

IN THE COURT OF APPEALS OF IOWA

No. 7-709 / 07-0207
Filed January 16, 2008

FRED ABRAHAM,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR
BLACK HAWK COUNTY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister,
Judge.

Fred Abraham challenges by certiorari the district court's dismissal of his application for an order holding his former wife, Jacquelyne Joens, in contempt of court and the court's grant of Jackie's application for an order holding Fred in contempt of court. **AFFIRMED ON DIRECT APPEAL; WRIT SUSTAINED.**

Linda A. Hall of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

David H. Correll of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellee.

Heard by Sackett, C.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Fred Abraham challenges by certiorari the district court's dismissal of his application for an order holding his former wife, Jacquelyne Joens (Jackie), in contempt of court for alleged violations of provisions of the parties' January 2003 dissolution of marriage decree, and the court's grant of Jackie's application for an order holding Fred in contempt of court for violation of a separate provision of the decree. Jackie seeks appellate attorney fees. We affirm on the direct appeal of the dismissal and sustain the writ of certiorari.

I. BACKGROUND FACTS AND PROCEEDINGS.

Fred and Jackie were divorced on January 24, 2003. They are the parents of two adult children who were both students at the University of Iowa at the time of the contempt hearing. At the time of their divorce, the parties entered into a written stipulation that was incorporated into the decree. The stipulation provided, in relevant part, that Fred would be responsible for paying for the children's college tuition, room and board, books, and student fees, while "Jackie shall be responsible for providing the boys a reasonable monthly allowance." The stipulation further provided that Fred was to maintain health and dental insurance for the children through his employer's insurance plan, and that

All medical, orthodontia, dental, physical therapy, eye care, including glasses or contact lenses, mental health treatment, substance abuse treatment, prescription drugs, and any other medical expenses for the children not covered by the insurance shall be paid 100% by Fred until July 14, 2003 and thereafter 80% by Fred and 20% by Jackie.

On December 7, 2006, Fred filed a contempt action against Jackie alleging she had failed to pay the boys a "reasonable monthly allowance" and

had not paid the twenty percent of uninsured medical expenses for the boys she was responsible for, both in violation of the parties' decree. On January 3, 2007, Jackie filed a contempt action against Fred alleging he was in violation of the parties' decree for failing to reimburse her for eighty percent of the cost of allergy medicine she had purchased for both the boys to use. On January 9, 2007, a combined hearing was held on both contempt actions. On the date of the hearing Jackie paid the twenty percent of uninsured medical expenses she owed to Fred and thus that portion of Fred's contempt action was remedied and is not at issue in this appeal.

The district court entered a written order on January 10, 2007, on the remaining two issues. The court declined to find Jackie in contempt, finding that what a "reasonable" amount would be is not stated in the stipulation and concluding that "[w]hat is 'reasonable' is too indefinite and uncertain to form the basis for a contempt citation because there are many factors which will cause a student's personal expenses to vary from the university's estimate." It further suggested that what a "reasonable" monthly allowance for the boys would be should be fixed by stipulation of the parties, or by a modification of the decree if necessary. The court dismissed Fred's contempt application.

The court found Fred was in contempt of court for not paying his eighty percent share of the expenses for the boys' allergy medicine. It found the plain meaning of the stipulation was that the out-of-pocket expenses for any and all of the children's medical needs were to be paid eighty percent by Fred and twenty percent by Jackie, and the over-the-counter allergy medicine needed to treat the

boys' allergies was a "medical expense" not covered by insurance as expressly provided for in the parties' stipulation. The court noted that had the parties wanted to exclude such things as over-the-counter medications in their stipulation they were free to do so but had not.

Fred challenges both the district court's dismissal of his application to hold Jackie in contempt and the court's finding he was in contempt.¹ More specifically, he contends the court erred in finding the term "reasonable monthly allowance" was too ambiguous to support a finding of contempt, and that uncovered "medical expenses" includes over-the-counter medications. Jackie seeks appellate attorney fees.

II. MERITS.

A. Dismissal of Fred's Contempt Application.

Fred first contends the district court erred in finding the term "reasonable" was too indefinite and uncertain to form the basis for finding Jackie in contempt of the stipulated decree and dismissing Fred's contempt application.

When a trial court refuses to hold a party in contempt in a dissolution proceeding, our review is not de novo. Instead, we review the record to determine if substantial evidence exists to support the trial court's finding.

¹ Fred filed a petition for a writ of certiorari with our supreme court asking the court to review the district court's rulings. After noting that an appeal from a finding of contempt is a matter subject to certiorari review, Iowa Code section 665.11 (2007), while an appeal from a dismissal of a contempt application can be appealed directly as a matter of right, *State v. Iowa Dist. Court*, 231 N.W.2d 1, 4 (Iowa 1975), the supreme court granted Fred's certiorari petition. Although we believe a direct appeal should properly have been taken from the dismissal of Fred's contempt action, separate from and in addition to his certiorari petition on the grant of Jackie's application, we shall proceed as though the proper form of review was sought in accordance with Iowa Rule of Appellate Procedure 6.304.

An individual may not be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Contempt consists of willful disobedience to a court order or decree.

In re Marriage of Hankenson, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993)
(internal citations and quotations omitted).

“Willful disobedience” requires

evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not.

McKinley v. Iowa Dist. Court, 542 N.W.2d 822, 824 (Iowa 1996) (citation omitted). The alleged contemnor has the burden of providing evidence on any defense tendered. *Id.* The burden of persuasion on the willfulness issue, however, remains on the person alleging contempt, *id.*, who must prove willfulness beyond a reasonable doubt. *Christensen v. Iowa Dist. Court*, 578 N.W.2d 675, 678 (Iowa 1998). A failure to follow a court order is not willful if a contemner shows the order was indefinite or that the contemner was unable to comply with the order. *Id.*

What a “reasonable” monthly allowance should consist of is not defined in the parties’ stipulation. We agree with the district court that without such a definition the term is too indefinite and uncertain to support a finding of contempt. Although it is clear from the stipulation that Jackie had some obligation to provide the boys some sort of monthly allowance, it is not at all clear what amount it should be or what form it should take. The evidence shows that Jackie did provide some support for the boys, including buying them a car to use at college

and providing them with money for gas. Thus, Fred's argument that she was in violation of this provision of the decree because she was providing the children with nothing at all is without merit.

Accordingly, we conclude substantial evidence supports the district court's determination Fred did not prove beyond a reasonable doubt that Jackie willfully violated the parties' stipulated decree. The court did not err in dismissing Fred's contempt application.

B. Grant of Jackie's Contempt Application.

Fred next contends the district court erred in finding that the term "medical expenses for the children not covered by the insurance" in the parties' stipulation included the cost of an over-the-counter allergy medication, Drixoral, for the children, and that he was thus in contempt for not paying his eighty percent share of the cost of that medication as required under the stipulation. More specifically, he argues it is clear from the stipulation that the language in question must be narrowly defined to include only prescription medications which would ordinarily be submitted to insurance for payment. He argues that because the language of the stipulation as incorporated into the decree parallels the language of Iowa Court Rule 9.12, and that rule does not include non-prescription drugs, the stipulation should not and does not include them either. In the alternative, Fred argues that if the term "reasonable monthly allowance" is too ambiguous to enforce by contempt, as discussed in detail above, then the court should have found the term "other medical expenses for the children not covered by insurance" too ambiguous to enforce as well.

Certiorari is an action at law; therefore, our review is at law. *Christensen*, 578 N.W.2d at 678. In our review of a certiorari action, we can only examine “the jurisdiction of the district court and the legality of its actions.” *Id.* When the court's findings of fact are not supported by substantial evidence, or when the court has not applied the law properly, an illegality exists. *Amro v. Iowa Dist. Court*, 429 N.W.2d 135, 138 (Iowa 1988).

Fred is correct that the language in the parties' stipulation closely parallels the language in rule 9.12. Rule 9.12 provides, in relevant part, that uncovered medical expenses are “all medical expenses for the child not paid by insurance” and that “[m]edical expenses” shall include “prescription drugs.” The rule does not expressly include non-prescription drugs in its list of “medical expenses,” but does expressly include “prescription drugs.” It is undisputed that Drixoral is an over-the-counter medication and no prescription is generally necessary to purchase it. There was a dispute as to how much Drixoral the boys need per month, and what level of usage might perhaps require a prescription due to the fact Drixoral contains pseudoephedrine. However, based on Fred's testimony regarding what the boys told him about how much they need and what he found out from the pharmacist as to how much a person can purchase per month, it was reasonable for him to believe no prescription would be needed for the medication to meet the boys' needs.

Furthermore, based on the language in question being placed in the stipulation with the other provisions regarding payment of health insurance for the children, it was reasonable for Fred to interpret the disputed language as

including only those medical expenses one would ordinarily submit to insurance for payment or partial payment. Over-the-counter medications are generally not submitted to insurance for payment.

As set forth above, contempt requires proof of willful disobedience of a court order or decree. Willful disobedience requires

evidence of conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not.

McKinley, 542 N.W.2d at 824. The person alleging the contempt has the burden of persuasion on the willfulness issue. *Id.*

Based on the similarity of the language in the stipulation to rule 9.12, the placement of the disputed language in the stipulation, the fact it is undisputed Drixoral is an over-the-counter medication, and the information Fred had regarding the boys' level of use of the medicine and its availability, it was very reasonable for Fred to interpret his eighty percent responsibility for "any other medical expenses for the children not covered by the insurance" as *not* including the cost of the Drixoral. The language in question is at a minimum ambiguous with respect to Fred's obligation. We conclude a finding that Fred acted with a bad or evil purpose, in wanton disregard for the rights of others, or contrary to a known duty in not paying for eighty percent of the cost of the Drixoral is not supported by substantial evidence. Jackie did not meet her burden to prove Fred willfully violated the court's decree.

We conclude the district court's finding of Fred in contempt for not paying eighty percent of the cost of the allergy medicine is not supported by substantial

evidence. The court erred in granting Jackie's contempt application. The writ of certiorari must be sustained.

C. Appellate Attorney Fees.

Jackie requests an award of appellate attorney fees. A court may in its discretion tax reasonable attorney fees against a party found in default or contempt of a dissolution of marriage decree. Iowa Code § 598.24 (2007). We have concluded the district court erred in finding Fred in contempt of court. We therefore deny Jackie's request for an award of appellate attorney fees.

III. CONCLUSION.

We conclude substantial evidence supports the district court's determination that the term "reasonable" was too indefinite to support a finding that Jackie willfully violated the parties' stipulated decree. The court did not err in dismissing Fred's contempt application. We further conclude Jackie did not meet her burden to prove Fred willfully violated the terms of the decree by not paying for eighty percent of the children's allergy medication. Substantial evidence does not support the district court's finding that Fred is in contempt of court. Costs on appeal are taxed one-half to each party.

AFFIRMED ON DIRECT APPEAL; WRIT SUSTAINED.

IN THE COURT OF APPEALS OF IOWA

No. 7-718 / 07-0814
Filed January 16, 2008

**IN RE THE MARRIAGE OF CHRISTINE MARIE WEBER
AND JAMES MICHAEL WEBER**

**Upon the Petition of
CHRISTINE MARIE WEBER,**
Petitioner-Appellant/Cross-Appellee,

**And Concerning
JAMES MICHAEL WEBER,**
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Johnson County, Mitchell E.
Turner, Judge.

Christine Weber appeals and James Weber cross-appeals from the
physical care provisions of the trial court's decree dissolving their marriage.

AFFIRMED AS MODIFIED AND REMANDED.

Sharon A. Mellon of Mellon & Spies, Iowa City, for appellant.

Randall B. Willman of Leff Law Firm, L.L.P., Iowa City, for appellee.

Heard by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

Christine Weber appeals and James Weber cross-appeals from the physical care provisions of the trial court's decree dissolving their marriage. We affirm as modified and remand.

I. Background Facts and Proceedings

Christine and James were married in 1996. They have three children—Alexis, born in 1996; Mikayla, born in 1998; and Jacob, born in 2003. At the time of trial, Christine was thirty-four years old. She was employed as a part-time nurse at the University of Iowa Hospitals. James was forty years old. He was employed as a pharmaceutical consultant, salesman, and trainer with Millennium Pharmaceuticals, Inc.

On October 14, 2005, Christine filed a petition for dissolution of marriage, requesting temporary and permanent primary physical care of the children. The trial court's December 1, 2005 order awarded Christine temporary primary physical care of the children and James liberal visitation. The trial court's March 23, 2007 dissolution decree granted James's request for joint physical care and denied Christine's request for primary physical care of the children. The trial court's decree provides:

Historically, James and Christine have worked together very admirably to accommodate each other's schedules and still provide superior care for all of their children. While it is true that Christine provided more than 50 percent of the daily care of the children in recent years, James has always provided significant, meaningful, and excellent care of the children as well. Contrary to the Petitioner's assertions, James is not a "Daddy come lately" in the lives of his children, nor, so far as the Court can see, has he placed his desires above the best interests of his children. . . . This Court is very confident that these parties absolutely have the ability to communicate with one another in a respectful and nondictatorial

fashion so as to accommodate (if necessary) each other's work schedules in the future, just as they have in the past.

. . . Without recounting the specifics, the Court finds that both Christine and James are bonded to and have superior relationships with all three children. Further, the Court finds from the testimony adduced at trial that all of the children love and are bonded to each of their parents. . . . Christine's complaint that James only encourages those activities in which he, personally, has an interest has not been borne out by the evidence. This Court's primary concern in evaluating the custodial status issue, quite frankly, is Christine's repeated sentiment that she deserves to be awarded primary physical care of the children (testifying in at least one instance that she should really get sole custody of the children because of all of the aggravation and turmoil and that James has selfishly put her through), and that she has "earned" the right to be the children's primary caretaker. These sentiments are disturbing. The custody and custodial access schedule for these children should neither be considered to be a reward for alleged good conduct, nor a punishment for perceived bad conduct. Christine has somewhat inflexibly adopted the position that whatever is in her best interests or the best interests of her family is automatically in the best interests of the children. This belief is not necessarily accurate and appears to have led to many of the minor communication problems which Christine cites as being an impediment to a shared care arrangement. Based upon the demeanor of the parties testifying during this trial, this Court believes that once some ground rules are established by this Decree, the parties will have little difficulty communicating with one another as they have for years in the past with respect to the children, in a respectful and nondictatorial fashion by both parties. No valid reason exists to deny James' request for a shared-care arrangement. Stated differently, this Court believes that both Christine and James are excellent parents and that the children should have the maximum opportunity to spend time with both of them without one parent granting or withholding access to the children based upon the myopic perception of how that parent is being treated.

Based on these findings of fact, the trial court ordered the following weekly care schedule: Mondays and Tuesdays with Christine, Wednesdays and Thursdays with James, with each parent having the children every other Friday, Saturday, and Sunday. The trial court also ordered an alternating holiday care schedule.

On appeal, Christine claims the trial court erred in denying her request for primary physical care of the children and in awarding joint physical care of the children. On cross-appeal, James claims (1) the trial court's award of joint physical care of the children should be affirmed and (2) if shared care is not in their best interests, he should be awarded primary physical care.

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. Merits

"Joint physical care" means

an award of physical care of a minor child to both joint legal custodial parents under which both parents have rights and responsibilities toward the child, including, but not limited to, shared parenting time with the child, maintaining homes for the child, providing routine care for the child and under which neither parent has physical care rights superior to the other parent.

Iowa Code § 598.1(4) (2005). If the trial court awards joint legal custody to both parents, the trial court may, upon the request of either parent, award joint

physical care of the children. *Id.* § 598.41(5)(a) (Supp. 2005). If the trial court denies the request, the trial court must specifically find and conclude that awarding joint physical care is not in the best interests of the children. *Id.*

The focus is on what is in the best interests of the *children*, not on the perceived fairness to the *parents*. *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 1997). “The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity.” *Id.* at 695-96.

In making this determination, our supreme court recently devised a nonexclusive list of factors to be considered whereby no one factor is determinative. *Id.* at 697. The factors are whether one parent was the primary caregiver, “the ability of the spouses to communicate and show mutual respect,” the degree of conflict between the parents, and “the degree to which the parents are in general agreement about their approach to daily matters.” *Id.* at 696-99.

Where the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In such cases, “stability and continuity of caregiving are important factors. . . .” *Id.* at 696. These factors favor a parent who was primarily responsible for physical care of the children. *Id.* Also relevant are the factors listed in Iowa Code section 598.41(3) and *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974). *Id.* at 696. Finally, we must examine the unique facts and circumstances of each case. *Id.* at 700.

Christine argues the *Hansen* factors weigh against an award of joint physical care and in favor of awarding her primary physical care of the children.

She cites her dominant role as the children's primary care provider during the marriage, as well as James's limited interest and experience in attending to the children's primary care, medical, and educational needs. Christine also cites the parties' failure to constructively communicate or otherwise amicably resolve visitation issues while this case was pending. Christine blames the parties' resulting conflict on James's lack of respect for her personal and parental autonomy. Lastly, Christine cites differences in the parties' approaches to daily parenting matters. For example, she claims James imposes his avocational preferences on the children and favors the children who share his interests in athletics and outdoor activities while ignoring the other children's interests in activities Christine prefers.

On the other hand, James argues the *Hansen* factors weigh in favor of an award of joint physical care. Alternatively, James argues he should be awarded primary physical care should we decide not to affirm the trial court's award joint physical care. The gist of his arguments is Christine has dramatically understated his primary care interest and experience and overstated the severity and implications of the parties' disagreement over physical care and visitation issues while this case was pending. James also claims Christine has attempted to sabotage his relationship with the children by arbitrarily denying his requests for access to the children beyond that specified in the temporary custody order.

As noted earlier, the trial court concluded it was in the children's best interests to award the parties joint physical care. Based on our de novo review of the record, we conclude otherwise.

Contrary to James's assertions, the evidence indicates Christine was the children's predominant primary caregiver during the marriage. Most notably, Christine reduced or otherwise changed her employment schedule so she could spend more time with the children while James was away on business. The evidence also indicates Christine was more familiar with and assumed virtually full responsibility for addressing the children's education and medical care needs. While James was generally supportive of Christine's primary care efforts, he has not historically contributed to the children's physical care in the same proportion as Christine.

We additionally find James has understated the severity and implications of the parties' inability to constructively communicate and resulting conflicts concerning physical care issues while this case was pending. The record includes multiple instances of hostile confrontations and exchanges of incivility between the parties. While each blames the other, we find it sufficient to note that both must share responsibility for the level of tension and hostility in their relationship. More importantly, the level of anger and conflict between the parties can and has negatively affected the children's emotions and behaviors.

In addition to our conclusion that the *Hansen* factors weigh against an award of joint physical care, we also find the record contains additional and compelling evidence supporting an award of physical care to Christine. Dr. Payne, a psychologist who interviewed all of the children, expressly noted her reservations about the proposed joint care schedule and its negative implications for the children's educational development. Dr. Payne also intimated, if not

expressly stated, her preference for the physical care arrangement established by the court's temporary custody order.

We, for all of the foregoing reasons, find the children's long-term best interests are better served by placing their physical care with Christine. We accordingly affirm the trial court's award of joint legal custody and modify the physical care provisions of the decree by awarding Christine primary physical care of the children. Because our resolution of the physical care issues will require modification of the decree's child support, visitation, and related provisions, we remand those issues to the trial court for further proceedings in conformity with our opinion. While we do not instruct the trial court on the resolution of these issues, the trial court is encouraged to consider the children's school calendar in structuring the modified decree's physical care and visitation provisions. Additionally, we reiterate the trial court's admonition to the parties concerning their obligation to support the children's relationship with the other parent.

We have carefully considered the remaining issues and arguments raised by the parties on appeal and conclude they are without merit or are controlled by the foregoing.

IV. Appellate Attorney Fees

"An award of appellate attorney fees is not a matter of right but rests within our discretion." *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We 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. *In re Marriage of Maher*, 596 N.W.2d

561, 568 (Iowa 1999). Based on these factors, we decline to award either party appellate attorney fees. Costs shall be shared equally by the parties.

AFFIRMED AS MODIFIED AND REMANDED.

IN THE COURT OF APPEALS OF IOWA

No. 7-787 / 07-0721
Filed January 16, 2008

**IN RE THE MARRIAGE OF NICOLE ANN SCURR
AND STEVEN TODD SCURR**

**Upon the Petition of
NICOLE ANN SCURR,**
Petitioner-Appellant,

**And Concerning
STEVEN TODD SCURR,**
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon,
Judge.

Nicole Scurr appeals from the economic provisions of the decree
dissolving her marriage to Steven Scurr. **AFFIRMED AS MODIFIED.**

Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C.,
Marshalltown, for appellant.

Barry Kaplan and Melissa Nine of Kaplan & Frese, L.L.P., Marshalltown,
for appellee.

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

VAITHESWARAN, J.

Nicole and Steven Scurr married in 1991 and divorced in 2007. The parents agreed to exercise joint physical care of their three daughters, leaving only financial issues to be decided at trial.

The key issue was spousal support. Nicole requested alimony of at least \$2500 per month. The district court found an award was “not justified in this case.” Also at issue was the appropriate allocation of the federal and state tax exemptions for the three children. The district court allocated all of them to Steven. A third issue was an appropriate property distribution. Nicole agreed Steven could retain a life insurance policy in his name but asked him to pay some of her credit card debt in return. The district court allocated the life insurance policy to Steven and ordered each party to be “solely responsible for the payment of any debt incurred subsequent to the filing of the Petition.” Nicole appealed.

I. Spousal Support.

Nicole asked the district court to award traditional or rehabilitative alimony. On our de novo review, we agree she should receive rehabilitative alimony. The parties were married for more than fifteen years. See Iowa Code § 598.21(3)(a) (2005). Although Nicole had a nursing degree and had worked as a surgical nurse early in the marriage, she agreed to give up her employment before the birth of their first child. In the ensuing thirteen years, Nicole earned negligible wages. See *id.* at (3)(e). For less than a year, she worked “very, very part-time at a salon as a receptionist.” In 2006, she took a two-month seasonal job at a local farm center, earning \$8.50 per hour.

At the time of trial, Nicole was undergoing training to be a part-time “independent marketing consultant,” which she described as a “customer service telephone operator.” That position paid between \$6.50 and \$8 per hour. Nicole also updated her education to ready herself for re-licensure as a nurse. Nicole agreed the court could impute income to her at the rate of \$8.50 per hour.

Even with the imputed income, Nicole’s earning capacity was far less than Steven’s. See *In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007). He was employed as a family practice physician and, in that capacity, earned \$202,000 per year. He also held several yearly contract positions that afforded him additional earnings. The district court found, and Steven does not dispute, that his total salary was \$255,312 per year. Although Steven urges that the disparity in earnings would not be as large if Nicole re-entered the workforce as a full-time nurse, even his estimate of her annual earning capacity was only \$35,000.

We recognize that Nicole was thirty-eight years old at the time of trial and relatively healthy. See *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). While these factors suggest she was capable of full-time employment for many years to come, they do not alter the fact that she left the marriage at a significant financial disadvantage. See *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (citation omitted). In addition to relinquishing more than a decade of Social Security earnings, she received neither a home nor any income-generating property as part of the property distribution. *Id.* (“We consider alimony and property distribution together in assessing their individual sufficiency.”) While she was awarded half of Steven’s

retirement benefits, she cogently testified that she could not use her \$40,000 portion without incurring significant penalties and dissipating necessary retirement income. Based on these factors, we conclude Nicole is entitled to rehabilitative spousal support while she seeks, obtains, and settles into employment.

As for the amount of spousal support, Nicole seeks \$2500 a month. This request is premised on part-time work outside the nursing field. At trial, Steven questioned Nicole's reluctance to work as a nurse and presented evidence that a nursing career would allow her to enhance her earning capacity and still exercise joint physical care. We find this evidence persuasive. Based on Nicole's needs, her degree and experience in a practical field, and Steven's heavy debt load, we conclude \$2500 a month is excessive. We conclude Steven should pay Nicole \$1000 per month.

Turning to the duration of the spousal support award, we believe an award for three years will allow Nicole sufficient time to obtain and settle into suitable employment. Accordingly, we conclude Steven should pay Nicole \$1000 per month for a period of three years.

II. Tax Exemptions.

The district court allowed Steven to claim all three dependent exemptions on his federal and state tax returns. Nicole contends this was inequitable. We disagree.

Exemptions may be allocated to the parent who would receive maximum benefit from them. *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). On his 2005 tax return, Steven was able to subtract \$3200 for each of the three

children, thereby reducing his taxable income. At the time of trial, Nicole was still in training for her telephone solicitation job and had yet to earn significant wages. Under these circumstances, we conclude the court acted equitably in allocating all three exemptions to Steven.

III. Property Division.

When the parties separated, they had two credit cards with debt totaling approximately \$11,000. Steven agreed to assume \$7000 of this debt and Nicole agreed to assume \$4000, which was on a credit card in her name. At the time of trial, Nicole had eight credit cards in her name, with debt totaling \$17,486. She argued that, because she allowed Steven to retain the cash value of a life insurance policy in his name, he should be allocated a portion of the \$13,486 in credit card debt she accumulated after the separation. The district court was not persuaded by this argument and neither are we.¹

The factors relevant to a property distribution scheme are set forth in Iowa Code section 598.21(1). Examining the property distribution scheme in its entirety, Steven was awarded significant assets, including a home that the parties began constructing before they separated. While the home was valued at \$823,000, the debt on the home exceeded its value. Steven agreed to assume all the house debt. As noted, he also agreed to assume \$7000 of the parties' pre-separation credit card debt. In addition, he had \$30,000 in student loan debt and a \$37,000 encumbrance on his vehicle. Before the parties separated, he

¹ Steven argues that the district court did not address this argument and, accordingly, Nicole has failed to preserve error. We disagree. The district court specifically apportioned the debt and addressed debt acquired after the petition was filed.

also borrowed \$10,000 against his life insurance policy to fund cosmetic surgery for Nicole. The net cash value of the policy was \$9557.66.²

Given Steven's large debt load, we conclude the district court acted equitably in declining to also assign him a portion of Nicole's post-separation credit card debt. We reach this conclusion notwithstanding Nicole's testimony that much of her credit card debt was accumulated to fund necessary expenses of daily living such as the purchase of a refrigerator and school supplies. We believe this problem will be ameliorated by Steven's agreement to assist with the children's expenses.

IV. Appellate Attorney Fees.

Nicole requests an award of appellate attorney fees in the amount of \$5070.95. An award is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). Given the substantial disparity in earnings and the fact that Nicole prevailed on her appeal of the district court's spousal support ruling, we order Steven to pay \$2500 towards her appellate attorney fee obligation.

Costs of the appeal are taxed to Steven.

AFFIRMED AS MODIFIED.

² These figures are gleaned from documentary evidence introduced at trial. Steven testified to different figures, stating the cash value minus the debt was about \$6700.

IN THE COURT OF APPEALS OF IOWA

No. 7-789 / 07-0740
Filed January 16, 2008

**IN RE THE MARRIAGE OF STANLEY A.
LAMOUREUX AND CAROL A. LAMOUREUX**

**Upon the Petition of
STANLEY A. LAMOUREUX,**
Petitioner-Appellee,

**And Concerning
CAROL A. LAMOUREUX,**
Respondent-Appellant.

Appeal from the Iowa District Court for Pocahontas County, Gary L
McMinimee, Judge.

The respondent appeals from the district court's order modifying custody
and physical care of the parties' children. **AFFIRMED IN PART, REVERSED IN
PART AND REMANDED.**

Jill Davis of Cornwall, Avery, Bjornstad & Scott, Spencer, for appellant.

Dan McGrevey, Fort Dodge, for appellee.

Heard by Huitink, P.J., and Vogel, J. and Robinson S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

PER CURIAM

Carol Lamoureux appeals from the district court's order granting Stanley Lamoureux's petition to modify the child custody provision of their dissolution decree. We affirm in part and reverse in part.

Carol Lamoureux and Stanley Lamoureux's marriage was dissolved in September 2003. They have three children: Christian (born 1993), Lucas (born 1995), and Emily (born 1998). At the time of the dissolution, Carol was dating John LeWallen. The district court found Carol's relationship with John troubling because John was a potential threat to the three children. However, the district court also credited Carol's testimony that she had no "current plan" to marry or cohabitate with John. Carol was granted physical care of the children and Stanley was granted liberal visitation.

In February 2004, Carol and the children moved in with John. In March 2006, Iowa Department of Human Services (DHS) began investigating reports that the children had been abused by Carol and John. On March 30, 2006, DHS filed an application for the emergency removal of the children from Carol and John's home. The district court granted the application and transferred physical care of the children to Stanley. The children were all adjudicated in juvenile court to be children in need of assistance. On April 25, 2006, Stanley filed his petition for modification, requesting that he be granted physical care of the children.¹ In May 2006, Carol and John married. Subsequently, DHS confirmed some of the allegations of abuse against Carol and John. In February 2007, the district court

¹ The juvenile court granted concurrent jurisdiction for Stanley to pursue the modification in district court. See Iowa Code § 232.2(2) (2005).

granted Stanley's petition, giving him physical care of the children and visitation to Carol. Additionally, the district court restricted Carol's visitation to prohibit John from being alone with the children. Carol appeals from this order.

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 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). Our overriding consideration is the children's best interests. *Ford*, 563 N.W.2d at 631.

Custody and Visitation

A party who seeks a modification of a dissolution decree must establish by a preponderance of the evidence that there has been a material and substantial change in circumstances since the entry of the decree or its last modification. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Additionally, the party seeking a change in custody must prove that he has the ability to minister more effectively to the children's well-being. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). This heavy burden "stems from the principle that once custody of a child has been fixed it should be disturbed only for the most cogent reasons." *Id.* (quoting *Frederici*, 338 N.W.2d at 158).

The district court found:

[T]he children's best interests make it expedient to change the custody provisions of the decree to provide for Stanley to have responsibility for the children's physical care. Between the dissolution decree and the removal of the children in March 2006, Carol chose to live with John and permitted him to create an environment of abuse. Her home became a place where slapping, shoving, head carrying, threats, abusive language, name calling,

and spousal abuse all existed With respect to Stanley's ability to administer to the children, it has been determined that he provides proper supervision, that he provides for the children's needs, and that the children are safe in his home.

We find little merit in citing all the instances of abuse that are detailed in the record as we agree with the district court in its findings and defer to its credibility assessments. The primary concern is the safety of the children. See *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the court considers the previous pattern of caregiving and the safety of the children, among other factors, in determining what physical care arrangement is in the best interests of the children). Because Stanley has met the heavy burden necessary to justify a modification of custody, we affirm.

Carol also argues that visitation should not have been restricted to prohibit John from being alone with the children. Again, the record contains the evidence of the incidences of abuse not just against these children but also against John's son from a former relationship. There was mixed testimony by the various professionals involved with the family as to the safety of the children in John's care. We agree with the district court's assessment of the evidence, including the credibility of the witnesses, that the visitation restriction for the protection of the children is in their best interests and affirm.

Retroactive Modification of Child Support

The district court's order and amended order of February and March 2007 retroactively modified child support. The district court awarded Stanley "unreimbursed child support" for April and May 2006 in the amount of \$1221.12

and entered a judgment against Carol in the amount of \$277.80.² The district court calculated the judgment amount based upon other debts the parties owed to one another. Additionally, the district court also awarded Stanley child support retroactive to September 2006. This resulted in Carol owing a child support amount of \$2781.72, which was characterized as a “delinquency”.

Carol first contends the district court erred in awarding Stanley “unreimbursed child support” for April and May 2006 when the petition for modification was not filed until April 2006. Iowa Code section 598.21C(4) (Supp. 2005) provides that child support may be “retroactively modified only from three months after the date the notice of the pending petition for modification is served on the opposing party.” Consequently, the award of “unreimbursed child support” is reversed as it was a retroactive modification before three months from the date the petition was filed. We remand to the district court to determine the amount due to each party in light of the reversal.

Carol next contends that characterizing the debt of \$2781.71 as a “delinquency” was in error. Both parties agree that the delinquency description is prohibited. See Iowa Code § 598.21C(4). (“A retroactive modification shall not be regarded as a delinquency unless there are subsequent failures to make payments in accordance with the periodic payment plan.”). Therefore, we reverse and remand to strike the delinquency description from the district court ruling.

² The amount of the judgment against Carol was “the difference between what [Stanley] owes Carol and what Carol owes [Stanley].” The judgment amount against Carol was the “unreimbursed child support” in the amount of \$1221.12 minus a \$350 payment Carol had previously made to Stanley and a \$593.32 debt that Stanley owed to Carol for the children’s prior medical expenses.

Trial and Appellate Attorney Fees

Finally Carol argues that the district court erred in awarding Stanley \$9000 in trial attorney fees. 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). In addition to arguing the unreasonableness of the award, Carol claims that some of the fees incurred in the juvenile proceeding were inappropriately included in the dissolution court's award. The timesheets submitted by Stanley's attorney do not tally the two court proceedings. However, the descriptions of the work performed indicate what was billed for the juvenile court proceeding and what was billed for the district court dissolution work. Stanley's request was for \$12,615 in fees and the district court's award of \$9000 strongly suggests the juvenile court fees were not included in the district court fee award. Upon review of the record, we find no abuse of discretion in the award of attorney fees.

Stanley requests attorney fees on appeal in the amount of \$4000. Appellate attorney fees are also discretionary and are determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). Having considered the proper factors,

we award Stanley appellate attorney fees in the amount of \$2000. Costs on appeal assessed to Carol.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

IN THE COURT OF APPEALS OF IOWA

No. 7-906 / 07-0424
Filed January 16, 2008

**Upon the Petition of
JAMES MICHAEL ANDERSON,**
Petitioner-Appellant,

**And Concerning
NICOLE KAY HILL,**
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon,
Judge.

A father appeals from a district court ruling that placed physical care of the
parties' minor children with their mother. **AFFIRMED AS MODIFIED.**

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

Joseph E. Halbur, Carroll, for appellee.

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

MILLER, J.

James Anderson appeals from a district court ruling that placed physical care of the parties' minor children, Isabella and Austyn, with their mother, Nicole Hill. We affirm the judgment of the district court as modified.

I. BACKGROUND FACTS AND PROCEEDINGS.

James and Nicole are the parents of Isabella, born in July 2003, and Austyn, born in December 2006. The parties were never married. James filed a petition in April 2006 seeking joint legal custody and physical care of Isabella. In the alternative, he requested joint physical care of Isabella. He did not dispute his paternity of Isabella. After Austyn was born, James sought joint legal custody and joint physical care of him and requested a paternity test. The paternity test confirmed James was Austyn's father. The petition came before the district court in January 2007.

James and Nicole began dating in high school. They moved in together in 2001 after Nicole graduated from high school. She began attending cosmetology school at some point following her graduation from high school. James did not graduate from high school and has an eleventh grade education. Shortly after Isabella was born in 2003, James's uncle offered to let them live at his farmhouse in Melbourne in exchange for James's assistance in "clean[ing] the place up." James, Nicole, and Isabella moved to Melbourne in August 2003. James worked about ten hours per week for his uncle to pay for their "room and board." His uncle would also occasionally give him small amounts of cash if he needed "diapers or dog food."

In March 2004, Nicole went back to complete cosmetology school. James cared for Isabella while Nicole was attending class, but once she got home, he would “let her rest for an hour and then I tried to go out and tried to work with my uncle.” Nicole graduated from cosmetology school in September 2004. She became employed in March 2005 at a hair salon in Newton, but she was fired from her job in September 2005. James obtained employment shortly thereafter through a temporary services agency. He worked from 6:00 a.m. until 2:30 p.m. during the week in Des Moines at a recycling center. He was terminated from his employment in January 2007.

Nicole testified she was Isabella’s “main caregiver” when she lived with James. According to Nicole, she was in charge of feeding, bathing, disciplining, and taking Isabella to the doctor. She also handled the cooking, cleaning, and laundry for the family. She did acknowledge that while she was in school, James cared for Isabella. However, Nicole testified Isabella’s health suffered when she was in James’s care during the day because “she was losing weight. And it come to find out he was just feeding her . . . bottles of cereal . . . instead of feedin’ her baby food.” James, on the other hand, testified he and Nicole both cared for Isabella when they were home with her. He “was basically just there for everything” and would “help hold her, rock her, feed her her bottle.”

Nicole and James separated on March 20, 2006, after an argument. Nicole obtained a temporary protective order under Iowa Code chapter 236 (2005), which was dismissed in early April 2006. She and Isabella then moved out of the farmhouse and began residing with Nicole’s mother in Cedar Rapids. James testified that after Nicole moved to Cedar Rapids, she told him “to get a

court order . . . if I wanted to see” Isabella. He consequently filed a petition in April 2006 seeking temporary and permanent joint legal custody and physical care of Isabella. James learned Nicole was pregnant with Austyn after he filed his petition.

The district court entered a temporary order in May 2006 placing Isabella in the parties’ joint legal custody and joint physical care. The parties began sharing physical care of Isabella on alternating weeks at the beginning of June 2006. At some point thereafter, Nicole and Isabella moved to Jamaica, Iowa, with Nicole’s boyfriend, Chad. Nicole testified Isabella was “really confused” by the joint physical care arrangement because “her schedules are all messed up” and “potty training has completely went . . . out the window.” She further testified Isabella has had diaper rashes and severe head lice after returning from her visits at James’s house. Nicole was concerned that James was living “at his mother’s and I think she’s doing the caretaking when . . . they are there.” James testified he would stay at his mother’s house in Des Moines “quite a bit” when Isabella was in his care. James’s roommate in Melbourne confirmed that James spent about four nights per week with Isabella in Des Moines.

Austyn was born in December 2006. James was not able to see him until after he filed a motion requesting that Austyn be placed in the parties’ joint legal custody and joint physical care. He also requested a paternity test for Austyn. The district court entered a temporary order in January 2007 placing Austyn in the parties’ joint legal custody and in Nicole’s physical care. The court set up visitation between James and Austyn and ordered the parties to obtain a paternity test for Austyn at James’s cost initially.

The trial was held shortly after the district court's temporary order in January 2007. At trial, James learned Austyn's full name was Austyn Chad Lee Hill. He requested that Austyn's name be changed to Austyn Lee Anderson. He also requested at trial that Nicole be responsible for one-half of the costs of the paternity testing for Austyn.

Following the trial, the district court entered a ruling placing Isabella and Austyn in the parties' joint legal custody and Nicole's physical care, subject to James's visitation with the children, which included every other weekend from Friday through Sunday and alternating holidays. The court granted James's request to change Austyn's last name to Anderson. James filed a motion under Iowa Rule of Civil Procedure 1.904(2), requesting the court reconsider its ruling regarding physical care and visitation. He also requested an order apportioning one-half of the paternity test costs to Nicole. The district court denied these requests.

James appeals. He claims the district court erred in placing Isabella and Austyn in Nicole's physical care. In the alternative, he claims he should have been given additional visitation with the children. He further claims the district court erred in denying his request to change Austyn's middle name¹ and in

¹ We agree with Nicole that James did not preserve error on this issue. In its initial ruling, the district court noted "James has asked that the surname of Austyn be changed from Hill to Anderson" and granted that request. See *Montgomery v. Wells*, 708 N.W.2d 704, 706 (Iowa Ct. App. 2005) (stating a district court may "consider the legitimacy of a child's original naming" in a paternity action where a mother unilaterally chose a child's name). The court did not address James's argument regarding Austyn's middle name. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). It is well settled that a post-trial motion is essential to preservation of error when a trial court does not resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication. *Id.* at 540; see also *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984). James's

denying his request that Nicole be responsible for one-half of the paternity test costs.

II. SCOPE AND STANDARDS OF REVIEW.

Our review in this equity matter is de novo. Iowa R. App. P. 6.4; *Callender v. Skiles*, 623 N.W.2d 852, 854 (Iowa 2001) (stating while “questions of paternity are reviewed on legal error,” decisions as to the “reasonableness of the court’s visitation and custody award” are reviewed de novo). Although not bound by the district court’s fact findings, we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

III. MERITS.

A. Physical Care.

“When considering the issue of physical care, the child’s best interest is the overriding consideration.” *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The court is guided by the factors set forth in Iowa Code section 598.41(3) (Supp. 2005) as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). See *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994) (noting criteria apply regardless of parents’ marital status). Among the factors to be considered are whether each parent would be a suitable custodian for the children, whether both parents have actively cared for the children before and since the separation, the nature of each proposed environment, and the effect on the children of continuing or disrupting an existing custodial status. See Iowa Code § 598.41(3); *Winter*, 223 N.W.2d at 166-67. The ultimate objective is to place Isabella and Austyn in the environment most

post-trial motion did not request a ruling on the issue of Austyn’s middle name. We therefore need not and do not address this issue.

likely to bring them to healthy physical, mental, and social maturity. See *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007). With these principles in mind, we conclude the district court was correct in placing the children's physical care with Nicole.

Where there are two suitable parents, "stability and continuity of caregiving are important factors that must be considered in custody and care decisions." *Id.* at 696. The successful caregiving by one parent in the past, although not determinative, is a strong predictor that the future care of the children will be of the same quality. *Id.* at 697. It is apparent from the record that Nicole has provided the majority of care for both Isabella and Austyn despite James's assertions to the contrary.

Although James recognizes Austyn has been in Nicole's care since he was born, he argues he was "Isabella's primary caregiver for nearly three years" because he cared for Isabella while Nicole attended "beauty school and began working at a salon." The record, however, reveals Nicole completed her cosmetology schooling six months after returning to school, and she did not begin working at a salon until almost six months after she graduated. Nicole was fired from that job six months later. In addition, even when she was attending school and working, Nicole provided care for Isabella at night and on the weekends while James worked for his uncle. We also note that James acknowledged he spent a significant amount of time at his mother's residence when Isabella was in his care following the parties' separation.

We likewise reject James's argument that he should be awarded physical care of the children because he "is more supportive of the children's relationship

with the other parent.” In support of his argument, he cites Nicole’s statement that he needed to obtain a court order before she would allow him to have visitation with Isabella. The denial by one parent of the children’s opportunity to have meaningful contact with the other parent is a significant factor in determining the custody or physical care arrangement. Iowa Code § 598.41(1)(c); *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). We do not believe Nicole’s actions at the inception of these proceedings demonstrate an unwillingness to allow James access to the children. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996) (“[T]he court must consider the willingness of each party to allow the child access to the other party.”).

Indeed, the record shows James did have visitation with Isabella before a temporary order was entered in this matter. In addition, Nicole attempted to notify him when she went into labor with Austyn so that he could be present at the birth, but “the only person we were able to get a hold of was his mother.” James testified he is always able to telephone Isabella when she is in Nicole’s care, while Nicole testified she is “lucky to get a hold of [Isabella] once a week or if at all” when she is in James’s care because “[n]obody answers the phone and nobody calls me back.” She acknowledged at trial that James is a good father, but she is concerned about his “care techniques . . . [Isabella] coming home dirty . . . the head lice and . . . bouncing around from home to home.” In light of the foregoing, we reject James’s argument that “Nicole will not encourage and support the relationship between” him and the children. *Cf. In re Marriage of Downing*, 432 N.W.2d 692, 694-95 (Iowa Ct. App. 1988) (awarding father physical care where mother intercepted children’s mail from father, interfered

with visitation with father, and removed telephone when she left to prevent children from calling their father).

After considering the parties' arguments on appeal and reviewing the evidence anew, we ultimately agree with the district court that Nicole and James are both competent and loving parents. Each is capable of providing for the children's long-range best interests. In close cases such as this, we give careful consideration to the district court's findings. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993) (noting the trial court was in a better position to evaluate the parties as custodians because it was able to observe their demeanor). We accordingly affirm the district court's decision to place physical care of Isabella and Austyn with Nicole.

B. Visitation.

The next assignment of error is whether the visitation schedule set by the district court allows sufficient contact between James and the children. In determining the appropriate amount of visitation, we are guided by the principle a court should order such visitation as will ensure a child the opportunity for maximum continuing physical and emotional contact with the noncustodial parent. See Iowa Code § 598.1(1); *id.* § 598.41(1)(a). In this case, the district court ordered that James would have visitation with the children every other weekend from 5:00 p.m. on Friday until 5:00 p.m. on Sunday, four weeks during the summer, and alternating holidays.

James seeks additional weekend and summer visitation. He also seeks visitation during spring break and on the parties' and children's birthdays. We note, as did the district court, the visitation schedule set forth in the parties'

decree “is the minimum amount of visitation to which James is entitled. Request for additional visitation should not unnecessarily be denied.” We find no reason to add to or otherwise modify the weekend and summer visitation provided by the trial court.

However, we agree with James that he should have been given “time with the children during spring break and birthdays.” We find the decree should be modified to allow James visitation with the children on the first half of spring break in even years and the second half in odd years. Spring break is to be determined by the school calendar for the school district in which the children are enrolled. Both parties testified at trial that birthdays are special events in their families that they enjoy celebrating. We therefore find the visitation schedule set forth by the district court should also be modified to allow each party several hours with the children on the children’s birthdays and on the party’s birthday. This visitation shall take precedence over regularly scheduled visitation time.

C. Paternity Test Costs.

James claims the district court abused its discretion in denying his request that Nicole pay one-half of the costs for the paternity test for Austyn.² Iowa Code section 600B.41(7) provides, “All costs [for the paternity test] shall be paid by the parties or parents in proportions and at times determined by the court. . . .” We find the district court’s decision to assess costs for the paternity test against James to be reasonable in light of the facts presented by this case.

² We assume without deciding that we review a district court’s assessment of paternity test costs under section 600B.41(7) for an abuse of discretion, as the parties agree to this scope of review.

D. Attorney Fees.

Nicole requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *Markey v. Carney*, 705 N.W.2d 13, 26 (Iowa 2005). In arriving at our decision, we consider the parties' needs, ability to pay, and the relative merits of the appeal. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). Applying these factors to the circumstances in this case, we find Nicole should be awarded \$500 in appellate attorney fees.

IV. CONCLUSION.

Upon our de novo review, we agree with the district court's decision to place Isabella and Austyn in Nicole's physical care. We modify the visitation schedule set forth by the district court to provide for visitation during spring break and on the birthdays of the children and the parties. Finally, we conclude the district court did not abuse its discretion in denying James's request that Nicole be responsible for half of the cost of the paternity test for Austyn. We therefore affirm the judgment of the district court as modified.

We award \$500 in appellate attorney fees to Nicole and assess three-fourths of the costs on appeal to James and one-fourth to Nicole.

AFFIRMED AS MODIFIED.

IN THE COURT OF APPEALS OF IOWA

No. 7-912 / 07-0719
Filed January 16, 2008

**IN RE THE MARRIAGE OF SUSAN ANN
DAYTON AND JEFFREY BRUCE DAYTON**

**Upon the Petition of
SUSAN ANN DAYTON, n/k/a SUSAN
HORNBACK,**
Petitioner-Appellee,

**And Concerning
JEFFREY BRUCE DAYTON,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

The respondent appeals from the district court's order entering a judgment against him for past due child support. **AFFIRMED.**

C. Jean Pendleton, West Des Moines, and Patricia Shoff, Des Moines, for appellant.

Jennifer Jaskolka-Brown, West Des Moines, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

VOGEL, P.J.

Jeffrey Dayton appeals from the district court's order enforcing a prior modification decree and entering a judgment against Jeffrey for past due child support. On appeal, Jeffrey argues the district court erred in construing the modification decree. Upon our de novo review, we find the district court accurately set forth the facts, made rational credibility assessments, and correctly applied the appropriate law. See Iowa R. App. P. 6.4; see also *In re Marriage of Woodward*, 229 N.W.2d 274, 277 (Iowa 1975) (“[A] court’s construction of its own decree is given great weight in determining what the decree means.”). We agree with the district court’s construction of the parties’ modification decree, which construed the term “net bonuses” to include commissions and stock options. See *In re Marriage of Lawson*, 409 N.W.2d 181, 182 (Iowa 1987) (discussing the interpretation and enforcement of a final judgment). Therefore, we affirm pursuant to Iowa Court Rule 21.29(1)(a), (d), and (e).

AFFIRMED.