

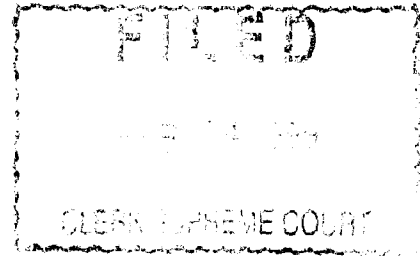
IN THE COURT OF APPEALS OF IOWA

No. 8-717 / 98-236
Filed February 24, 1999

IN RE THE MARRIAGE OF ANGELA WHEELER AND TODD WHEELER

Upon the Petition of
ANGELA WHEELER,
Appellee,

And Concerning
TODD WHEELER,
Appellant.



Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Todd Wheeler appeals various economic provisions in the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Stacey N. Warren of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler, P.C., Des Moines, for appellant.

Matthew S. Sheeley of Parrish, Kruidenier, Moss, Dunn & Montgomery, Des Moines, for appellee.

Heard by Sackett, C.J., and Streit and Vogel, JJ. Zimmer, J., takes no part.

VOGEL, J.

Todd Wheeler appeals various economic provisions in the parties' dissolution decree. We affirm as modified.

Background facts. Todd and Angela Wheeler were married in April of 1989. Two children were born to the marriage; Blake in 1989 and Whitney in 1991. Angela filed a petition for dissolution in March of 1997.

The parties agreed to joint legal custody with Angela having primary physical care. After trial, the court issued its decree, dividing the parties' property and ordering Todd to pay child support. Todd now appeals.

Scope of review. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996). We give weight to the fact findings of the district court, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

Error preservation. Angela asserts that Todd has not preserved error on the issues raised in his appeal because he failed to file a 179(b) motion. Contrary to criminal procedure which requires that specific legal arguments be made to preserve issues for appeal, dissolution of marriage cases are reviewed de novo. Therefore, although any additional reasoning contained in a 179(b) ruling is always helpful, we

are not foreclosed from reviewing the equities of a property distribution without such a ruling.

I. Property division. Todd asserts that the trial court's division of property was inequitable and based on improper factors.

Partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Hass*, 538 N.W.2d 889, 892 (Iowa App. 1995). To make an equitable distribution of assets, the court must first determine what assets are available to be allocated between the spouses. To do this, the court must identify and value the assets of the parties, both jointly and separately. The value of the assets then should be determined as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa App. 1994); *In re Marriage of Klein*, 522 N.W.2d 625, 628 (Iowa App. 1994). Assets are then equitably, not necessarily equally, divided under the circumstances after considering the criteria delineated in Iowa Code section 598.21(1). *In re Marriage of Driscoll*, 563 N.W.2d 640, 642 (Iowa App. 1997).

The allocation of marital debts between the parties is as integral a part of the property division as is the apportionment of marital assets. *See In re Marriage of Johnson*, 299 N.W.2d 466, 467 (Iowa 1980); *see also In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa App. 1996).

Todd's arguments focus mainly on the court's division of the parties' largest asset, the marital home. After deducting the mortgage encumbrance, certain

necessary repairs and a 7% real estate sales commission from the fair market value of the home, the court determined the net equity of the home to be \$24,066. The court then awarded Angela 75% of the net equity and Todd 25% in the form of a lien against the home. Todd first argues that the court erred in deducting a real estate commission when Angela has no plans to sell the home and the house could potentially be sold without use of an agent. However, this is a likely expense that both parties should share. Furthermore, such a deduction has been deemed appropriate even when the custodial spouse plans to remain in the home for several years until the children reach majority. *See In re Marriage of Pittman*, 346 N.W.2d 33, 36 (Iowa 1984); *In re Marriage of Richards*, 439 N.W.2d 876, 882 (Iowa App. 1989).

Next Todd argues that the property division itself was inequitable. We would note that it is very difficult for us to review property distributions on appeal where neither the decree nor the parties' briefs provide us with the net distribution each party received. However, from the materials before us, it appears that Angela was awarded 56% percent of the parties' net assets, and Todd 44%. In its decree, the trial court found that although the parties' salaries were relatively equal during the marriage, Angela had contributed more financially. The court specifically cited Todd's prior child support obligations and the more than \$5000 in attorney fees he incurred when he sought physical care of one of the children. However, we do not think these were appropriate factors to consider in making a property division. Angela was aware of

Todd's prior child support obligations before they married and acquiesced to the obligations throughout the marriage. *See In re Marriage of Burgess*, 568 N.W.2d 827, 829 (Iowa App. 1997) (finding wife was not entitled to any property set-off for husband's child support and alimony obligations from prior marriage where wife was aware of obligations when she married husband, and acquiesced in them throughout the marriage).

As for Todd's attorney fees, we note that they were incurred *during* the marriage. Although all debts incurred during the marriage may not be agreed upon, they are tolerated within the bounds of marriage, and in most instances retain their marital debt status upon dissolution. We have previously expressed that we are averse to the idea of keeping financial score throughout the course of a marriage and will not encourage such a practice by ruling otherwise. *See Driscoll*, 563 N.W.2d at 643 (finding that to delve into a complete accounting of the parties' income and expenses during the marriage would be an impossible task, and uncalled for under Iowa law); *see also In re Marriage of Miller*, 552 N.W.2d 460, 464 (Iowa App. 1996) (rejecting the notion that a spouse must provide detailed documentation to support testimony concerning any household duties or other work).

Having determined that Angela was not entitled to any set-off for Todd's prior child support obligations or attorney fees, we find that the property award should be modified. We have reviewed the various asset and debt valuations contained in the

record and conclude the following figures most accurately reflect the trial court's distribution:

Item	Todd	Angela
Personal Property	1500 (more than Angela)	
Cars	3,000	1,000
Pension	18,464	17,116
Insurance	1,841	1,367
House Equity	6,016 (25%)	18,050 (75%)
Norwest Loan	* (½ assigned to each)	*
Dr. Wilson Debt		-200
Car Insurance Debt	-130	
Debt to Grandfather's Estate	-1,900	
TOTALS	28,791 (44%)	37,333 (56%)

We find Todd should be awarded 43% of the equity in the home in order to make a more equitable distribution. His lien will therefore be in the amount of \$10,348. This shift accomplishes an approximate 50-50 net distribution between the parties.

Todd next claims that it is inequitable for such a large share of his distribution to be tied up for potentially sixteen years, without interest.² In many cases the trial

¹The personal property figure was particularly difficult to calculate because of discrepancies within the decree.

² The decree provided:

Said lien shall become payable within ninety (90) days from the day

court is able to shift assets from one party to another in order to make an equitable and immediate distribution. However, that is not always possible when the primary asset is limited to equity in the home and there are children who should remain in the home for purposes of stability. *See* Iowa Code § 598.21(1)(g) (1997) (directing the court to consider the desirability of awarding the family home for a reasonable period of time to the party having physical care of the children); *In re Marriage of Florke*, 270 N.W.2d 643, 645 (Iowa 1978) (finding that allowing the custodial parent to remain in the home will permit the children to enjoy some measure of stability during their minority, but will also allow noncustodial parent the benefit of his or her equity as soon as that goal is accomplished). In such cases, one party may necessarily have to defer enjoyment of their share of that asset to promote the best interests of the children. While this may not be the ideal situation, it is not inequitable. *See In re Marriage of Woodward*, 426 N.W.2d 668, 669-70 (Iowa App. 1988) (rejecting wife's contention that freezing her equity in the marital home until the youngest children were eighteen years old was inequitable).

At oral argument, Todd alternatively requested that he at least be awarded interest on his share of the home. Although awarding interest in some situations may

the youngest child graduates from high school, becomes nineteen years of age, marries, becomes self-supporting, or the house is sold, whichever shall first occur. However, in the event the youngest child continues to reside at home while attending post-high school educational institutions, then the right to enforce the lien shall be stayed for so long as the child remains in the home as her primary residence and qualifies for support as provided by Iowa Code section 598.1(2).

be called for, the net effect of adding interest, over and above the current rate of inflation, is to steadily decrease Angela's share over the years. We modify to add that interest shall accrue at the rate of 3% per annum from the date procedendo issues and the interest rate shall increase to 6% after the judgment becomes payable under the terms of the decree.

II. Child support. Todd asserts the trial court erred in including the \$5000 bonus he received in 1997 when calculating his child support obligation. He claims that he is eligible for an annual bonus only if his department is profitable, and therefore it is too speculative to be included in the calculation.

All income that is not anomalous, uncertain, or speculative should be included when determining a party's child support obligation. *See In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993). When deciding whether bonuses are to be included in gross income, we examine the employment history of the payor over the past several years to determine whether the amount of money paid from year to year was consistent. *Id.* If so, the bonuses should be included in gross income. *Id.*

In such cases where bonuses are unpredictable, yet provide a substantial increase to income, an alternative to continual adjustments to the monthly child support obligation is to order that a percentage of any bonus received be paid as child support. *See In re Marriage of Allen*, 493 N.W.2d 273, 275-76 (Iowa App. 1992). We believe this method provides the most equitable solution for this case. It allows the

children to share their father's financial increases without saddling Todd with a support obligation that he may not be able to sustain absent the bonus income.

We therefore order Todd to pay Angela a percentage of any net bonus received during each year, beginning with any bonus received in 1998, within thirty days of receipt. The percentage of the bonus shall be the same as the percentage used for calculating child support. Todd shall also provide Angela with a copy of his federal and state income tax returns and all documentation from his employer showing bonuses offered and received during the course of the preceding year.

Todd also claims the trial court failed to give him full credit for his child support obligations to his two other children. However, inconsistencies between Todd's testimony and trial exhibits brought his credibility into question. In April of 1997, Todd filed an affidavit indicating that his child support obligations amounted to \$160 per month. One week before trial, Todd filed another affidavit indicating that his obligations had increased to \$901.33. The trial court stated in its decree:

The Respondent [Todd] testified at the time of trial that his prior child support obligation has increased by more than five times since the time he filed the April 7, 1997 affidavit. . . . Respondent's claims of increased prior child support are not taken lightly. However, they do come during the time of the parties' pending dissolution action. The Court is disturbed that there was no independent evidence introduced at trial to corroborate the Respondent's claims of increased child support.

As Todd had only submitted three pay stubs into evidence, the trial court adopted Angela's estimate of \$460 per month for Todd's prior support obligations.

We find this amount to be very reasonable to Todd under the circumstances and will defer to the trial court's calculations.

Todd's child support obligation should be modified retroactively to the date of the decree. After removing his 1997 bonus from gross income and applying the 1997 child support guidelines using the deductions allowed by the decree, we find Todd's monthly child support obligation is \$565.11. However, Angela should also be paid 30% of any bonus Todd received in 1998.

III. Tax exemptions. Pursuant to the parties' stipulation, the trial court ordered that Angela would have the right to claim Whitney as a dependant for income tax purposes, and Todd would have the right to claim Blake. Todd now asks that the exemption awards be switched so he could claim the younger child, Whitney, as a dependant rather than Blake.

The Internal Revenue Code generally provides that the custodial parent is entitled to the tax exemption unless he or she executes a waiver in favor of the noncustodial parent. *See* 26 U.S.C.A. § 152(e) (1997). However, like the majority of other states, our courts have used their authority under state family law to allocate exemptions to achieve an equitable resolution of the economic issues presented. *See In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). Our supreme court has held that the noncustodial parent may be awarded the dependency exemptions if he or she is current on all child support obligations. *See In re Marriage of Pothast*, 539 N.W.2d 199, 203 (Iowa App. 1995) (citations omitted).

In this case, the trial court ordered that the determination of whether Todd was current on his child support obligation would be made on January 31st of each year. Todd now asks that the date be changed to December 31st of the tax year. However, this date, and the assignment of one exemption to each party, was stipulated to by the parties.

A stipulation and settlement in a dissolution proceeding is a contract between the parties; however, it becomes final only when accepted and approved by the court. *In re Marriage of Von Glan*, 525 N.W.2d 427, 430 (Iowa App. 1994). When a stipulation merges into a decree, it is then to be interpreted and enforced as a final judgment of the court, not as a separate contract between the parties. *Id.* A stipulated settlement should be approved and enforced only if the district court determines the settlement will not adversely affect the best interests of the parties' children. *In re Marriage of Udelhofen*, 538 N.W.2d 308, 310 (Iowa App. 1995). We find no adverse effect to the best interests of the parties' children, and no reason to switch the exemptions.

IV. Attorney fees. Todd asserts the court erred in awarding Angela \$1000 toward her trial attorney fees. An award of attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *See In re Marriage of Francis*, 442 N.W.2d 59, 67 (Iowa 1989). The test is whether the fee is reasonable and based on the parties' respective abilities to pay. *See In re*

Marriage of Applegate, 567 N.W.2d 671, 675 (Iowa App. 1997). We find no abuse of discretion.

Angela requests that she be awarded appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We are to consider the needs of 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 Wood*, 567 N.W.2d 680, 684 (Iowa App. 1997). After considering these factors, we decline to award appellate attorney fees. Costs of this appeal are to be split equally between the parties.

Having considered all issues properly before us on appeal, we hereby affirm the district court's decree as modified.

AFFIRMED AS MODIFIED.

Streit, J., concurs; Sackett, C.J., concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I agree with the majority modification to increase Todd's interest in the family home. Like the majority opinion clearly points out, ours is not the task of dividing property using some kind of financial score kept during marriage.

Todd complained it was not equitable to tie up his distribution for sixteen years without interest. The majority agreed and modified to award three percent interest. This is not sufficient interest for the sixteen-year period. The low rate of interest for a long period decreases the present value of Todd's lien.

I would modify to order Angela pay Todd \$10,000 within eighteen months, or the house be sold and the net proceeds go fifty-seven percent to Angela and forty-three percent to Todd.