property distribution. Iowa courts are to divide equitably all property owned by the parties at the time of the divorce except inherited property or gifts received by one spouse. Iowa Code § 598.21(5) (Supp. 2007); *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005). Iowa does not require an equal division or percentage distribution. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.* When distributing property we take into consideration the criteria codified in Iowa Code section 598.21(5). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). We consider property division and spousal support together in evaluating their individual sufficiency. *Russell*, 473 N.W.2d at 246.

A. Retained Earnings

From 2005 to 2009, Barton's retained earnings on which David had paid taxes totaled $768,720. Each year David received a distribution in the amount of the estimated tax liability to use to pay the taxes. The district court ordered that if, sometime in the future, David received any portion of these retained earnings, he was to transfer one-half of the amount received to Susanne. David asserts

the district court erred in including retained earnings owned by Barton in its property division. Susanne asserts the district court properly divided the retained earnings, which she argues constitute past earned income since David has already paid the taxes on the income.

Generally, income becomes property when received and retained during the marriage. *Schriner*, 695 N.W.2d at 498. "[F]uture earnings of a spouse from employment are not considered to be property at the time of the divorce." *Id.* (citing *In re Marriage of Horstmann*, 263 N.W.2d 885, 891 (Iowa 1978) for its finding that an advanced degree is not itself an asset for property division, but an increased earning capacity is a factor to consider in making an equitable distribution of property). Iowa courts have held that assets to be received in the future can be considered part of the divisible estate if they are derived from activities that occurred during the course of the marriage. *See In re Marriage of White*, 537 N.W.2d 744, 746–47 (Iowa 1995) (dividing future royalties on textbooks published during the marriage); *In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989) (concluding a military pension is compensation for past services and therefore properly characterized as marital property). Thus, to the extent the future interest in an asset accrued during the marriage, the future interest in the asset is properly considered a marital asset.

First, we agree with David that the retained earnings at the time of the divorce belonged not to him, but to Barton. Susanne's expert witness first testified retained earnings were not an asset, but he later testified Barton, not its shareholders, had title to all of its assets, which included the retained earnings.

David's expert witness testified, "[R]etained earnings are part of the assets of the company." This finding is supported by case law in other jurisdictions, which we find persuasive. *See, e.g.*, *In re Marriage of Joynt*, 874 N.E.2d 916, 919 (Ill. App. Ct. 2007) ("[R]etained earnings and profits of a subchapter S corporation are a corporate asset and remain the corporation's property until severed from the other corporate assets and distributed as dividends.").

Further, we conclude that during the marriage David did not accrue any future interest in the retained earnings as the corporation had no obligation to distribute the earnings and David did not have the power to direct such a distribution. The corporation was organized in such a way that David did not have sole, or even controlling, power to distribute the retained earnings. David owned only 6.7% of the Barton stock. The record shows that only the board of directors could decide to distribute retained earnings. There were nine people on the board of directors, including David; six of the board members were part of the Barton family, and three were not. Thus, despite David's position as president of Barton, he could not have unilaterally declared or withheld dividends. Further, the record in this case gives no indication that David had collaborated with other shareholders to use Barton to shield marital assets from the property division. Barton's retained earnings since the time of the separation were not extraordinarily higher than they had been in past years. Both expert witnesses testified Barton was well-managed, and David's witness testified the amount of earnings retained by Barton was reasonable. Because David held a small percentage of Barton's stock, did not have unilateral authority to distribute dividends, and the record suggests no intent to hide assets in the corporation, we

conclude David did not accrue any future interest in Barton's retained earnings during the marriage.

In reaching this decision, we have considered case law from other jurisdictions, which we find to be persuasive. Other jurisdictions have found a spouse's controlling interest in the corporation or the spouse's substantial control over decisions to distribute dividends to be critical factors in determining whether retained earnings are marital property. *See Hoffman v. Hoffman*, 676 S.W.2d 817, 827 (Mo. 1984). The majority of jurisdictions have found that where a spouse is a minority shareholder and does not have the ability to distribute dividends, retained earnings of a corporation in which a spouse held an interest were nonmarital property. *See, e.g.*, *Swope v. Swope*, 834 P.2d 298, 303 (Idaho 1992) (holding retained earnings of a corporation are nonmarital property unless the stockholder has sufficient control of the corporation to be able to cause the earnings to be retained); *Joynt*, 874 N.E.2d at 919 (finding the retained earnings of a closely held S corporation were nonmarital where stock was held in unequal shares by three individuals, husband possessed only a minority percentage of shares, and husband was only one of three board members); *Robert v. Zygmunt*, 652 N.W.2d 537, 543 (Minn. Ct. App. 2002) (noting wife did not use marital funds to pay corporation's taxes, was a minority shareholder, and had no right to distribute retained earnings in deciding wife's interest in S corporation's retained earnings was nonmarital property); *Hoffman*, 676 S.W.2d at 827 (finding retained earnings of corporation did not constitute marital property, noting husband owned only 29.5% of stock, husband was only one of four board members so could not

unilaterally declare dividends, and absence of evidence of collusion with other board members to defraud wife by minimizing dividends).

Further, we find this case is factually distinguishable from cases cited by Susanne in which the court found retained earnings to be marital property. *See, e.g.*, *Ramon v. Ramon*, 963 A.2d 128, 133–34 (Del. 2008) (noting that power to control funds was a "critical factor" in its analysis including retained earnings in the marital estate where husband did not present any evidence indicating he would not have the power to control distribution of the retained earnings); *Heineman v. Heineman*, 768 S.W.2d 130, 137 (Mo. Ct. App 1989) (including retained earnings in the marital estate after finding the case to be the "exact reverse" of *Hoffman* because wife was the sole shareholder of the corporation and had used marital funds to acquire retained earnings); *Metz v. Keener*, 573 N.W.2d 865, 632 (Wis. 1997) (finding retained earnings should be included in the marital estate where wife had "full access, control and right to the undistributed income"). Susanne's reliance on these cases for the proposition that an S corporation's retained earnings are marital property is misplaced because in those cases, the shareholder had full access to the retained earnings and could distribute the earnings at will.

Because David was a minority shareholder, did not have authority to distribute retained earnings, and nothing in the record suggested he had conspired with other shareholders to minimize distributions, we find Barton's retained earnings are not marital property. Therefore, we modify the decree to strike the district court's provision on page twenty-six of the decree in paragraph

seventeen requiring David to pay Susanne half of the amount of retained earnings, up to $768,720, he may receive in the future.

B. Proceeds from the Sale of Personal Property

The parties testified that prior to trial they had sold certain personal property and divided the proceeds evenly between them. As part of its property award, the district court presumed that each party had received half of the proceeds and attributed that sum to each party. On appeal, David asserts the district court's property award duplicated the proceeds as there was no evidence the proceeds were held separately from other assets shown on his financial statement, such as his bank accounts. However, our review of the record shows no error in this portion of the district court's award. When asked about where David acquired the money he provided to his girlfriend during the parties' separation, David testified "my wages and also my portion of the assets that we split," referring to the proceeds from the specific items of personal property the parties sold. Accordingly, we find no error in the district court's conclusion that these proceeds had been spent and were not reflected elsewhere on David's financial statement.

C. Caribou Stock

David asserts the district court erred in failing to set aside as nonmarital property $61,015 of the value of his stock in Caribou Corporation, which he asserts was purchased with proceeds from his sale of stock in Waukee State Bank (WSB) that had been gifted to him by his father. Gifted property is specifically excluded by statute from the divisible estate. *See* Iowa Code § 598.21(5). Gifted property is usually awarded to the spouse to whom the

property was gifted. *Schriner*, 695 N.W.2d at 496. However, the exclusion is not absolute, and the court may find gifted property is subject to property division in a dissolution if the court determines that refusing to divide the property is inequitable to the other party or to the children of the marriage. *See* Iowa Code § 598.21(6).

We find the district court's division of the entire value of the Caribou stock as marital property is supported by the record. First, David's father testified he had gifted the WSB stock to both David and Susanne, rather than just to David as David testified. The court could have found this more convincing than the father's later statement that he might be mistaken on how the gift had been made. Second, Susanne testified David told her he was going to take out a loan to purchase the Caribou stock. This testimony is supported by a review of the activity in the bank accounts involved in the sale of the WSB stock and the loan for and purchase of the Caribou stock. Though David testified he obtained a loan to purchase the Caribou stock because of the timing of the stock purchase as related to the sale of the WSB stock, the record shows David did not pay off the loan used to purchase the Caribou stock until approximately seven months after the WSB transaction was completed. This suggests David obtained the loan to buy the Caribou stock, not merely to bridge the potential short-term gap between the purchase of the Caribou stock and the sale of the WSB stock. The fact that David did not use the WSB proceeds to pay off the loan immediately supports Susanne's testimony that David never intended to use the proceeds to buy the Caribou stock. Accordingly, we affirm the district court's division of the entirety of the Caribou stock as marital property.

D. Amerus Life Insurance Policy

The district court found $21,171 of an Amerus life insurance policy valued at $79,279 was a marital asset but found the rest was to be held out of the property division as gifted property. David argues the district court erred by not setting aside as gifted property $76,777 of the Amerus policy.

David asserted at trial that $76,777 was rolled into the Amerus policy from policies that had been gifted to him. He therefore asked the court to set aside $76,777 of the Amerus policy as a nonmarital asset. Susanne testified one of the policies, which had a cash value of about $14,171 at the time of trial, was not a gift but had been purchased by David before the birth of their first child. Further, David testified he had paid $7000 in premiums since the parties' separation. The district court, apparently finding Susanne's testimony to be more credible, found that $21,171 of the Amerus policy had been purchased with marital funds. A review of the record reveals nothing that allows us to conclude the district court erred in dividing $21,171 of the Amerus policy as a marital asset.

E. Wright County Cabin

The district court awarded David the $11,200 value of a cabin the court determined David owned in Wright County. The district court's award was based on a tax assessment listing David as the owner of the cabin. David asserted at trial that the assessor's statement was incorrect in listing him as the owner. He testified he had made the property tax payments on two occasions because the cabin's owner was late on making the payment, did not have his checkbook with him, and was not computer savvy. Susanne testified David had told her before their separation that the assessment erroneously listed him as an owner, but

Susanne testified she did not believe David at the time. She testified at trial she still believed David was lying and that he would have had his name removed from the assessor's statement if he was not the true owner. The district court found, "David has produced no evidence corroborating his own testimony wherein he denies ownership of any building or real estate in Wright County. Therefore, the court finds that he does own said building and that its value for purposes of this proceeding is $11,200.00." We find nothing in the record suggesting the district court's conclusion was in error.

F. Firearms

David asserts the district court erred in failing to exclude as premarital property firearms valued at $8550 that David brought to the marriage. The district court found David had acquired "numerous items of hunting, fishing, camping, and sporting equipment as well as animal trophies." The district court found David should be awarded these items with the exception of a gun he had given to Susanne as a gift. The court found Susanne's gun should be excluded from the property division, valued the remaining items at $50,000, and awarded them to David. In her cross-appeal, Susanne asserts the district court undervalued David's equipment, which she asserts had a value of $73,485. Susanne further asserts the district court's award of $50,000 already excluded David's $8550 worth of premarital property.

First, we find the district court's valuation of the parties' various equipment was within the range of permissible evidence and decline to disturb its valuation. *See In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007) ("Ordinarily, a trial court's valuation will not be disturbed when it is within the range of

permissible evidence."). Next, we believe the district court's decree, by its clear language, included David's $8550 worth of premarital firearms in its award of $50,000 worth of equipment. However, Iowa law does not automatically set aside premarital property. *See Sullins*, 715 N.W.2d at 247 ("[T]he property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party."). The "property brought to the marriage by each party" is a factor to be considered under section 598.21(5)(b) in making an equitable distribution. The purpose of section 598.21(5)(b) "in many instances, is to prevent a spouse from being given an interest in property for which he or she made no contribution to acquiring." *In re Marriage of Miller*, 452 N.W.2d 622, 624 (Iowa Ct. App. 1989). The parties agreed at trial that firearms with a value of $8550 were owned by David prior to the marriage. While we do not believe the entire value of the firearms should be set aside to David, we conclude that in making an equitable property division, some consideration should be given to the difference in the amount of property each party brought to the marriage. We will consider this below in analyzing whether the property distribution was equitable.

G. Valuation of Assets

When the parties separated they split certain assets, including an Ally account that Susanne received. At the time of the separation, the Ally account had a value of $191,260; by the time of trial, the account balance was $137,086. In its decree, the court awarded the Ally account to Susanne and found the account had a value of $191,260. In her cross-appeal, Susanne argues the

district court erred in valuing the account as of the date of the parties' separation rather than the date of trial.

In making an equitable distribution, the court should value the assets as of the date of trial. *In re Marriage of Hagerla*, 698 N.W.2d 329, 333 (Iowa Ct. App. 2005). We recognize the need for flexibility in making equitable property distributions based on the unique circumstances of each case. *See In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa Ct. App. 1997) (finding equitable distributions require flexibility and that on occasion the trial date is not appropriate to determine asset values). However, we find that under the facts of this case, it is neither practical nor equitable to use the date of separation to value just this one asset. We agree with Susanne that the court should have valued the Ally account as of the time of trial. We therefore modify the decree to value the Ally account as of the date of trial at $137,086. We will take this valuation modification into consideration in determining whether the district court's property division was equitable.

H. Overall Property Distribution

David asserts on appeal the district court's decree did not equitably divide the parties' property as Susanne received approximately sixty percent of the parties' marital property while David received only about forty percent. David therefore asks this court to eliminate the district court's award to Susanne of any part of David's retirement account. In analyzing the district court's property division, we note that, as mentioned above, David brought property to the marriage, including $8550 worth of firearms, and that our finding that the district court should have valued the Ally account as of the time of trial reduced

Susanne's share of the property award by approximately $54,000. Based on the factors set forth in section 598.21(5), with some emphasis on the length of the marriage, the substantial difference in earning capacity of the parties, the considerable alimony award, discussed below, and the significant inherited and gifted assets set aside to David, we conclude the district court's property division, with our modification related to the value of the Ally account, achieves an equitable property distribution. We therefore decline David's request that we eliminate the district court's award of a portion of his retirement accounts to Susanne.

IV. Alimony

David asserts the district court's award of alimony was excessive in duration and amount and was inequitable. David asserts that, given the property distribution, rehabilitative alimony in the amount of $3000 per month for eight years would be sufficient.

Spousal support is a discretionary award dependent upon each party's earning capacity and present standards of living, as well as the ability to pay and the relative need for support. *See In re Marriage of Kurtt*, 561 N.W.2d 385, 387 (Iowa Ct. App. 1997). Spousal support "is not an absolute right; an award depends on the circumstances of each particular case." *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). An award of spousal support is made after considering the factors listed in Iowa Code section 598.21A(1). *In re Marriage of Hazen*, 778 N.W.2d 55, 61 (Iowa Ct. App. 2009). We give the district court considerable discretion in awarding alimony, and we will only disturb the

court's ruling when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

> Rehabilitative spousal support is 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. The goal of rehabilitative spousal support is self-sufficiency and for that reason such an award may be limited or extended depending on the realistic needs of the economically dependent spouse.

In re Marriage of Becker, 756 N.W.2d 822, 826 (Iowa 2008) (internal citations and quotation marks omitted).

We agree with the district court that after considering the factors listed in Iowa Code section 598.21A, an award of alimony to Susanne is warranted. The parties' marriage was one of long duration, lasting roughly sixteen and one-half years. Though the district court's property division left Susanne with a substantial property award and no debt, the district court set aside significant assets to David as inherited and gifted property. As a result, David left the marriage with considerably more assets than Susanne. *See In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa 1997) ("We consider alimony and property distribution together in assessing their individual sufficiency."). Though Susanne was educated and had significant and recent work experience, David's earning capacity was substantially higher than Susanne's. The parties were accustomed to a comfortable lifestyle that allowed them to travel frequently and to save and invest large amounts of money. Susanne is unlikely to become self-supporting in the near future at a standard of living reasonably comparable to the one she enjoyed during the marriage. "[T]he spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely

resembling the standards existing during the marriage as possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living . . . ." *In re Marriage of Hayne*, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). Upon our de novo review, we find the district court's award of alimony is equitable. The award should allow Susanne to develop her earning capacity beyond an entry-level position. We therefore affirm the award.

V. Life Insurance Requirement

At trial Susanne requested that David be required to secure payment of alimony by acquiring a $250,000 life insurance policy listing her as the beneficiary. The district court required David to designate Susanne as the primary beneficiary on a $750,000 life insurance policy to secure his alimony obligation. David claims the district court erred in requiring him to maintain this insurance policy. "A provision in a dissolution of marriage decree to maintain life insurance is enforceable." *Stackhouse v. Russell*, 447 N.W.2d 124, 125 (Iowa 1989). We find this case is distinguishable from the unpublished opinion *In re Marriage of Weber*, No. 98-1688, 2000 WL 278535 (Iowa Ct. App. Mar 15, 2000), cited by David. In this case, unlike in *Weber*, Susanne requested the security of a life insurance policy and demonstrated a need to have David provide alimony funds in the event of his death before expiration of the alimony award. David does not object to providing life insurance policies to secure his child support obligations, and the record includes evidence regarding other insurance policies on David's life. The district court reasonably could have found the cost of such a policy was not unduly burdensome to David. We find this record contains substantially more information than the record in *Weber* regarding evidence of

insurability, costs, and reason for imposing the requirement. We therefore affirm the requirement of life insurance to secure spousal support.

VI. Dissipation of Assets

In her cross-appeal, Susanne asserts the district court erred in finding David did not dissipate marital assets during the parties' separation. The district court found in this regard, "It appears that all monies David has expended in pursuit of/support of his relationship with [his girlfriend during the parties' separation] have been made from his earnings since the parties separated and David has not depleted marital assets in the process."

> We have previously held dissipation of assets is a proper consideration when dividing property. In determining whether dissipation has occurred, courts must decide (1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances. The first issue is an evidentiary matter and may be resolved on the basis of whether the spending spouse can show how the funds were spent or the property disposed of by testifying or producing receipts or similar evidence. The second issue requires the consideration of many factors, including
>
> > (1) the proximity of the expenditure to the parties' separation, (2) whether the expenditure was typical of expenditures made by the parties prior to the breakdown of the marriage, (3) whether the expenditure benefited the "joint" marital enterprise or was for the benefit of one spouse to the exclusion of the other, and (4) the need for, and the amount of, the expenditure.
>
> Courts may also consider "[w]hether the dissipating party intended to hide, deplete, or divert the marital asset.

In re Marriage of Fennelly, 737 N.W.2d 97, 104–05 (Iowa 2007) (citations omitted) (quoting Lee R. Russ, *Spouse's Dissipation of Marital Assets Prior to Divorce as Factor in Divorce Court's Determination of Property Division*, 41 A.L.R.4th 416, 421 (1985)) (internal quotation marks omitted). The facts of this

case do not justify a finding that David dissipated marital assets. While David spent a large amount of money since the parties separated, a review of the record shows that his spending during the separation was more or less consistent with his spending during the marriage. Both parties agreed they enjoyed a comfortable lifestyle, allowing them to take frequent vacations and pursue hobbies and interests without financial limitations. In addition, we found above that some of the money David spent on his girlfriend was from the proceeds of the sale of personal property, money that the court allocated to David in its property division. Further, we modified the district court's decree to value Susanne's Ally account as of the time of trial, recognizing that Susanne had spent roughly $54,000 from the account during the pendency of these proceedings. We cannot find that David's spending during the parties' separation was extraordinarily higher than Susanne's spending. We conclude David's spending since the parties' separation did not evidence any intent to hide, deplete, or divert marital assets. We further find Susanne's claim on appeal that David failed to deposit checks he had received during the separation is not preserved for our review as this specific issue was not decided by the district court and was not raised in Susanne's motion pursuant to Iowa Rule of Civil Procedure 1.904(2). *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("[I]ssues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). We affirm the district court's finding that David did not dissipate marital assets.

VII. Appellate Attorney Fees

This court has broad discretion in awarding appellate attorney fees. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). An award of appellate attorney fees is based upon the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). Because we find the parties are both able to pay their counsel, we decline to award appellate attorney fees.

Costs on appeal are assessed to David.

AFFIRMED AS MODIFIED.