

IN THE COURT OF APPEALS OF IOWA

No. 2-749 / 12-0337
Filed October 31, 2012

**IN RE THE MARRIAGE OF JULIE ANN SMITH
AND MARK ALAN SMITH**

Upon the Petition of

JULIE ANN SMITH,
Petitioner-Appellee/Cross-Appellant,

And Concerning

MARK ALAN SMITH,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Shelby County, Greg W. Steensland, Judge.

Mark Smith appeals, and Julie Smith cross-appeals, from the economic provisions of the decree dissolving their marriage. **AFFIRMED AS MODIFIED.**

Joanne C. Lorence of Otto, Lorence & Wiederstein, P.L.L.C., Atlantic, for appellant.

Bryan D. Swain and J.C. Salvo of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellee.

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

BOWER, J.

Mark Smith appeals, and Julie Smith cross-appeals, from the economic provisions of the decree dissolving their marriage. Mark contends the district court erred in awarding spousal support to Julie and in dividing the marital property. Julie contends the district court erred in its award of trial attorney fees. Both parties seek an award of their appellate attorney fees.

We find the district court's award of spousal support is appropriate considering the facts and circumstances of this case. We modify the property provisions of the decree to reflect a decrease in the valuation of the office building from \$110,000 to \$80,000. To account for this modification, we reduce Mark's equalization payment to Julie from \$116,240 to \$101,240. We affirm the property distribution in all other respects. We further conclude the district court did not abuse its discretion in declining to award Julie additional trial attorney fees. We decline to award either party their attorney fees on appeal.

I. Background Facts and Proceedings.

Mark and Julie were married in July 1997. It was the second marriage for both of them, and no children were born during the marriage. They each have two adult children from their prior marriages.

Mark was born in 1962 and is in good health. Mark entered the marriage with a Bachelor of Science degree in agricultural economics. Mark is a certified financial planner, and is licensed to sell life and health insurance and securities. Mark owns DDS, Inc. in Atlantic, Iowa. Mark started working for his father at DDS, Inc. in 1984, and Mark purchased DDS, Inc. from his father's estate when

his father passed away in 1996. Mark earns approximately \$92,683 per year in salary. DDS, Inc. also pays for a new vehicle, an antique truck, a country club membership, a one-third interest in an airplane, cell phone, football and racing tickets, and fuel for a motor home, boat, and car.

Julie was born in 1963 and is in good health. Julie has flight attendant training and worked as a flight attendant off and on from 1982 to 2001. Julie then worked briefly in the restaurant business and in advertising for a local radio station. Julie went to school for cosmetology and related skin care, but did not complete the program. Julie also attended some kitchen and bathroom design courses. Beginning in 2002, Julie held a series of jobs as a kitchen and bathroom designer. Just before trial, Julie accepted a position with Kitchen Classics in Des Moines where she was to make \$40,000 per year. However, at the time of trial, Julie had been placed on probationary leave and was not sure of the status of her position. Julie testified an annual salary between \$32,000 and \$36,000 would be “a fairly good interpretation” of her skills in the current market.

Julie filed a petition for dissolution of marriage in October 2010. Trial was held in October 2011. In December 2011, the district court entered a decree dissolving the parties’ marriage. The court “set off” DDS, Inc. as an asset, as well as any debt attaching to it, and awarded it to Mark. The court also “set off” premarital assets of Mark, an inheritance to Mark, and workers’ compensation proceeds to Julie. The court divided the parties’ assets, awarding Julie her car, a Lake Panorama lot, and her IRA worth \$7885. The court awarded Mark the remaining assets, including in part the parties’ marital home and its contents, the

office building, a boat and trailer, a motor home, and his IRA worth \$70,720. The court divided the parties' debts. To make the property division equitable, the court ordered Mark to pay Julie \$122,490. The court awarded Julie spousal support in the amount of \$1000 per month for sixty months. The court denied Julie's request for attorney fees.

Mark filed a motion to enlarge, modify, and amend the decree. The court denied the motion, except for acknowledging that one asset was improperly awarded twice to Mark and finding Julie's property settlement should be reduced by \$6250. Accordingly, the court ordered Mark's equalization payment to Julie to be \$116,240. Mark now appeals, and Julie cross-appeals, the court's conclusions in regard to various economic provisions of their decree.

II. Scope and Standard of Review.

We review dissolution cases de novo. *In re Marriage of Okland*, 699 N.W.2d 260, 263 (Iowa 2005). We examine the entire record and adjudicate the rights of the parties anew on the issues that are properly preserved. *In re Marriage of Jones*, 653 N.W.2d 589, 592 (Iowa 2002). However, we accord the trial court considerable latitude in making an award and will disturb its ruling only where there has been a failure to do equity. *Okland*, 699 N.W.2d at 263. We give weight to the trial court's fact findings, especially when considering the credibility of witnesses, although we are not bound by them. *In re Marriage of Duggan*, 659 N.W.2d 556, 559 (Iowa 2003).

III. Spousal Support.

The district court ordered Mark to pay Julie spousal support of \$1000 per month for sixty months. Mark argues this award should be eliminated or reduced. Mark argues that given Julie's work history, "there is no reason to believe that she would be unemployed." Mark further alleges Julie's claim for spousal support "was based on the parties' lifestyle," but the court "overlooked" the fact that the parties lived well "by accumulating substantial debt." Mark states that Julie's estimate of monthly expenses "is ludicrous." Mark further contends Julie "leaves the marriage in a better financial position" than he does, including a cash settlement which "will allow her to pay all of her debts and still have a substantial sum to put down on a home or to invest to earn income."

There is no absolute right to spousal support. *In re Marriage of Spiegel*, 553 N.W.2d 309, 319 (Iowa 1996) (superseded by statute on other grounds as recognized by *In re Marriage of Shanks*, 758 N.W.2d 506, 510–11 (Iowa 2008)). Rather, whether it is awarded depends on the circumstances of each particular case. *Id.* Iowa Code section 598.21A(1) (2009) sets forth the criteria for determining spousal support. This includes the length of the marriage, the age and physical and emotional health of the parties, the property distribution, the earning capacity of each party, and any other factors the court may determine to be relevant. Iowa Code § 598.21A(1).

We consider the property distribution and spousal support provisions of a decree together to determine their sufficiency. *In re Marriage of Hazen*, 778 N.W.2d 55, 59 (Iowa Ct. App. 2009). Spousal support is justified when the

distribution of the marital assets does not equalize the inequities and economic disadvantages suffered in marriage by the party seeking the support, and there is a need for support. *Id.* While the property distribution is designed to sort out property interests acquired in the past, spousal support is made in contemplation of the parties' future earnings and is modifiable. *Id.* at 59–60.

An award of traditional spousal support is payable for life or until the dependent is capable of self-support. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). The purpose of traditional spousal support is “to provide the receiving spouse with support comparable to what he or she would receive if the marriage continued.” *Id.* “Traditional alimony analysis may be used in long-term marriages where life patterns have largely been set and the earning potential of both spouses can be predicted with some reliability.” *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997).

We agree with the district court that a spousal support award is appropriate here. Although our review is *de novo*, the district court is given considerable latitude in determining spousal support. *See Anliker*, 694 N.W.2d at 540. “We will disturb that determination only when there has been a failure to do equity.” *Id.*

This is a marriage of average duration of approximately fourteen years. Julie is forty-eight years old; Mark is forty-nine years old. Both parties are healthy and capable of full-time employment. We acknowledge Julie's work history and find she is capable of supporting herself. Julie testified she felt she could earn “between \$32,000 and \$36,000 per year.” Despite this, we agree with

the district court that “[i]t is also clear that Julie’s ability to continue earning an income is far less than Mark’s.” Mark testified he could expect to earn a salary (which does not include bonuses and fringe benefits) of not less than \$92,000 per year in the future.

We recognize that an award of spousal support to Julie may not be best characterized as “rehabilitative” as the district court set forth, as Julie will not likely use the support to seek training or education that would allow her to increase her earning capacity. See *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008) (“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.”) (citation omitted). We agree, however, that Julie is entitled to some amount of traditional spousal support given the disparity of the parties’ incomes, the length of the marriage, the distribution of the marital assets, and the parties’ comfortable lifestyle. See Iowa Code § 598.21A(1); *Becker*, 756 N.W.2d at 826; *In re Marriage of Stark*, 542 N.W.2d 260, 262–63 (Iowa Ct. App. 1995) (balancing recipient’s need with payor’s ability to pay). We conclude the court’s award was equitable.

IV. Property Division.

Mark next contends the district court’s distribution of the parties’ assets and debts is inequitable. Mark argues the court erred in “awarding Julie a credit for her workers’ compensation award received and spent by her during the marriage” and “excluding the \$57,572 in marital debt from the property

settlement.” Mark also takes issue with the court’s valuation of the DDS, Inc. office building.

Iowa is an equitable division state. *Hazen*, 778 N.W.2d at 59. Equitable division does not necessarily mean equal division of each asset, although an equal division of assets accumulated during the marriage is frequently considered fair. *Id.* The issue the court must consider in each case is what is fair and equitable under the circumstances. *Id.* “The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts.” *Id.* In distributing the property, we consider the criteria set forth in Iowa Code section 598.21(5).

A. *Workers’ Compensation Award.* The district court set off a credit of \$23,150 to Julie for a workers’ compensation award she received in 2002. In the same breath, the court set off a credit of \$61,000 to Mark for his “premarital assets” and a credit of \$16,027 to Mark for an inheritance he received during the marriage. Mark contends Julie’s workers’ compensation award was property subject to division, as it was essentially income Julie contributed during the marriage that was spent years ago. Julie counters that “this credit was only an offset against credit Mark was granted for premarital property.”

“All property of the marriage that exists at the time of the divorce, other than gifts and inheritances to one spouse, is divisible property.” *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Significantly, “the 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.”

Id. (citation omitted). “Property brought into the marriage by a party is merely a factor to consider by the court, together with all other factors, in exercising its role as an architect of an equitable distribution of property at the end of the marriage.”

Id. (citation omitted). Likewise, in regard to workers’ compensation proceeds, “once received and retained during the marriage, the proceeds become property of the marriage” subject to equitable distribution. *In re Marriage of Schriener*, 695 N.W.2d 493, 498 (Iowa 2005).

Here, the district court properly set aside Mark’s inheritance as property not subject to equitable distribution. See Iowa Code § 598.21(6) (“Property inherited by either party or gifts received by either party prior to or during the course of the marriage is the property of that party and is not subject to a property division”). However, the court further took Julie’s workers’ compensation award and Mark’s premarital assets and “set off the assets” from the divisible property. At first glance, “[t]his finding was contrary to our distribution scheme in Iowa. The property is part of the divisible estate, just as is property acquired during the marriage.” See *Sullins*, 715 N.W.2d at 247. However, as Julie set forth in her resistance to Mark’s motion to enlarge, modify, and amend, “The Court in this case gave Mark a generous credit for assets he claimed he brought to this marriage over 14 years ago,” where it “could have easily discounted Mark’s premarital claim to 50% or less.” As Julie further alleged, “the Court should disallow any of [Mark’s] premarital if it fails to consider Julie’s separate claim” for the workers’ compensation proceeds.

The district court may not separate premarital assets or workers' compensation proceeds received and retained during the marriage from the divisible estate and "automatically award" them to the respective spouse that owned or received it. *Id.* The court may, however, place "different degrees of weight on the premarital status of property" in achieving an overall equitable distribution. *Id.* Although it may have been more prudent for the court to not specifically enumerate these assets, in this case, we find the court considered the assets as one factor among many in reaching an equitable distribution. We therefore affirm as to this issue.

B. Marital Debt. Mark next argues the district court erred in excluding \$57,572 in "marital debt" from the property settlement. In reality, this amount constituted a debt of DDS, Inc. that has accumulated since 1997. Mark alleges he "borrowed money repeatedly from the business to subsidize the parties' lifestyle." As Mark contends, "By failing to consider the shareholder loan as a marital debt, the court gives Julie a windfall." Mark and Julie testified Mark borrowed extra money from DDS, Inc. as "bonuses," but this borrowed money was not reported as Mark's income. As the district court observed:

[A] considerable amount of evidence was received concerning DDS, Inc. Exhibit 22 is Petitioner's requested distribution. It is significant to note that she does not ask to have DDS, Inc. included as an asset or a debt. She is satisfied with letting Mark have that business and letting it rise or fall on its own merits. This is an equitable approach to the distribution of assets in this case. Mark spends a great deal of time talking about the value of the business and debt against the business. It is just a numbers crunch. All of the exhibits that deal with DDS, Inc., any debt against DDS, Inc., and the residuary trust involved in this case are all documents and transactions involving Mark. Mark signs as the seller and the purchaser. He signs as the trustee and one of the residuary

beneficiaries of the trust. He signs the promissory note on behalf of himself as one entity to himself as the representative of another entity. These are well and good when it comes to setting up tax shelters and structuring businesses so that you can maximize tax advantages and cash flow, primarily for the IRS. It really has little to do with an equitable value to be attached to the asset or the debt. It is clear that this is Mark's business and he is the one who lends the primary value to it. The rest of it is just a paper shuffle he has created to gain advantage for tax and business purposes. It is significant to note that the original \$297,000 purchase price has not had one dime of principal paid upon it. It was clear from the evidence that the likelihood Mark will ever pay anything on the principal of this is remote. The testimony established that should his mother demand, the payment, she would be entitled to it. There's absolutely no evidence that she intended to ever do that. In fact, the evidence in this case strongly supports that no principal payments will ever be made on this. The evidence in this case establishes that the most equitable resolution would be to set DDS, Inc., off as an asset, as well as any debt attaching to it to Mark to run as his own business like he has always done.

As the district court set forth, Mark received DDS, Inc. free and clear under the decree; the court did not include the business as an asset or a debt in the property distribution. This was obviously a benefit to Mark, as Mark's testimony indicates that the assets of DDS, Inc. exceed its debts. Now, Mark requests the "marital debt" of the business be distributed between the parties. Mark testified this debt is essentially owed to himself. Under these facts, we find the court's decision to exclude the \$57,572 debt of DDS, Inc. from the property distribution to be equitable. We therefore affirm as to this issue.

C. Valuation of the Office Building. Mark disputes the district court's valuation of the office building occupied by DDS, Inc. at \$110,000. Although our review is de novo, we will defer to the district court when valuations are accompanied with supporting credibility findings or corroborating evidence. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999).

The parties purchased the building during the marriage and spent \$74,000 on improvements to remodel it into an office for DDS, Inc. DDS, Inc. paid the parties \$850 per month in rent to occupy the building. An expert appraiser, Dale Gross, prepared a written appraisal and testified at trial as to the value of the building. Gross has thirty-four years of real estate experience in Atlantic and is also president of the Iowa Realtors Association. Gross explained the comparable sales method was the most accurate approach to estimate the fair market value of the building at issue. Under that method, Gross opined the building's fair market value was \$80,000. The parties were surprised, as they anticipated the building would be valued at approximately \$145,000. However, when Julie was questioned whether she agreed \$80,000 was the fair market value for the property, Julie testified, "I agree to that." Mark agreed to that valuation of the property as well.

The district court concluded "a more equitable and realistic value" for the office building to be \$110,000. We disagree. Upon our de novo review, we find the testimony of Dale Gross and Julie's agreement with Gross's appraisal to be significant on this issue. Under these facts, we find a more equitable valuation for the office building is \$80,000.

To account for this modification, we reduce Mark's equalization payment to Julie from \$116,240 to \$101,240. We affirm the property distribution in all other respects.¹

¹ Mark also requests this court "[i]gnore Mark's premarital debts as the court ignored Julie's" and "[d]elete the cash equalization payment from Mark to Julie." Mark fails to

V. Attorney Fees.

Julie contends the district court “abused its discretion regarding attorney fees.” Julie argues she should have received “an award of \$4,500 to help pay her attorney fees.” We review the district court’s award or denial of trial attorney fees for an abuse of discretion. *Sullins*, 715 N.W.2d at 247. Whether attorney fees should be awarded depends on the parties’ respective abilities to pay. *Id.* at 255. In addition, the fees must be fair and reasonable. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994). 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 Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). We find Julie has failed to show the district court abused its discretion in declining to award her additional trial attorney fees.

Julie and Mark both request an award of appellate attorney fees.² Such an award rests within our discretion. *Okland*, 699 N.W.2d at 270. “Factors to be considered in determining whether to award attorney fees include: the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal.” *Id.* (quotation marks omitted). In this case, we decline to award any appellate attorney fees.

cite any authority or offer further support for these conclusory assertions. These issues are therefore deemed waived. *Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) (“When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived.”); see Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed waiver of that issue.”).

² We have considered Julie’s statement of attorney fees on appeal, filed in August 2012, in reaching our conclusion on this issue.

Costs of appeal are assessed equally to each party.

VI. Conclusion.

We find the district court's award of spousal support is appropriate considering the facts and circumstances of this case. We modify the property division provisions of the decree to reflect a decrease in the valuation of the office building from \$110,000 to \$80,000. To account for this modification, we reduce Mark's equalization payment to Julie from \$116,240 to \$101,240. We affirm the property distribution in all other respects. We further conclude the district court did not abuse its discretion in declining to award Julie additional trial attorney fees. We decline to award either party their attorney fees on appeal.

AFFIRMED AS MODIFIED.