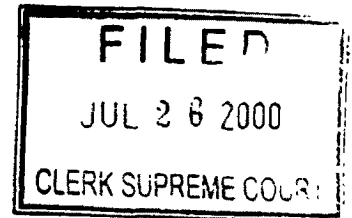


IN THE COURT OF APPEALS OF IOWA

No. 0-256 / 99-1118
Filed July 26, 2000



**IN RE THE MARRIAGE OF ZINA ANN ALLEN
AND MATTHEW WAYNE ALLEN**

**Upon the Petition of
ZINA ANN ALLEN,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
MATTHEW WAYNE ALLEN,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Marion County, Robert A. Hutchison, Judge.

Matthew Wayne Allen appeals from the court's **decree** of dissolution of his marriage, contending the court erred in the calculation of his child support obligation. **REMANDED.**

Bruce H. Stoltze of Brick, Gentry, Bowers, Swartz, Stoltze, Schuling & Levis, P.C., ~~Des~~ Moines, for appellant.

Martha L. Mertz of Mick & Mertz, Knoxville, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

STREIT, J.

Matthew Allen appeals the decree dissolving his marriage, claiming the trial court erred in correctly calculating his earnings for purposes of child support and in equitably dividing the property. We affirm the decree in every respect, except for the court's failure to divide the photographs memorializing the parties' sixteen-year marriage. We therefore remand the case back to the district court for the institution of a reasonable method for dividing the photographs.

I. Background Facts & Proceedings.

Matthew and Zina Allen married in 1983 and have two children, Heather, born April 9, 1985, and Michele, born July 11, 1988. In 1999 the district court dissolved their marriage. In the dissolution decree the court calculated Matthew's pay, for purposes of child support, based on his year-to-date pay indicated on his pay stub and divided the assets with Zina receiving slightly more than a pure fifty-fifty split.

Matthew appeals, claiming the trial court erred in calculating his income for child support purposes and in equitably dividing the marital property.

II. Error Preservation.

Matthew first claims the trial court erred in calculating his base pay. The court in determining Matthew's salary used the amount indicated as his year-to-date regular earnings. Matthew now claims for the first time on appeal the amount indicated on his pay stub as year-to-date earnings included a portion of his overtime pay. Without support in the record, he alleges his employer includes all hours worked in the year-to-date summary of its employees' earnings and includes in the overtime pay category only the additional compensation paid for

the overtime.¹ Under Iowa Rule of Civil Procedure 179(b), a party must alert the trial court of its failure to properly resolve an issue, claim, or other theory properly submitted to preserve error. Iowa R. Civ. P. 179(b); *Ritz v. Wapello County Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999). The purpose of a rule 179(b) motion is "to advise counsel and the appellate court of the basis of the trial court's decision in order that counsel may direct his attack upon specific adverse findings or rulings in the event of an appeal." *Berger v. Amana Society*, 254 Iowa 1036, 1040, 120 N.W.2d 465, 467 (1963). Although Matthew did move under rule 179(b) for an enlarged ruling, he never alerted the trial court of this particular problem. Furthermore, there is no evidence in the record his company's pay summaries communicate his earnings as he now alleges. Therefore, his claim is not only procedurally barred, but his allegations are not supported by the record.

III. Standard of Review.

In an equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa App. 1993). We have a duty to examine the entire record and adjudicate anew the issues properly presented. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

IV. The Property Division.

Matthew next claims the trial court erred in equitably dividing the marital property by: (1) failing to divide Zina's 401(k), (2) including his tools as marital

¹ For example, if Matthew received time and a half for all overtime worked, all hours he actually worked would allegedly appear on his year-to-date earnings summary. The additional half hour of compensation would appear on his overtime summary. Thus, he claims two-thirds of his overtime pay was considered regular pay by the trial court.

property, (3) granting Zina anywhere between two and four thousand dollars more in assets, and (4) in awarding Zina all photographs taken during the course of the marriage.

A. Failure to Divide an Asset. Matthew argues that the court's decree did not provide for him to receive any of Zina's 401(k) plan with her employer. The court ordered:

RETIREMENT ACCOUNTS. Each party has at the present time a retirement account through their respective employer. As each party becomes eligible for retirement, the other shall be entitled to a monthly benefit calculated as follows: [formula] The Court reserves jurisdiction to enter such orders as may be necessary to effectuate the Court's intent, including but not limited to, Qualified Domestic Relations Orders.

The stipulation of assets at trial included a "Principal Pension" valued at \$6216, which is the total value of the Principal 401(k) and Principal pension. It is clear the trial court divided the Maytag pension and the Principal pension, including the Principal 401(k), by this provision. Matthew's complaint is without merit.

B. Tools as Marital Property. Matthew next claims his tools were purchased prior to the marriage and should not have been included in the property distribution. Although property brought to marriage is a factor to consider in equitably dividing the parties' property, Matthew was unable to substantiate his claim with any sort of detail. He was unable to articulate what specific tools or what percentage of the tools were acquired prior to the marriage. Even if we were capable of discerning the makeup of the tools, given the long duration of the marriage any premarital consideration has long since faded. The court's including the tools in the property division was equitable.

C. Equity Does Not Demand a Fifty-Fifty Split. Matthew complains that the assets were not evenly divided and that he should receive part of Zina's IRA in order to equalize the division. The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *Id.* When distributing the property, we take into consideration the criteria codified in Iowa Code section 598.21(1) (1997). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Although the trial court did award Zina somewhere between two to four thousand dollars more in assets, we find no reason to disturb the court's decree. Equity does not demand a fifty-fifty split to the penny. Rather, it requires fairness. We find the district court's property division with regard to the monetary value received by each party to be both fair and equitable.

D. The Photographs. Matthew finally claims the trial court erred in awarding Zina all the photographs accumulated in the course of the marriage. We agree. Matthew is entitled to one-half on these visual memories. We therefore remand this case to the district court to divide the photographs. It is further ordered that either party may seek duplication of any photograph not in their possession after the division at his or her own cost. We do not retain jurisdiction. Costs are assessed to Matthew.

REMANDED.

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