

IN THE COURT OF APPEALS OF IOWA

No. 7-859 / 07-0283
Filed February 13, 2008

JOHN MARTIN FARRELL,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,
Defendant.

Appeal from the Iowa District Court for Polk County, Douglas Staskal,
Judge.

John Farrell appeals from the order finding him in contempt for failure to
pay child support. **WRIT ANNULLED IN PART AND SUSTAINED IN PART.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Barbara Davis, West Des Moines, for appellee Iowa District Court.

Catherine K. Levine, Des Moines, for appellee Janna K. Farrell.

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

VAITHESWARAN, J.

John Farrell, a divorced father of two children, refused to pay court-ordered child support and refused to pay certain expenses associated with the children's extracurricular sports activities. He did so "to get his ex-wife's attention over joint parenting issues."

John's ex-wife, Janna Farrell, applied to have John held in contempt. After the application was filed, John satisfied his child support obligation but reiterated his refusal to pay his portion of the extracurricular expenses. The district court first held John in contempt for failing to pay child support when it came due. The court next found John in "default" on the extracurricular expenses and ordered him to pay Janna \$372.67. Finally, the court ordered John to pay \$750 toward Janna's trial attorney fees.

John petitioned for a writ of certiorari, challenging all three aspects of the district court's ruling. The Iowa Supreme Court granted the petition and transferred the appeal to this court for disposition.

Our standard of review in certiorari actions is well-established. We may only examine "the jurisdiction of the district court and the legality of its actions." *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). An illegality exists "[w]hen the court's findings of fact are not supported by substantial evidence, or when the court has not applied the law properly." *Ary v. Iowa Dist. Court*, 735 N.W.2d 621, 624 (Iowa 2007)

I. Contempt for Failure to Pay Child Support. Iowa Code section 598.23 (2005) provides that a court may cite and punish persons for contempt if they willfully disobey a temporary or final order or decree. "There are two ways in

which the contemner may show that a failure to comply with a court order was not willful: (1) the order was indefinite; or (2) the contemner was unable to perform the act ordered.” *Christensen*, 578 N.W.2d at 678.

John concedes he “did not pay his support in September and October of 2006” and concedes he did so “willfully.” His admissions amount to substantial evidence in support of the district court’s finding of contempt.

In reaching this conclusion, we note that John makes no argument that the support obligation was indefinite or that he was unable to pay the child support. *Id.* He simply argues that his actions were justified because he needed to get his wife’s attention on joint parenting issues. This type of self-help measure is not a basis for avoiding a contempt citation. *See id.* Issues of child support and custody or visitation are independent. Problems with one do not justify withholding of the other. *See Wagner v. Wagner*, 480 N.W.2d 883, 885 (Iowa 1992) (accepting State’s premise as a general rule that “one parent’s duty of support does not turn on the other parent’s fulfillment of custodial obligations such as visitation.”); *Gerk v. Gerk*, 144 N.W.2d 104, 298 (Iowa 1966) (“The parent’s duty to support continues unless removed or shifted in some way recognized by law.”); *In re Marriage of Hoksbergen*, 587 N.W.2d 490, 492 (Iowa Ct. App. 1998) (“The withholding of visitation does not stop an obligation for child support.”). We conclude the district court did not err in holding John in contempt for failing to pay his child support obligation when it came due.

II. Default. We turn to the district court’s determination that John was in default on the payment of extracurricular expenses. The dissolution decree provided:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in addition to child support, the parties agree to each be responsible for fifty percent (50%) of the costs for the mutually agreed-upon children's extracurricular activities and lessons including but not limited to registration fees, camp fees, equipment, costs related thereto, etc.

The parties initially agreed to equally divide the expenses associated with the children's extracurricular activities, but John later backed away from this agreement. After evaluating the decree's language, the district court stated:

[T]he Decree of Dissolution of Marriage literally affords one party an "out" if they didn't agree to the participation of the children in sports. While the Court does not find the Respondent to be in contempt, the Court does find Respondent to be in default. As a result, the Respondent should pay the Petitioner four hundred seventy two dollars and sixty seven cents (\$472.67) but with a credit of \$100 to acknowledge Respondent's attempt to discipline the children through their sports activities. In the future, the Court highly suggests that the Respondent make his objections about sports involvement known in writing to the Petitioner.

We agree with the district court that John could not be held in contempt of the cited decree provision, as the language of the decree did not definitively require him to pay the expenses associated with the children's extracurricular sports activities. We reach this conclusion notwithstanding John's concession that he acted willfully in refusing to pay the extracurricular expenses.

This brings us to the district court's determination that John was in "default." We recognize that it is possible for a party to be in default of an obligation without being in contempt. See Iowa Code § 598.24; *In re Marriage of Anderson*, 451 N.W.2d 187, 189 (Iowa Ct. App. 1989). For example, the party may not have acted with the willfulness required to support a finding of contempt, yet be in default on a court-ordered obligation. *Id.* The problem here is that John was not in default on a court-ordered obligation. As the district court found, the

decree specifically allowed him to opt out of paying the extracurricular expenses. Because John was not in default, the district court was not authorized to require payment of the extracurricular expenses. Accordingly, we sustain the writ of certiorari as to the portion of the district court's order that required John to pay Janna \$372.67.

III. Attorney Fees. John next challenges the district court's award of trial attorney fees. That award is specifically authorized by Iowa Code section 598.24, which states:

When an action for a modification, order to show cause, or contempt of a dissolution . . . decree is brought on the grounds that a party to the decree is in default or contempt of the decree, and the court determines that the party is in default or contempt of the decree, the costs of the proceeding, including reasonable attorney fees, may be taxed against that party.

Iowa Code § 598.24. See *In re Marriage of McCurnin*, 681 N.W.2d 322, 332-333 (Iowa 2004).

As John was found in contempt for nonpayment of two months of child support, the district court was authorized to order the payment of attorney fees.

Janna requests appellate attorney fees of \$1000. As John partially prevailed in his challenge to the district court's ruling, we decline to order the payment of appellate attorney fees.

WRIT ANNULLED IN PART AND SUSTAINED IN PART.

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

IN THE COURT OF APPEALS OF IOWA

No. 8-018 / 07-0638
Filed February 13, 2008

CATHERINE S. TORNBLOM,
Plaintiff-Appellee,

vs.

JAMES ROBERT TORNBLOM,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, David M. Remley,
Judge.

James Robert Tornblom appeals from the district court's grant of
Catherine Tornblom's petition for relief from domestic abuse. **AFFIRMED.**

Paul K. Waterman of Lynch, Greeneaf & Michael, L.L.P., Iowa City, for
appellant.

Noelle Murray of Cronk & Murray, L.L.P., Iowa City, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

HUITINK, P.J.

James Robert Tornblom appeals from the district court's grant of Catherine Tornblom's petition for relief from domestic abuse. We affirm.

I. Background Facts and Prior Proceedings

Catherine and James have been married for eleven years and have two young children. In 1998 James was arrested for allegedly physically abusing Catherine. The charges were later dropped at Catherine's request.

On January 24, 2007, Catherine filed a pro se form petition for relief from domestic abuse pursuant to chapter 236 of the Iowa Code (2007). In this petition she described the "most recent" incident of domestic abuse in the following manner:

Jan. 23rd [James] came home to have lunch. Told me I'd better have a new attitude in 5 hours (when he came home). I asked him again, "What do you mean." Replied, "What my decision was boarded on the course of my life." Again in evening he said "this is a threat." Because of previous violence pattern I'm frightened for my safety.

The next question on the form directed Catherine to describe any other injuries or threats she had received from James. Catherine only listed the aforementioned 1998 incident.

The court granted her a temporary protective order. James hired an attorney and filed a resistance to the petition. Catherine eventually hired an attorney, and the matter proceeded to a hearing on February 7. Catherine described the January 23 incident that prompted her to file the report. She described how James told her "You had better have a new attitude in five hours or your life is going to change. Your life borders on what's going to happen in

five hours.” Catherine was frightened by these comments. She took both children and left their Iowa City home to stay with her parents in Des Moines. James called her and told her that she needed to come home. She refused, and he said “this is a threat.”

Catherine also went on to describe another recent incident that contributed to her decision to file the petition. Approximately three months prior, on Halloween, Catherine and James got into an argument. She testified that during the course of this argument, James “got up on me on top of me and was verbally calling me a fat pig.” She left the room and went to lie down on her bed. James followed her into the bedroom and proceeded to hit and kick her side of the bed while he yelled at her. This lasted for approximately ten minutes and only ended when she threatened to call 911. James testified that he did not mean to frighten her, but admitted his decision to kick the bed was “uncalled for.”

The district court concluded James had committed a domestic assault and entered a protective order that same day. The ruling stated James had committed a domestic abuse assault against Catherine “on Halloween, 2006, but not on January 23, 2007.” The protective order was amended shortly thereafter to allow for marriage counseling.

James filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) to enlarge or amend the court’s order. In this motion James argued, for the first time, that the original petition did not provide him with notice that he was being accused of domestic abuse assault for his actions on Halloween. The district court denied the motion finding, among other things, that the matter had been tried by “consent” pursuant to Iowa Rule of Civil Procedure 1.457.

One week later, on March 15, James filed a “petition to dismiss” the protective order. This petition contained affidavits from family members stating that they did not believe James was a threat to Catherine’s safety. The district court denied this petition.

On April 4 Catherine filed an application to dismiss the protective order. Catherine informed the court that she had been attending marriage counseling with James for the past month, she no longer feared for her safety, and that she had agreed to allow James to move back into the family home. That same day, the court entered an order cancelling the protective order and dismissing the petition for relief from domestic abuse.

James now appeals, claiming the court erred when it entered the original domestic abuse order.¹ James contends a ruling based on the Halloween allegation was inappropriate because the incident was not listed in the petition for relief and therefore violated Iowa Rule of Civil Procedure 1.402. He also claims Catherine did not meet her burden of proving domestic abuse because he did not intend to place her in fear. Catherine did not respond to this appeal.

II. Standard of Review

Because this civil domestic abuse case was heard in equity, our review is *de novo*. *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994). The allegations of domestic abuse must be proven by a preponderance of the evidence. *Id.* We give respectful consideration to the trial court’s factual findings and credibility

¹ Even though the final protective order was eventually dismissed, James filed this appeal because he claims the original adjudication of domestic abuse could have a negative impact on any potential dissolution proceedings. Because we find there is sufficient evidence to support the district court’s original decision, we choose to address this appeal on the merits, rather than determine whether the appeal is now moot.

determinations, but those findings and determinations are not binding on appeal. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001).

III. Merits

A. Rule 1.402 Violation

James contends rule 1.402 requires that the petition for relief from domestic abuse inform the respondent of the incident giving rise to the claim. *See Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994) (noting a domestic abuse petition gives fair notice if it “informs the [respondent] of the incident giving rise to the claim and the claim’s general nature”). He argues the court’s decision to issue the order was erroneous because it was based on an incident not specifically listed in Catherine’s petition for relief. In essence, he claims that had he known he was being accused of assaulting Catherine on Halloween, he would have prepared his defense in a different manner.

The district court rejected this claim because it found the issue was tried by “consent” pursuant to rule 1.457. James does not challenge the court’s consent finding. Instead, he focuses his appeal on whether the court violated rule 1.402 when it ruled on an incident not specifically listed in the pro se petition.

Rule 1.402 outlines the general rules of pleading and procedures for amending a pleading. Rule 1.457, however, establishes that a party can consent, expressly or impliedly, to a trial on issues not directly raised in the pleadings. Rule 1.457 states, in pertinent part, that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” It goes on to state that if a party objects that the evidence is not within the issues in the

pleadings, the court “may grant a continuance to enable the objecting party to meet such evidence.” Iowa R. Civ. P. 1.457.

When Catherine testified about the alleged Halloween assault, neither James nor his attorney objected to her testimony. When questioned about the incident on cross-examination, James described the incident in his own words, again without objection. Also, James did not ask for a continuance and did nothing to suggest he was surprised by the allegation.² Based upon the allegations in the petition of a “pattern” of abuse and James’s willingness to allow evidence on the alleged Halloween assault, we find the district court properly determined that James impliedly consented to a trial on the issue of whether the Halloween incident constituted an assault. Because we agree with the court’s conclusion that James consented to a trial on this issue, we find the court did not violate rule 1.402 when it entered judgment on the issue.

B. Sufficient Proof of Domestic Abuse

Under Iowa Code section 236.5(2), a court may grant a protective order “[u]pon a finding that the defendant has engaged in domestic abuse.” For the purposes of chapter 236, domestic abuse is defined as “committing assault as defined in section 708.1.” Iowa Code § 236.2(2). Section 708.1 states

A person commits an assault when, without justification, the person does any of the following:

. . . .

² In a post-ruling motion, James proffered affidavits from witnesses he claims he would have called to testify had he known that the Halloween incident could serve as the basis for the domestic abuse finding. None of these affiants claim they were present during the Halloween incident. At most, one affiant says she spoke with Catherine the day after Halloween and Catherine “never mentioned” she was afraid for her safety. As noted below, we find it was reasonable to infer that James intended to place Catherine in fear of immediate physical contact. The fact that Catherine did not tell the affiant that she was afraid of her own husband does not eliminate this reasonable inference.

2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

On appeal, James claims Catherine failed to prove that he intended to place her in fear for her immediate safety. James contends that his kicking of the bed was not sufficient evidence to prove he intended to put her in fear of physical contact. In his appellate brief, he admits that “kicking the bed may have caused [Catherine] to be fearful that [he] would batter her,” but argues that kicking the bed “could just as easily have been an attempt to prevent [her] from ignoring [him].”

The intent element required by the assault statute “may be inferred from the circumstances of the transaction and the actions of the defendant.” *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006) (quoting 21 Am. Jur. 2d *Criminal Law* § 128, at 214-15 (1998)); *State v. Taylor*, 689 N.W.2d 116, 132-33 (Iowa 2004). Catherine is assisted in meeting her burden of proof on this element “by the principle that an actor will ordinarily be viewed as intending the natural and probable consequences that usually follow from his or her voluntary act.” *Taylor*, 689 N.W.2d at 132.

As conceded in James’s appellate brief, his repeated kicking of the bed could have caused Catherine to be fearful that he would batter her. Indeed, Catherine testified that his actions did make her fear for her own immediate physical safety. We find this is a natural and probable consequence of someone acting in such a manner. Accordingly, we conclude the evidence supports the inference that James intended to make her fear immediate physical contact when he yelled and repeatedly hit and kicked the area she occupied on the bed.

Upon our de novo review of the record, we find a preponderance of the evidence supports the district court's conclusion that the incident that occurred on Halloween night, 2006, was an assault. Accordingly, we affirm the district court's conclusion that domestic abuse occurred and its original decision to enter a protective order.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 8-027 / 07-0890
Filed February 13, 2008

**IN RE THE MARRIAGE OF STEVEN W. SWENSEN AND KYLA LEE
SWENSEN**

**Upon the Petition of
STEVEN W. SWENSEN,**
Petitioner-Appellee,

**And Concerning
KYLA LEE SWENSEN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke,
Judge.

Mother appeals the district court's ruling denying her request to modify a
dissolution decree and keeping physical care with the father. **AFFIRMED.**

William H. Habhab, Fort Dodge, for appellant.

Kurt T. Pittner, Fort Dodge, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

EISENHAUER, J.

When Steven and Kyla Swensen separated in 1997, they decided Steven would care for Michael (October 5, 1990) and Kyla would care for Victoria (December 31, 1992). In 1998, Kyla dropped Victoria off at Steven's home telling him she wanted him to take care of both children because she needed time to put her life in order. Steven took over the physical care of both children. On June 16, 2000, the marriage was dissolved by stipulated decree. They agreed to joint legal custody with physical care to Steven. After the decree was entered, Steven consistently provided visitation for Kyla significantly exceeding the decree's provisions, both during the school year and during summer vacation.

Steven is a veterinarian who worked in the Fort Dodge area until recently. Kyla moved to Cedar Falls after the separation and does not work outside the home. She has remarried and has two children, ages five and three.

When Steven lost his job in Fort Dodge, he searched unsuccessfully for a new job in Iowa. Eventually, he expanded his job search and obtained a veterinarian position in Arizona with a significant increase in salary. Steven and the children moved to Arizona in January 2007.

Kyla filed a petition to modify the dissolution decree seeking physical care. After a hearing in April 2007, the court declined to modify physical care, but did modify visitation. Kyla appeals the court's modification order.

We review this equity action de novo. Iowa R. App. P 6.4. We have a duty to examine the entire record and "adjudicate anew rights on the issues properly presented." *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa

1981). We give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. Iowa R. App. P. 6.14(6)(g).

The only issue is whether the physical care of the children should be changed from Steven to Kyla because of Steven's move to Arizona. In seeking to modify the physical care arrangement, Kyla has a heavy burden. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). She must establish "by a preponderance of the evidence, a substantial change in circumstances justifying [her] requested modification." See *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Additionally, Kyla has the burden of showing she will render superior care. See *In re Marriage of Spears*, 529 N.W.2d 299, 301 (Iowa Ct. App. 1994). These requirements stem from the principle that once custody has been fixed, "it should be disturbed only for the most cogent reasons." *Id.* The best interests of the children are the controlling considerations. *Thielges*, 623 N.W.2d at 235.

When the basis for seeking modification is relocation of the custodial parent, the heavy burden required to modify custody does not change. *Id.* at 236. The stability of the relationship with the primary caregiver is more important than the physical setting of the children. *Id.* If Kyla proves only a substantial change in circumstances, then Iowa law "contemplates only a visitation modification." See *id.* at 237. We conclude that is the situation presented here.¹ Under the current arrangement, with Steven freely allowing more visitation than required in the decree, the parties have raised normal, well-adjusted and

¹ Under Iowa Code section 598.21D (2007), if a custodial parent moves 150 miles or more from the former custodial home, this may be considered a substantial change in circumstances.

emotionally-healthy children. The evidence does not show the move will be detrimental to their long-range best interests. At most, the record shows Steven and Kyla are both good parents who can provide the same level of care for their children. Since Kyla has not met her heavy burden of proving she will give superior care; we will not place the children in her physical care. It is in the children's best interests to continue living with Steven who has been their primary caregiver for ten years.

While the children testified they desired to remain in Iowa and live with Kyla, they both stated Steven had done a good job in raising them and are happy he has never attempted to restrict their contact with Kyla. Both have made new friends in Arizona, enjoy their new house and swimming pool, and can walk to their new schools. Placement with Kyla would similarly require a change to a new and different school system. We have considered their testimony, but such testimony "is entitled to less weight in a modification action than would be given in an original custody proceeding." *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991). Additionally, "the analysis involved in deciding custody is far more complicated than asking children with which parent they want to live." *Id.* at 101-02. Under the circumstances of this case, we will not defer to the children's stated preferences.

Additionally, the record shows the district court is correct in finding: "Of particular concern is this court's feeling that Kyla has much less concern for providing Steven significant contact with the children than he has provided to her through all these years." For example, during the nine weeks the children were in Arizona prior to trial, Steven flew them back at his expense for two visitations

totaling fifteen days. Kyla, meanwhile, proposes a modification where Steven will have the children two weeks of the summer and whenever he can fly back to Iowa to see them.

Kayla's proposal ignores the fact "it is generally in the children's best interests to have the opportunity for maximum continuous physical and emotional contact with both of their parents." *Thielges*, 623 N.W.2d at 238. Where a long-distance relocation has occurred, the court can assure this contact "by granting the non-relocating parent extended visitation during summer vacations and school breaks and scheduled telephone contact." *Id.* The district court continued significant contact with both parents by modifying the visitation schedule to require: (1) Steven to fly the children back to Iowa every sixty days; (2) Kyla to have the children for all but two weeks of summer vacation; (3) Kyla to have the children for all of spring break and one-half of Christmas vacation; and (4) each party to allow regular telephone and internet contact. These changes are appropriate and fair, as is the court's ordering of shared travel expense.

The district court's ruling continues physical care in the parent who has undeniably supported the children's relationship with their non-custodial parent and who, by his recent actions, has demonstrated he would continue to do so. We conclude the children have been assured the opportunity for maximum continuous physical and emotional contact with both Steven and Kyla and affirm the district court.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 8-032 / 07-1162
Filed February 13, 2008

IN RE THE MARRIAGE OF SHARON D. MOUW AND JEFFREY MOUW,

**Upon the Petition of
SHARON D. MOUW,**
Petitioner-Appellant,

**And Concerning
JEFFREY MOUW,**
Respondent-Appellee.

Appeal from the Iowa District Court for Sioux County, James D. Scott,
Judge.

Petitioner appeals from the economic provisions of the decree dissolving
the parties' marriage. **AFFIRMED AS MODIFIED.**

Michael L. Zenor of Zenor, Houchins & Borth, Spencer, for appellant.

Lloyd W. Bierma of Oostra, Bierma & Van Engen, P.L.C., Sioux Center,
for appellee.

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

SACKETT, C.J.

Petitioner-appellant, Sharon Mouw, appeals from the economic provisions of the decree dissolving her marriage to respondent-appellee, Jeffrey Mouw. She contends the court erred in valuing certain assets and in not awarding her traditional alimony. We affirm as modified.

I. Background

The parties married in 1980. They had two children who are now adults. At the time of the dissolution in June of 2007, Sharon was fifty-one years old and Jeffrey was fifty-seven. Sharon has a GED and one semester of college. She works as a travel agent, cleans houses, and does other office work. The district court found she had monthly income of \$1550. Jeffrey has a tenth-grade education and is a long-haul truck driver. The district court found his monthly income to be \$3000.

The district court valued certain assets and based on these valuations awarded Jeffrey the family home, an acreage, and assigned all the parties' debt to him. The district court determined this left Jeffrey with a negative net award of \$19,269. The court awarded Sharon assets of \$8912 but did not order her to pay any of the parties' debts. The court considered alimony together with the property award and concluded alimony was not appropriate because of the disparity in the property settlement, Sharon's younger age, her better health, and greater education.

II. Scope and Standards of Review

We review decrees of dissolution of marriage de novo. Iowa R. App. P. 6.4. We give weight to the findings of the district court, but are not bound by

them. *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992). Prior cases have little precedential value, and we base our decision on the facts and circumstances unique to the parties before us. *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991). “We consider alimony and property division together in assessing their individual sufficiency. They are neither made nor subject to evaluation in isolation from one another.” *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa Ct. App. 1994). An award of alimony depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). When determining the appropriateness of alimony, the court must consider the statutory factors enumerated in Iowa Code section 598.21A (Supp. 2005). The court also considers each party’s earning capacity, as well as the parties’ present standards of living and ability to pay, balanced against the relative needs of the other. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Although our review of the district court’s alimony award is de novo, we afford that court considerable latitude in making the determination. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). We will disturb that determination only when there has been a failure to do equity. *Id.*

III. Property Division

Sharon contends the district court undervalued certain of the assets awarded Jeffrey and erred in considering as debt to Jeffrey an oral obligation to Jeffrey’s father, which the court determined to be in the amount of \$75,000. Sharon contends the home and acreage that went to Jeffrey should have been valued at \$250,000 rather than the \$185,000 value placed on it by the district

court. She also challenges the valuation placed on a Peterbilt tractor and reefer trailer. Although our review is de novo, we will defer to the trial court when valuations are accompanied with supporting credibility findings or corroborating evidence. We find the values assigned by the court are within the permissible range of the evidence and we will not disturb them on appeal. See *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007); *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999).

We consider the valuations established by the district court in assessing the economic provisions of the decree.

Sharon also challenges the district court crediting to Jeffrey a \$75,000 oral debt he claimed was owed to his father. In 1993 Jeffrey's father sold and transferred to Jeffrey and Sharon the home and part of the acreage allocated to Jeffrey. The district court found there was an oral agreement between Jeffrey and his father for a sale price of \$75,000 with payment of interest only at \$400 a month and principal payments at Jeffrey and Sharon's discretion. The court further found "Jeffrey's father has never asked for principal and the court does not believe he intends to do so."

Sharon argues if the \$75,000 is not going to be repaid then it should not excuse Jeffrey from paying alimony.

We give some consideration to Sharon's argument on this issue in assessing her claim for alimony. The forbearance of principal payments is in the nature of a gift to Jeffrey. Sharon testified the \$400 was paid to Jeffrey's father nearly every month and it was her understanding the \$400 went to principal and no interest was being charged. She also testified this was his way

of giving the couple an inheritance without having to pay taxes. Inherited and gifted property can be considered in determining alimony. See, e.g., *In re Marriage of Moffatt*, 279 N.W.2d 15, 20 (Iowa 1979); *In re Marriage of Weiss*, 496 N.W.2d 785, 788 (Iowa Ct. App. 1992); *In re Marriage of Voss*, 396 N.W.2d 801, 804 (Iowa Ct. App. 1986).

IV. Alimony

We address Sharon's contention the court erred in not awarding her traditional alimony. This was a nearly thirty-year marriage. Jeffrey's income is greater than Sharon's. Sharon spent several years out of the workforce caring for the couple's children. She worked for a number of years as a travel agent, an occupation for which there no longer is a demand. We modify the decree to provide that Jeffrey shall pay Sharon alimony of \$200 a month until he reaches his sixty-second birthday. The alimony shall terminate at the death of either party if it occurs before Jeffrey's sixty-second birthday.

V. Attorney Fees

Sharon requests appellate attorney fees. In considering such a request, we look to 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 trial court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). Jeffrey is ordered to pay \$250 of Sharon's appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED.

IN THE COURT OF APPEALS OF IOWA

No. 8-034 / 07-1225
Filed February 13, 2008

**IN RE THE MARRIAGE OF SUE ELLEN RATHBUN
AND JAMES L. RATHBUN**

**Upon the Petition of
SUE ELLEN RATHBUN,**
Petitioner-Appellee,

**And Concerning
JAMES L. RATHBUN,**
Respondent-Appellant.

Appeal from the Iowa District Court for Allamakee County, Monica L. Ackley, Judge.

James Rathbun appeals from the district court's decree denying his petition for modification of his alimony obligation. **AFFIRMED AS MODIFIED.**

Jeffrey L. Swartz of Jacobson, Bristol, Garrett & Swartz, Waukon, for appellant.

Laura J. Parrish Maki of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C., Decorah, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

HUITINK, P.J.

James Rathbun appeals from the district court's decree denying his petition for modification of his alimony obligation. He argues the evidence supports the relief requested, and the trial court erred by concluding otherwise. We affirm as modified.

I. Background Facts and Proceedings

The district court's February 24, 1993 original decree dissolved James and Sue Rathbun's marriage. Based upon the circumstances surrounding the marriage, the district court's March 9, 1993 supplemental decree ordered James to pay \$500 per month in alimony until Sue's death or remarriage. At the time of the supplemental decree, Sue, who was forty-one years old, was employed full-time with the Allamakee Community School District making \$979.44 per month and part-time with a local hospital making \$186.67 per month. James, who was forty-six years old, was employed as a vice-president at Farmers & Merchants Savings Bank making \$56,500 per year. In addition, he received stock dividend income totaling \$1400 per year. Neither party had serious health problems at the time the original decree was entered.

On October 9, 2006, James filed a petition for modification of alimony, alleging a substantial and material change of circumstances since the supplemental decree was entered. More specifically, James cited his declining health, loss of employment and resulting diminished earning capacity, as well as Sue's increased earnings. James accordingly requested termination of his alimony obligation or alternatively a reduction in the amount of alimony. Sue denied these allegations, and the matter proceeded to trial on its merits.

The evidence at trial revealed the following: James, who was sixty years old at the time of trial, was diagnosed in 2006 with degenerative peripheral neuropathy, degenerative disc disease, and low back pain. Because of these conditions, James quit his job at Farmers & Merchants Savings Bank on March 18, 2006. He applied for and began receiving disability insurance from his employer in the amount of \$2800 per month in October 2006. He will receive disability payments until he turns sixty-five, when he is eligible for social security. In addition, he continued to receive stock dividend income. His total earnings for 2006 were \$25,227. His IRA retirement account was valued at \$151,000.

At the time of trial, Sue was fifty-six years old. She suffered from high blood pressure, high cholesterol, diabetes, and psoriasis. Sue was still employed full-time with the school district making \$22,665 per year and part-time with the hospital working ten hours every two weeks at \$11.42 per hour. She had recently reduced her work hours, citing health reasons. Sue's IPERS retirement account was valued at \$43,197. In 2006 Sue filed for bankruptcy and discharged approximately \$36,000 in debts. She also sold her home and moved into an apartment. She claimed monthly expenses of \$2200.

The district court's June 21, 2007 modification order denied James's petition but modified the alimony so it would terminate at James's death. On June 28, 2007, James filed a motion for enlarged or amended findings and different judgment. The district court denied the motion on July 2, 2007.

II. Standard of Review

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the legal and factual issues properly

presented and preserved for our review. *In re Marriage of Reinhart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We, however, give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(g).

III. Modification of Alimony

The alimony provision of an original decree may be modified if there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (Supp. 2005). In making this determination, the court must consider “[c]hanges in the employment, earning capacity, income or resources of a party,” “[c]hanges in the physical, mental, or emotional health of a party,” and other relevant factors. *Id.* § 598.21C(1)(a), (e), (f). Our supreme court has previously delineated the following relevant principles that may be considered when ruling on a petition for modification:

- (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree;
- (2) not every change in circumstances is sufficient;
- (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice;
- (4) the change in circumstances must be permanent or continuous rather than temporary;
- (5) the change in financial conditions must be substantial;
- and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered.

In re Marriage of Walters, 575 N.W.2d 739, 741 (Iowa 1998) (quoting *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983)). The party seeking modification bears the burden of proof by a preponderance of the evidence. *In re Marriage of Lee*, 486 N.W.2d 302, 304 (Iowa 1992).

Based on our de novo review, we find James has met his burden to show a substantial change in circumstances. These circumstances include his earlier-mentioned health problems and resulting decline in his earning capacity, as well as Sue's increased earnings. The amount of relief to which he is entitled must, however, be tempered by Sue's continuing need for support, despite the change in circumstances. See *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We accordingly modify the trial court's modification decree by reducing James's alimony obligation to \$300 per month. We affirm the trial court's decree in all other respects.

IV. Appellate Attorney Fees

Sue requests attorney fees on appeal. The award of attorney fees is discretionary and is not a matter of right. *In re Marriage of Sprague*, 545 N.W.2d 325, 328 (Iowa Ct. App. 1996). We must 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 trial court's decision on appeal." *Id.* After considering these factors, we decline to award attorney fees. Costs shall be taxed equally to the parties.

AFFIRMED AS MODIFIED.

IN THE COURT OF APPEALS OF IOWA

No. 8-035 / 07-1261
Filed February 13, 2008

**IN RE THE MARRIAGE OF JANE ELLEN
NEDDERMEYER AND ROSS ERIC NEDDERMEYER**

**Upon the Petition of
JANE ELLEN NEDDERMEYER,
n/k/a JANE ELLEN NEDDERMEYER HOUT,**
Petitioner-Appellee,

**And Concerning
ROSS ERIC NEDDERMEYER,**
Respondent-Appellant.

Appeal from the Iowa District Court for Ida County, Duane E. Hoffmeyer,
Judge.

A father appeals from the child support provisions of a district court
modification decree. **AFFIRMED.**

Bradford Kollars and Michele M. Lewon of Kollars & Lewon, P.L.C., Sioux
City, for appellant.

Peter Goldsmith of Boerner & Goldsmith Law Firm, P.C., Ida Grove, for
appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

In this case we are asked to decide whether the district court's failure to explicitly adopt a child support guidelines calculation precludes the court from deviating from the guidelines in its modification of the parent's monthly support obligation. We hold it does not. We further hold that, under the circumstances of this case, the application of the guidelines would lead to an unjust or inappropriate result. We affirm the district court's modification.

I. Background and Facts

Jane and Ross Neddermeyer were married on June 10, 1988. In August 2001, Ross was arrested and incarcerated in Colorado. He has been incarcerated since his arrest and will not be eligible for parole until approximately 2016.

Jane filed a petition for dissolution of marriage in June 2002. The parties agreed to Jane having physical care of the children and Ross paying \$1000 per month in temporary child support. The support was reduced to \$750 after the November 2002 death of one of their children.

On June 6, 2003, a decree of dissolution was entered. At that time there were two surviving minor children, Rebecca, born in June 1992, and Margaret, born in February 1996.¹ Jane was granted sole legal and physical custody. The decree also provided that Ross would not pay child support while in prison. In lieu of monthly child support, however, a percentage of the inheritance Ross was to receive from the Chris Neddermeyer estate was to be set aside in a trust for

¹ There were three other children born to the marriage: Anna, who died in infancy in 1999; Marcus, who died in infancy in 2000; and Christian, who died in November 2002.

the children's support and maintenance. The trust provided that Jane would receive at least \$500 per month to support the children and contemplated that the trust may be exhausted before the children reached age eighteen.

In 2004, Jane used approximately \$11,000 from the trust without court approval to make a down payment on a house where she and her husband, Don Hout, and the children reside. The house was placed solely in Don's name because Jane had bad credit. Don signed an agreement that, if the marriage ended for any reason, he would make no claim on the first \$10,582.52 in equity.

Because Jane's health has deteriorated, she is no longer able to perform the work she could previously. She currently earns \$600 per month providing in-home child care. In December 2004, the monthly amount Jane received from the trust increased from \$500 to \$750. The trust was depleted in May 2006.

Ross has over \$36,000 from the remaining share of his inheritance from the Chris Neddermeyer estate. In 2005, Ross's grandmother died. Ross received an inheritance of over \$102,000 from her estate. These assets have been placed into certificates of deposit (CD). They generate income at 5.28%.

On May 25, 2006, Jane filed a petition for modification of child support. The district court granted the petition and ordered Ross to pay \$500 per month in child support. Ross filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) asking, in pertinent part, that he be credited \$233 per month due to the down payment on the residence, and that the court clarify its failure to order a reduction in child support when the older daughter turns eighteen. The court denied the motion. Ross appeals.

II. Merits

Modification proceedings are equitable proceedings; our review, therefore, is de novo. Iowa R. App. P. 6.4; *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). Although we give weight to the findings of fact made by the district court, especially as to the credibility of witnesses, we are not bound by those findings. *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998). “We recognize that the district court ‘has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity.’” *Id.* (quoting *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983)). Our primary consideration “is not what is in the best interest of [the parent], but what is in the best interest of his child[ren].” *In re Marriage of McKenzie*, 709 N.W.2d 528, 533-34 (Iowa 2006).

A court may modify child support orders when there has been a substantial change in circumstances. Iowa Code § 598.21C(1) (Supp. 2005). In determining whether there has been a substantial change in circumstances, a court may consider: “a. Changes in the employment, earning capacity, income, or resources of a party. b. Receipt by a party of an inheritance, pension, or other gift l. Other factors the court determines to be relevant in an individual case.” *Id.* “Courts . . . will not hesitate upon proper showing to modify provisions for the care, maintenance and education of children.” *Smith v. Smith*, 239 Iowa 896, 897, 32 N.W.2d 662, 663 (1948).

A. Substantial Change in Circumstances

In Ross’s statement of facts he asserts that he disagrees with several of Jane’s claims of substantial changes in circumstances. For example, because

his grandmother's death was expected at the time of the dissolution, he claims his inheritance from her was not a substantial change in circumstances. He does not identify this as an issue, argue against, nor cite any sources to support an argument against the district court's finding that there has been a material and substantial change in circumstances. Therefore, we will not address the issue on appeal. See Iowa R. App. P. 6.14(1)(c) ("Failure in the brief to state, to argue, or to cite authority in support of an issue may be deemed waiver of that issue.").

Even if we were to address this issue, we would reach the same result. In the original decree, there was a downward departure from the guidelines to an award of no monthly child support due to the transfer of assets to the trust and Ross's lack of income. There has been a substantial change in circumstances due to the depletion of the trust's assets and Ross's receipt of the additional inheritance. See Iowa Code § 598.21C(1)(b); see also *Smith*, 239 Iowa at 897, 32 N.W.2d at 664 (holding the acquisition of inheritance that was not reasonably contemplated at the time of the decree is a substantial change in circumstances).

B. Consideration of Net Income

Ross argues the district court erred in failing to determine his net income for child support calculation purposes. Since the court did not calculate his net monthly income, he argues, it could not have determined the correct amount of support.

Jane asserts that Ross failed to preserve this issue and the second issue (whether the court erred in failing to apply the child support guidelines) for review because these issues were not raised in Ross's 1.904(2) motion. See Iowa R. Civ. P. 1.904(2). A rule 1.904(2) motion is a precondition to an appeal only if the

district court failed to resolve an issue that had been properly submitted. *West Branch State Bank v. Gates*, 477 N.W.2d 848, 852 (Iowa 1991). Because these issues are related to errors Ross claims the district court made in computing the child support award, and the court clearly ruled on the amount of the award, a 1.904(2) motion was not required in order to preserve these issues for our review.

The purpose of Iowa's child support "guidelines is to provide for the best interests of the children by recognizing the duty of both parents to provide adequate support for their children in proportion to their respective incomes." *State ex rel. Nicholson v. Toftee*, 494 N.W.2d 694, 695 (Iowa 1993). As a rule, the guidelines are to be strictly followed. *State ex rel. Reaves by Reaves v. Kappmeyer*, 514 N.W.2d 101, 104 (Iowa 1994). The court may deviate from the guidelines, however, if it finds a deviation is "necessary to provide for the needs of the children and to do justice between the parties under the special circumstances of the case." *Nicholson*, 494 N.W.2d at 695; *see also* Iowa Code § 598.21B(2)(c) and (d).

Ross argues the district court failed to compute his monthly income in determining his child support obligation, and therefore could not have determined the correct amount of support. Ross's assertion that the court was required to determine the guidelines amount first is generally correct. *See Reaves*, 514 N.W.2d at 104 ("[T]he preferable procedure is to determine the guideline support amount first. Only when that figure is known can the court decide whether an adjustment of that amount is warranted under the special circumstances of the case."). The court was not required, however, to make a written finding of the

specific support amount calculated under the guidelines prior to deviating from the guidelines.

In this case, the district court implicitly determined the guidelines amount. The court ordered support “[b]ased upon the present financial circumstances of the parties and the mandatory child support guidelines” and noted that “[b]efore applying the guidelines, there needs to be a determination of the net monthly income.” The court also referenced the child support worksheets attached to the modification order. Even though the court did not make a specific written finding of Ross’s net monthly income under the guidelines, the district court was not precluded from deviating from the guidelines in its modification of Ross’s monthly support obligation. The court was not required to explicitly make a written finding of the guidelines calculation prior to deviating from the guidelines.

C. Application of Child Support Guidelines

Ross next argues that the district court erred in failing to apply the child support guidelines to the parties’ net income in determining his obligation. We agree with the court that, under these circumstances, the application of the guidelines would lead to an unjust or inappropriate result.

Ross asserts that, by applying his and Jane’s monthly incomes to the child support guidelines, he would be required to pay \$75 per month. Net income, however, is not the only basis for calculating a parent’s support obligation. The fact that Ross has assets from which his child support obligation could be satisfied is an important consideration in determining his ability to pay. See *Walters*, 575 N.W.2d at 742 (noting that an incarcerated parent’s ability to pay is a necessary consideration in child support modification proceedings).

A court may deviate from the guidelines if it makes a written finding that applying the guidelines would be unjust or inappropriate. Iowa R. Civ. P. 9.11; *see also* Iowa Code § 598.21B(2)(d). The criteria for determining this is whether:

- 9.11(1) Substantial injustice would result to the payor, payee, or child.
- 9.11(2) Adjustments are necessary to provide for the needs of the child and to do justice between the parties, payor, or payee under the special circumstances of the case.

Iowa R. Civ. P. 9.11(1) and (2).

The district court deviated from the guidelines based upon Ross's limited personal needs and the possibility that his assets would be depleted. In this case, substantial injustice would result to the children if Ross were allowed to pay only \$75 per month in child support while he retains his assets. *See Vetternack*, 334 N.W.2d at 763 (holding it would be inequitable for incarcerated parent's equity in family "home to remain set off to him while his children were being supported by others"). Under the special circumstances of this case, the strict application of the guidelines would lead to an unjust or inappropriate result. Notwithstanding Ross's incarceration, it is still "necessary to care, feed, and provide for his children. He remains responsible for those expenses." *Id.*

D. Credit for Children's Equity in Residence

Ross next argues that, if we affirm the \$500 per month in child support, the award should be modified to credit him for the children's equity interest in Jane's residence, thereby reducing his monthly obligation to \$267. Neither party cites any authority to support its argument on this issue. We therefore consider this issue waived and will not consider it on appeal. *See* Iowa R. App. P. 6.14(1)(c).

E. Attorney Fees

Jane requests an award of \$2500 in appellate attorney fees. An award of 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 parties' respective abilities to pay and whether the requesting party was defending the district court's decision on appeal. *Id.* Jane was forced to defend the court's decision and was successful in her defense. Further, she has a relatively low income, and Ross has sizeable assets available. We therefore award Jane \$2500 in appellate attorney fees.

III. Conclusion

Upon our de novo review, we find the district court was not required to explicitly adopt a child support guidelines calculation in order to deviate from the guidelines. Therefore, the court's failure to make a written finding of the guidelines amount did not preclude it from deviating from the guidelines. Further, under the circumstances of this case, the application of the guidelines would lead to an unjust or inappropriate result. Therefore, the court appropriately deviated from the guidelines. Having considered all issues presented on appeal, we affirm the child support modification set forth by the district court.

AFFIRMED.

IN THE COURT OF APPEALS OF IOWA

No. 8-037 / 07-1330
Filed February 13, 2008

**IN RE THE MARRIAGE OF DORINDA MILLER
AND JOSEPH MILLER**

**Upon the Petition of
DORINDA MILLER,**
Petitioner-Appellant,

**And Concerning
JOSEPH MILLER,**
Respondent-Appellee.

Appeal from the Iowa District Court for Crawford County, James D. Scott,
Judge.

The petitioner appeals the district court's ruling granting modification of the
custody provisions of the dissolution decree. **AFFIRMED.**

Bryan Swain of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for
appellant.

Elizabeth Kellner-Nelson of Pendleton Law Firm, P.C., West Des Moines,
for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Dorinda Miller appeals the district court's order granting modification of the child custody provisions of the dissolution decree of Dorinda and Joseph Miller. As we conclude the district court's ruling modifying physical care was proper, we affirm.

I. Background Facts and Proceedings.

Dorinda and Joseph's marriage was dissolved by a stipulated decree in July 2003. They have one daughter, Madison, born in November 2001, of whom Dorinda had physical care under terms of the decree. Joseph filed a modification petition in July 2004 requesting physical care be changed to him. The parties reached an agreement approved by the court in June 2005 that expanded Joseph's visitation and accommodated it to better meet his new work schedule. This stipulated modification also contained a provision placing a moratorium on all non-emergency modifications for five years. At the time, Dorinda and Joseph both lived in or near Vail in Crawford County, Iowa.

Within three weeks of the new modification order, Dorinda informed Joseph that she intended to move with Madison to Kearney, Nebraska. Joseph filed another modification petition in July 2005, in anticipation of Dorinda's move. This petition was set for hearing on May 10, 2006, but because Dorinda had not accomplished any move to Kearney as of that date, Joseph dismissed the petition without prejudice.¹ Again within a few weeks of the dismissal of the latest modification petition, Dorinda did actually move to Kearney, Nebraska, with

¹ Additional litigation surrounding dismissal of this petition occurred, but will not be discussed here as it is not relevant to the issues on appeal.

Madison. Some intervening litigation ensued concerning visitation and transportation issues between June 2006 and April 2007.

Joseph filed the modification petition at issue on appeal in April 2007, requesting physical care be changed from Dorinda to him. Dorinda also filed a modification petition, requesting that Joseph's visitation be changed to a more standard schedule to keep interference with her work schedule at a minimum when it came to transporting Madison for visitation. Following trial on custody issues, the district court concluded that a significant change in circumstances had occurred with Dorinda's move to Kearney, that Joseph had proven a superior ability to parent Madison, and physical care should be granted to him. An order modifying the decree as such and laying terms of visitation was entered on July 18, 2007. Dorinda appeals, contending the district court erred when it granted Joseph physical care of Madison.

II. Scope and Standards of Review.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). We examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). We give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). Our overriding consideration is the children's best interests. *Ford*, 563 N.W.2d at 631.

III. Issue on Appeal—Custody Modification.

Dorinda asserts on appeal that the district court erred when it removed Madison from her physical care and placed her in the physical care of Joseph. A party seeking modification of a dissolution decree must establish there has been a substantial change in circumstances since the entry of the decree. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65 (Iowa 1999). To change a custodial provision of a dissolution decree, the applying party is required to establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the child's best interests make it expedient to grant the requested change. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). The change must be more or less permanent and relate to the child's welfare. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The party seeking to alter physical care must also demonstrate he or she possesses the ability to provide superior care for the child, *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002), and to minister more effectively to the child's well-being. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). This heavy burden stems from the principle that once custody of children has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000).

It is clear from the record before the trial court that Dorinda's move from Crawford County, Iowa, to Kearney, Nebraska, exceeds 150 miles. Under Iowa Code section 598.21D (2007), if a custodial parent moves 150 miles or more from the former custodial home, this may be considered a substantial change in circumstances. Thus, the district court's ruling that the move constitutes a

significant change in circumstances under section 598.21D is consistent with the statute, and we affirm this issue.

We now turn to the issue of whether Joseph proved himself able to provide superior care to Madison. In reaching its decision, the district court made ample note that both Dorinda and Joseph are able to cook, perform household duties, and are proper caregivers and parents to Madison. Madison was about to begin kindergarten in the fall of 2007 and exhibited good mental and emotional health. Joseph has been an involved parent and strived to keep visitation and in contact with Madison since the dissolution and particularly since the relocation to Kearney, though Dorinda has been her primary caregiver. The evidence at trial focused greatly on the relationship between Dorinda and Joseph and their behavior since the previous modification. The district court found Dorinda's actions more troublesome and unsupportive of Joseph's relationship with Madison:

Dorinda has both supported and undermined Joseph's relationship with Madison. When she relocated, Dorinda initially refused to share visitation transportation because the modification decree state Joseph should provide transportation. Dorinda's attorney assured Joseph that Dorinda would share in transportation. . . . Prior to the breakdown of the parties' cooperation in April, Dorinda had shown some flexibility in the visitation schedule, meeting Joseph a few hours later than the schedule called for in order to accommodate transportation. Dorinda has also provided Joseph with copies of Madison's report cards from preschool and the school schedule. She made an effort to allow Joseph visitation when he was working in western Nebraska.

Unfortunately, Dorinda has also undermined the principles of joint custody. Her demeanor and testimony reveal ill will and lack of respect for Joseph. When she moved to Kearney days after Joseph dismissed his petition to modify, she neglected to tell Joseph. He did not learn of the move until he realized Madison would not be available for visitation. At the time of the cancelled

modification hearing, Dorinda had investigated housing and schooling in Kearney and had an option on a house. Nevertheless, she kept Joseph in the dark.

Dorinda's mother lives close to Joseph. Soon after moving to Kearney, Joseph was unable to exercise a weekend visitation because of the distance and Dorinda then returned to visit Dorinda's mother in Iowa. Even though they were within miles of Joseph's home, Dorinda did not allow Joseph to see Madison.

Other examples of Dorinda's lack of support for Joseph include her last-minute notification that Madison must be returned early from visitation for her immunization and failure to tell Joseph of her extracurricular activities. Also, the Court finds Madison's preschool was willing to provide Joseph with information concerning Madison until Dorinda advised them not to.

The court also noted that much of Madison's extended family through Joseph still live in Iowa, including her paternal grandparents and maternal grandmother. Before she made the decision to move to Kearney for work, Dorinda admitted that she had not inquired into employment prospects in Iowa or Nebraska nearer to Crawford County, though she believed suitable employment was available, because a commute would be too lengthy.² For all of these reasons, the district court found that Joseph could provide superior care to Madison back in Iowa. Like the district court, we note that this is a tough case between two parents who obviously love and are both able to care for their daughter. However, Iowa Code section 598.41 makes it clear that one parent's ability or inability to support the other parent's relationship with the child is an important factor to consider in these cases. The denial by one parent of support for the child's maximum continuing physical and emotional contact with the other parent is a significant factor in arriving at a proper custody arrangement. See Iowa Code § 598.41. This factor likewise would apply to a physical care

² Dorinda has experience in the architectural field and as a computer-aided drafter. She moved to Kearney to work for a former employer.

determination. Deferring to the district court's credibility findings as better suited to judge witnesses and evidence before it, we agree with its ruling granting physical care to Joseph as in Madison's best interests. See *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the best interests of the child should guide a determination of a physical care arrangement). We decline to award attorney fees on appeal, *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997) (stating an award of attorney fees is not a matter of right, but rests within the court's discretion), and affirm. Costs on appeal are assessed to Dorinda.

AFFIRMED.