

**IN THE COURT OF APPEALS OF IOWA**

No. 7-714 / 07-0510  
Filed January 30, 2008

**IN RE THE MARRIAGE OF KIMBERLY ANN DIRKSEN  
AND BRIAN DEAN DIRKSEN**

**Upon the Petition of  
KIMBERLY ANN DIRKSEN,**  
Petitioner-Appellee/Cross-Appellant,

**And Concerning  
BRIAN DEAN DIRKSEN,**  
Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Franklin County, Stephen P. Carroll, Judge.

Brian Dean Dirksen appeals and Kimberly Ann Dirksen cross-appeals from the provisions of the decree dissolving the parties' marriage. **AFFIRMED.**

Stacey Warren and Kodi A. Petersen of Babich, Goldman, Cashatt & Renzo, P.C., Des Moines, for appellant.

Dorothy Dakin of Kruse & Dakin, L.L.P., Boone, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

**ZIMMER, J.**

Brian Dean Dirksen appeals from the property division, child support, and alimony provisions of the decree and subsequent orders dissolving the parties' marriage. Kimberly Ann Dirksen (Kim) cross-appeals from the property division, child support, tax deduction, and attorney fees provisions. We affirm.

***I. Background Facts and Proceedings.***

Brian and Kim were married in 1984. They have two minor children: Brett, born in 1990, and Katie, born in 1992. Kim filed a petition for dissolution of marriage in October 2004. The parties separated in July 2005, at which time Brian vacated the marital residence.

The district court entered a temporary order in September 2005 prohibiting the parties from having contact with each other, except as it related to visitation. The order provided for Brian to have temporary visitation with the parties' minor children and to pay temporary child support and attorney fees. In calculating the amount Brian should pay for temporary child support, the court used Brian's average earning capacity of \$47,080<sup>1</sup> and set temporary child support at \$894 per month commencing September 1, 2005. Finally, the order allowed Brian to borrow money using the parties' tractor as collateral. Subsequently, Brian filed a motion to reconsider the ruling on temporary child support and temporary

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<sup>1</sup> Brian claimed his annual earnings for child support purposes should be \$25,560, based on his projected annual income at Someday Farms for January through December 2006. Kim claimed the appropriate figure was \$60,000, based on Brian's base salary plus benefits at Ag Inputs. The court declined to use either of these values. The court arrived at \$47,080 for Brian's average earning capacity based on an average of Brian's social security earnings over a five-year span. The court averaged Brian's earnings from 1998 to 2002 because the records from 2003 through 2005 were not made available.

attorney fees. The court determined it would reconsider the temporary matters at the same time as trial.

Trial commenced in October 2005. Trial proceedings took place over several days in October 2005, and in January and February 2006. At the conclusion of trial, Brian was forty-three years old and Kim was forty-two.

The record reveals that Brian graduated from CAL Community High School in 1981 and then worked at various jobs in agronomy, soil sampling, and GPS mapping. Brian has worked in management positions. In 1998 he joined Ag Inputs, Inc., a business owned in part by Kim's father. Brian was in charge of the sales and soil sampling, and he sold crop insurance. His salary was between \$45,000 and \$47,000, and he received money each month to help with insurance. When the parties' marriage began to deteriorate, so did Brian's work performance. His employment with Ag Inputs was eventually terminated on January 14, 2005. After leaving Ag Inputs, Brian started his own business, Someday Farms, Inc. Brian projected his income, as the sole owner and an employee, at \$2150 per month; however, the business was not successful. In April 2006, two months after trial had concluded, Brian began employment with Hagie Manufacturing Company at a base salary of \$40,000. At the time of trial, Brian was in good physical health but suffered from depression and anxiety.

Kim graduated from Hampton High School in 1981 and from a vocational "travel school" later that year. Thereafter, she worked at travel and clerical jobs. While married to Brian, her income ranged from \$8500 to \$20,000. Her 2005 gross income totaled \$20,000. During the parties' marriage, Kim was primarily responsible for the care of the children and family home. At the time of trial, Kim

suffered from rheumatoid arthritis (RA). She was diagnosed with RA in 1997. Dr. Maria Radia, a physician who specializes in arthritis management, has seen Kim every four to six months since 2000.<sup>2</sup> Dr. Radia has not placed Kim on any specific restrictions and opined that her medical condition does not prevent her from working full time. Dr. Radia testified that although Kim's condition has stabilized, she needs to continue taking her medications to prevent exacerbation of her condition. Kim's annual medical expenses are greater than \$9000.<sup>3</sup>

On March 6, 2006, before the district court entered its dissolution decree, Kim filed a motion to reopen the record regarding the valuation of a tractor and loader and their son's grades. Brian resisted the motion. On June 1, 2006, Kim filed a second motion to reopen the record based on Brian's new employment and income, which Brian resisted. The hearing was held on Kim's motion to reopen the record on October 20, 2006. The only issue at this hearing was Brian's income from his new employment and its effect on child support.

On November 17, 2006, the district court entered a decree placing the children in the parties' joint legal custody and in Kim's physical care. The court ordered that Brian was entitled to visitation with the children every other weekend, one weekday each week, and alternating holidays. Summer visitation was to be worked out between the parties. Brian was ordered to pay child

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<sup>2</sup> Dr. Radia testified she has seen arthritis in Kim's shoulders, knees, and feet. Additionally, she testified that, based on x-rays, Kim has incurred arthritic damage to both wrist bones, which indicates an aggressive stage of the disease. Dr. Radia opined that Kim has a fifty-percent chance of becoming disabled in the first five years of the disease. She also opined that her chances of not becoming disabled are getting better and the progression of the disease has slowed significantly.

<sup>3</sup> At the time of trial, Kim's actual annual medical expenses were the health insurance cost of \$5016 (\$418 per month), plus other medical expenses of \$4000.

support in the amount of \$861 per month, to cover the children with health insurance, and to pay a portion of the medical expenses not covered by insurance. He was allowed to claim both children as dependents on his income tax returns.

The court awarded the marital home, valued at \$116,000, to Kim. The court also awarded Kim the Ag Inputs stock, her IPERS retirement account, and the remaining personal property in her possession, with the exception of the 210 John Deere mower.<sup>4</sup> The court also awarded Kim \$1270.47 from the proceeds of the sale of the Dodge Ram truck. Brian was awarded his Reassure Life Insurance policy, his Principal Life policy, the tractor and loader, the 210 mower, the horse wagon, the old Chevy truck, the 1998 Jeep, the bale forks, his guns, and the sum of \$1144.56 from the sale of the parties' Dodge Ram truck.

In addition, the court awarded each party "any and all checking and saving accounts" in his or her name. The court also ordered any remaining oats to be sold and the proceeds divided equally between the parties. Neither party was awarded spousal support or attorney fees.

After the decree was entered, both parties filed a motion asking the court to enlarge/amend its findings of fact and conclusions of law and to modify the decree pursuant to Iowa Rule of Civil Procedure 1.904. Each party filed a resistance to the other party's motion to amend. A hearing was held on the parties' respective motions, and on February 7, 2007, the court modified its decree in several respects.

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<sup>4</sup> The parties had previously divided their furniture and other household contents according to a mutual agreement. For those items not agreed upon, the court listed the items of property and the values attributed to them.

First, the court ordered Brian to pay Kim “permanent alimony” as follows: \$100 per month until Brett turns eighteen in 2008, then \$300 per month until Katie turns eighteen in 2010, and then \$500 per month until either spouse deceases, Kim remarries, or Brian turns sixty-six years old. The court concluded the \$100 per month spousal support obligation would be effective September 1, 2005, the same date the temporary child support obligation commenced.

Second, the court determined the amounts Kim and Brian received from the proceeds of the truck being sold should be modified so that Kim would be reimbursed for her expenses in selling the truck and the remaining \$1551.43 would be divided equally between the parties.

Finally, the court stated it had inadvertently failed to review the temporary support order in the final decree. The court then ruled that Brian’s temporary support obligation should have been calculated based on his projected income from Someday Farms and not the five-year average income the court used to calculate his average earning capacity. The court stated,

I consider that given the economic reality of the situation (namely, that he was not turning a profit), it is fair and equitable to use the annual sum of \$25,560 to determine his child support obligation until he went to work at Hagie Manufacturing Company.

The court then reduced Brian’s temporary child support, for the period of time between September 1, 2005, and May 1, 2006, to \$548 per month.

On February 16, 2007, Brian filed his second motion to enlarge and modify the trial court’s findings of fact and conclusions of law. Kim filed a response arguing that there is no provision in the Iowa Rules of Civil Procedure that permits the filing of a second motion. The district court agreed with Kim that

no such provision exists. However, in a nunc pro tunc order dated February 26, 2007, the court lowered Brian's temporary child support from \$548 to \$468 per month, effective from September 1, 2005, to May 1, 2006, due to a miscalculation resulting from the use of an incorrect medical insurance figure. Additionally, effective May 1, 2006, Brian was ordered to pay Kim \$861 per month for child support based on his employment at Hagie Manufacturing. The court stated that

[Brian] shall continue to pay \$861 per month, as provided in the decree, until he is no longer obligated for the support of the older child, Brett, at which time he shall be obligated to pay Kimberly the sum of \$561 per month child support for Katie.

After the nunc pro tunc order was filed, Brian appealed and Kim cross-appealed. Brian claims the district court erred in reopening the record more than eight months after trial concluded. He further claims the district court erred in awarding Kim alimony. He also claims the district court's property division is not fair or equitable to the parties and that Kim should refinance the marital home. Kim claims the district court failed to properly determine the correct amount for child support. She further claims the district court erred by not allowing her to claim at least one child as a deduction on her income taxes. She also claims the district court erred in failing to properly assess the value of the parties' home. Finally, she claims the district court erred in failing to award her attorney fees.

## ***II. Scope and Standards of Review.***

We review the trial court's decision to reopen the record for an abuse of discretion. *Sun Valley Iowa Lakes Ass'n v. Anderson*, 551 N.W.2d 621, 634 (Iowa 1996). Abuse occurs when the court exercises its discretion on grounds or

for reasons clearly untenable, or to a clearly unreasonable extent. *State v. Teeters*, 487 N.W.2d 346, 349 (Iowa 1992). The trial court has wide discretion in deciding whether to reopen a case for the reception of additional evidence. *Id.* at 348; see *Bangs v. Maple Hill, Ltd.*, 585 N.W.2d 262, 267 (Iowa 1998) (noting “a trial court in its discretion may allow reopening of the case at any stage of the trial, including after argument has commenced if it appears ‘necessary to the due administration of justice’”).

We review dissolution cases de novo. Iowa R. App. P. 6.4; *In re Marriage of Fennelly & Breckenfelder*, 737 N.W.2d 97, 100 (Iowa 2007). Although not bound by the district court’s factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

### ***III. Merits.***

#### ***A. Reopening the Record.***

Brian argues that the district court abused its discretion in reopening the record eight months after the trial concluded. He asserts that if the district court would have entered its dissolution decree earlier then a reopening of the record would not have been necessary.

During the hearing on Kim’s motion to reopen the record, held on October 20, 2006, the court stated, “the record shall be reopened for the limited purpose of looking at the child support issue.” The court continued, “If I did not reopen . . . then to get a more precise result, you’d have to bring an action to modify and, hopefully, we can avoid a subsequent proceeding as to child support by honing up that issue . . . .” The court then heard testimony from Brian

regarding his new job at Hagie Manufacturing and the salary earned at his new position. Additionally, the district court stated in its modification order on February 7, 2007, "I reopened the record to attempt to prevent future litigation in the form of a modification action to increase his child support based on his increased earnings at Hagie Manufacturing Company."

We recognize it is desirable to expeditiously resolve an acrimonious dissolution proceeding. However, we do not believe the district court based its decision to reopen the record on clearly unreasonable grounds in this case. Accordingly, we conclude the court did not abuse its considerable discretion in reopening the record.

***B. Property Division Issues.***

In allocating the parties' assets and debts, the court strives to make a division that is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution; rather, the decisive factor is what is fair and equitable in each particular case. *Id.* In determining what division would be equitable, courts are guided by the criteria set forth in Iowa Code section 598.21(1) (2003). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). Before making an equitable division of assets, the court must determine "all assets held in the name of either or both parties as well as the debts owed by either or both." *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002). The assets should then be given their value as of the date of trial. *Id.*

Brian argues the district court's property division is inequitable because the court incorrectly valued a 2003 Dodge Ram truck and a horse wagon. He

also argues the court's distribution is inequitable because the court erred in including gifted property in the marital estate, and because the court substantially overvalued the property awarded to him. Brian further argues that Kim should have to refinance the marital home. In her cross-appeal, Kim asserts the court failed to properly assess the value of the marital home.

"Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). We generally defer to the trial court when valuations are supported by accompanying credibility findings or corroborating evidence. *Id.*

#### **Dodge Ram Truck.**

Brian argues he should have been awarded the full equity in the Dodge Ram truck that he and Kim owned. The record reveals Kim had the truck appraised for \$23,900. Brian wanted to sell the truck for \$17,000. Kim tried to have the truck sold at a higher price and eventually sold it for \$18,000. She incurred \$863 in expenses trying to get the truck sold. In its modification order filed February 7, 2007, the court reimbursed Kim for her expenses, using the \$2415.03 in proceeds from the sale of the truck. The court then ordered the remaining \$1551.43 to be divided equally between the parties. We conclude the court's decision on how to distribute the proceeds from the sale of the truck was fair to both parties and was within the permissible range of evidence; therefore we do not disturb the court's valuation. *See Id.*

#### **Horse Wagon.**

Brian argues the district court erred by including the horse wagon in the distribution of marital property. Brian testified that Someday Farms purchased

the wagon and used it in starting his company's business. He asserts because Kim signed a waiver releasing any claims to the company's assets, the \$1250 value of the wagon should not have been credited to him and he should have received an equalizing property settlement payment. Kim argues there is no evidence in the record, such as a purchase receipt or a check, to prove the wagon was purchased by Someday Farms rather than Brian personally. In allocating the wagon to Brian, the court did not discuss Kim's execution of a waiver releasing any claims to the company's assets. Although the wagon was valued at \$1250, Brian bought the wagon at an auction for \$200. Even if the wagon should have been excluded from marital property because of the waiver signed by Kim, the court's overall division of the property was equitable, and we conclude no equalizing payment is necessary under the circumstances presented here.

**Chevrolet Truck.**

Brian contends the 1952 Chevrolet truck was a gift and should be taken out of the property distribution and given to him. Typically, gifted and inherited property is not considered marital property, unless it would be inequitable to exclude the property. Iowa Code § 598.21(2). There are a variety of factors we may consider in deciding how such property should be treated. *In re Marriage of Thomas*, 319 N.W.2d 209, 211 (Iowa 1982). One of those factors is the "contributions of the parties toward the property, its care, preservation or improvement." *Id.* Brian received the truck from his uncle in 1986. The truck did not run and had little value. The couple put \$500 of marital assets into restoring the truck. Because the truck was of little value before the marital assets were

expended, we conclude the district court properly concluded the truck was marital property.

Brian argues that if we determine the truck is marital property then we should reassess the value of the truck. The district court determined the value of the truck was \$4125 based on the “low value” in the NADA Guide. One of Brian’s witnesses testified the value of the truck was only \$500. We decline to disturb the district court’s valuation of the truck.

**\$7000 Down Payment.**

Brian also contends a \$7000 gift from his parents to be spent on the down payment of the parties’ marital home was a gift to Brian personally. Brian’s father’s testimony was somewhat unclear as to whom he intended to give the \$7000. He testified he gave the check to his son, but also stated he intended it as a “gift to help them.” When asked, “Did you say a gift to help them or to help him?” Brian’s father replied, “Just – I don’t know, it just went to him.” After considering the evidence presented on this issue, the district court concluded the \$7000 was a gift to both Brian and Kim. When issues of credibility are at issue, we give weight to the trial court’s findings of fact. See Iowa R. App. P. 6.14(g). Moreover, because the \$7000 was used as a down payment for the marital home and became commingled with other marital income as part of the equity in the home, we believe it would be inequitable to exclude the amount from marital property. See Iowa Code § 598.21(2). Therefore, we conclude the district court properly determined the \$7000 was marital property.

**Tractor and Loader.**

The district court valued a John Deere tractor and loader at \$11,000. Brian asserts the district court overvalued these items. The court heard testimony from an auctioneer who originally valued the tractor and loader at \$15,000 and then lowered his assessment to \$7500 after Brian complained to the auctioneer's supervisor. The court also received an appraisal from a John Deere dealership in Mason City, appraising the tractor at \$9000 and the loader at \$2000. We conclude the value placed on the tractor and loader by the district court was within the permissible range of evidence and supported by corroborating evidence. See *Hansen*, 733 N.W.2d at 703.

**Marital Home.**

In her cross-appeal, Kim argues the district court erred in failing to properly assess the value of the marital home. The court heard testimony from Dale Hoyt, who opined that the value of the home was between \$96,000 and \$98,000, and Jerry Plagge, who valued the home at \$116,000.<sup>5</sup> The court found Plagge's valuation to be most credible, stating,

I find that Mr. Plagge's opinion is more credible than the opinion offered by Dale Hoyt. Mr. Plagge is familiar with the properties in the Latimer area. Using a market comparison, he opined that the fair market value would be about \$116,000. In contrast, Mr. Hoyt is not as familiar with Franklin County properties as Mr. Plagge. In addition, cross examination pointed out that, in using his comparable sales, Mr. Hoyt's method was flawed to some extent because a sale relied upon was a less than arm's length transaction.

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<sup>5</sup> The court also received an opinion from Brad Staley, who did not testify but stated in a letter that the value of the home was \$108,000 in September 2005.

We find the value placed on the marital home by the district court was within the permissible range of evidence and supported by corroborating evidence; therefore, we will not disturb the valuation. *See id.*; *see also* Iowa R. App. P. 6.14(g).

**Refinancing Issue.**

Brian argues that the district court erred by not ordering Kim to refinance the marital home in order to remove his name from the mortgage. Brian is not required to make payments on the mortgage, and nothing in the record indicates Brian will be damaged by the court's failure to order Kim to refinance the parties' former marital home. Therefore, we reject this assignment of error.

**C. Spousal Support.**

An award of spousal support is used as a means of compensating the party who leaves the marriage at a financial disadvantage, particularly where there is a large disparity in earnings. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). It is a discretionary award, dependent upon factors such as the length of the marriage, each party's age and earning capacity, the ability of the spouse seeking support to become self-sufficient, and the relative need for support. Iowa Code § 598.21(3); *In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005). Traditional alimony is payable for life or for so long as a dependent spouse is incapable of self-support. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). The property division and an award of spousal support should be considered together in evaluating the individual sufficiency of each. *In re Marriage of Earsa*, 480 N.W.2d 84, 85 (Iowa Ct. App. 1991).

In its original decree issued November 17, 2006, the district court determined Kim was not entitled to alimony. However, in its order filed February 7, 2007, the court modified its prior decision and ordered Brian to pay Kim “permanent alimony” as follows: \$100 per month until Brett turns eighteen in 2008, then \$300 per month until Katie turns eighteen in 2010, and then \$500 per month until either spouse deceases, Kim remarries, or Brian turns sixty-six years old. The court concluded the \$100 per month spousal support obligation would be effective September 1, 2005, the same date the temporary child support obligation commenced. In modifying its order, the court noted that its original reasoning for not awarding Kim alimony was flawed. In deciding that after payment of child support, Brian would have \$1950 per month to work with and Kim would have \$2400, the court explained it had not considered that Brian’s amount is for one person, while Kim’s is for three persons. The court also discussed Dr. Radia’s testimony regarding Kim’s diagnosis of rheumatoid arthritis and her associated monthly medical expenses, and ultimately concluded Kim should be awarded some amount of spousal support. In discussing the possibility that Kim may become disabled from RA and not be able to work in the future, the court stated, “[t]o not award any spousal support to Kimberly would foreclose her from raising this issue on later modification . . . .”

Kim is now forty-four years old. Over the course of her marriage she has worked in various clerical positions. At the time of trial, she worked full-time at Ag Inputs as a secretary and earned approximately \$20,000. Brian consistently earned considerably more than Kim during the parties’ marriage. He currently earns about twice what Kim does.

Given the length of the marriage, the disparity in earning capacities, and Kim's considerable medical expenses, we conclude the court's award of spousal support was equitable. We affirm the spousal support provision of the decree.

***D. Child Support.***

In her cross-appeal, Kim argues the district court improperly calculated Brian's child support obligation. Following the hearing on temporary matters, Brian was ordered to pay \$894 per month, based on his average earnings from a five-year period prior to his termination from Ag Inputs. In the court's modification order filed on February 7, 2007, the court used Brian's projected gross annual income for Someday Farms and reduced his temporary child support to \$548 per month for the time period between September 2005 and May 2006. In its order nunc pro tunc, the court further reduced Brian's temporary child support for this time period to \$468, based on a miscalculation using an incorrect medical insurance figure. Additionally, the court stated that effective May 1, 2006, Brian would pay \$861 per month, based on his salary at Hagie Manufacturing, until his oldest child no longer needed support and then he would pay \$561 per month to support his youngest child.

Kim argues that because Brian voluntarily and intentionally quit working for Ag Inputs, where he made a base salary of over \$48,000 with other incentives worth an additional \$12,000, the court should have taken his earning capacity into consideration. See *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998) (explaining a primary factor to be considered in determining whether support obligations should be modified is whether an obligor's reduction in

income and earning capacity is the result of activity, which, although voluntary, was done with an improper intent to deprive his or her dependents of support).

Upon our review of the record, we believe it was appropriate to use Brian's projected income in calculating his temporary child support from September 1, 2005, to May 1, 2006. Brian's employment with Ag Inputs was terminated on January 14, 2005. There is some evidence that Brian became very difficult to work with and he acted as though he wanted to be fired. However, following his termination, he began looking for options to support his family and then began Someday Farms where he hoped to utilize his agricultural career skills. Although Brian's poor performance at Ag Inputs may have contributed to his termination, we do not believe this rises to the level of a voluntary income reduction to avoid his support obligations. See *In re Marriage of Foley*, 501 N.W.2d 497, 500 (Iowa 1993) (holding that termination for insubordination, although not commendable, does not qualify as self-inflicted or voluntary).<sup>6</sup> Therefore, we conclude the district court properly reduced Brian's temporary child support obligation to \$468 per month for the time period between September 1, 2005, and May 1, 2006. We further conclude the district court properly used Brian's current income at Hagie Manufacturing in calculating his child support payments beginning May 1, 2006.

#### ***E. Tax Deductions.***

In her cross-appeal Kim also contends the district court erred by not allowing her to claim at least one child as a deduction on her income taxes. The

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<sup>6</sup> Additionally, we note that at the time of his termination, Kim's father was one of the five owners of Ag Inputs.

district court has the ability to award a tax exemption to a noncustodial parent “to achieve an equitable resolution of the economic issues presented.” *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). In the original decree the court stated,

[Brian] shall be entitled to claim the two children as exemptions for state and federal income tax purposes, provided that he is current in his child support obligation at the end of the taxable year. If he is entitled to claim the exemptions under this provision, then [Kim] shall sign whatever documents may be necessary to permit him to claim the exemptions.

Although the Internal Revenue Service’s general rule is the custodial parent is allowed the tax deduction, an exception to the rule exists when the custodial parent releases his or her claim to the deductions. *See In re Marriage of Kerber*, 433 N.W.2d 53, 54-55 (Iowa Ct. App. 1988). The court can order the custodial parent to sign the IRS form releasing the exemption to the noncustodial parent. *Id.* at 55. In allowing Brian to claim both children, the district court noted that Brian’s net monthly income will increase by \$255.26 if he claims both children as dependents, whereas Kim’s net monthly income will only decrease by \$94.38 if she claims both children as dependents. *See In re Marriage of Thede*, 568 N.W.2d 59, 62 (Iowa Ct. App. 1997) (“Tax exemptions are considered with child support; the allocation of the tax exemptions will have an effect on the income tax liabilities of both parties and their resulting net income for child support purposes.”). Upon our review of the record, we conclude the court did not err in determining Brian is entitled to claim both children as exemptions on his federal and state returns as long as he is current on his child support obligation.

**F. Attorney Fees.****Trial Attorney Fees.**

Kim asserts in her cross-appeal that the district court erred in failing to award attorney fees to her. She argues that the court failed to take into consideration the respective earning capacities of each party and her medical expenses. The district court has broad discretion in awarding attorney's fees. *In re Marriage of Giles*, 338 N.W.2d 544, 546 (Iowa Ct. App. 1983). An award of attorney fees is based upon the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997). We generally will not disturb an award unless the court abused its discretion. *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993). In denying attorney fees, the district court noted that it had to a great extent divided the marital assets more or less equally. The court further noted that it could be inferred that the parents of each party had financed the dissolution proceeding as neither party had the ability to pay attorney fees. We conclude it was within the district court's discretion to deny attorney fees in this case.

**Appellate Attorney Fees.**

Kim requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court's discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We award no appellate attorney fees in this case.

***IV. Conclusion.***

We conclude the court did not abuse its discretion in reopening the record. We further find the district court's property division and valuation of the marital home was equitable. Additionally, we conclude the court's award of spousal support was equitable. We find the district court did not err in determining the amount Brian owed in child support and in allowing Brian to claim both of the children as a deduction on his income taxes. Nor did the district court err in denying attorney fees. Accordingly, we affirm the district court's ruling. We decline Kim's request to award her appellate attorney fees.

**AFFIRMED.**

**IN THE COURT OF APPEALS OF IOWA**

No. 7-785 / 07-0571  
Filed January 30, 2008

**IN RE THE MARRIAGE OF DAVID R. BRIES AND VANITA C. BRIES**

**Upon the Petition of**  
**DAVID R. BRIES,**  
Petitioner-Appellee,

**And Concerning**  
**VANITA C. BRIES,**  
Respondent-Appellant.

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

Vanita C. Bries appeals the spousal support and property division provisions of the decree dissolving her marriage to David R. Bries. **AFFIRMED.**

Stephen W. Scott, Kintzinger Law Firm, P.L.C., Dubuque, for appellant.

Jennifer A. Clemens-Conlon, Clemens, Walters, Conlon & Meyer, L.L.P.,  
Dubuque, for appellee.

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

**MILLER, J.**

Vanita C. Bries appeals the spousal support and property division provisions of the decree dissolving her marriage to David R. Bries. We affirm.

**I. BACKGROUND FACTS.**

The parties were married on September 12, 1970, when David was twenty-two years of age and Vanita was eighteen. They have two children, born in 1971 and 1983 and whose welfare is not affected by these proceedings. David filed a petition for dissolution of marriage on May 4, 2006. A trial was held in January 2007 and the trial court filed its ruling on February 26, 2007. Vanita timely appealed in March 2007.

Vanita was fifty-five years old at the time of the dissolution trial. She had only a high school education until she began attending a community college in the fall of 2005. Vanita consistently maintained employment throughout the parties' marriage, while also being the main caretaker of their children. After graduating from high school she worked at Ertl's on the assembly line until she was about three months pregnant with the couple's first child and had to quit according to company policy. Vanita then opened an in-home day care business shortly before their first child was born in 1971 and continued to operate that for approximately five years. David and Vanita opened and operated a gas station for approximately eight months in 1975. During that time Vanita spent most days at the business waiting on customers and pumping gas, often from 8:00 a.m. to 9:00 p.m. because David was working out of town at that time.

In 1977 Vanita started working with Princess House, selling products at home shows in customers' homes. She was involved with this business, to varying degrees, for approximately twenty-two years. At the height of her career with Princess House, Vanita worked thirty to forty hours per week and earned approximately \$16,000 annually. While she was working for Princess House Vanita also began working at a retail store at a mall in 1989. She initially worked there from September through December as seasonal help, and then was rehired the next year to work from spring through Christmas. During this time Vanita also became employed at Overhead Door and worked there until November 2003. She was earning \$9.10 per hour plus benefits at the time of her termination from Overhead Door. Vanita was also a cheerleading coach for three years at a local high school during this time period.

Vanita took some classes to become a Master Gardener in 2000 and then worked part-time, seasonally, in the garden center at Steve's Ace Hardware from 2000 until the end of the gardening season in 2005. Her earnings there were \$7.00 per hour.

Vanita obtained employment at the Dubuque YMCA/YWCA in the fall of 2005, conducting a before- and after-school care program for a local elementary school. She earned approximately \$7.85 per hour at the Dubuque YMCA from 2005 until June 2006, when she got a job with the United States Post Office as rural carrier associate, delivering mail on Saturdays and when the regular carrier was unable to work. Her wages at the post office were \$16.45 per hour. Vanita was not able to sort or deliver the mail fast enough and was given the option of

being fired or quitting so she quit the postal job. After that she returned to the Dubuque YMCA job and worked there periodically from the fall of 2006 through the time of trial.

Vanita began attending the business program at Northeast Iowa Community College (NICC) in the fall of 2005. At the time of trial she had just finished her fourth semester of schooling. However, three semesters into her four-semester degree program Vanita changed her major from business to pursuing a degree to become an activities director for a retirement complex or college. As a result of this change she anticipates needing two more years of school before she can graduate from NICC, and will then need to attend a four-year college to complete her degree. Vanita estimates the four-year college will cost around \$16,000 per year. After completion of her degree she hopes to obtain a position as an activities director earning approximately \$22,000 annually.

Vanita has had several health problems over the years, and continued to see various physicians at the time of trial for the following conditions: hyperthyroidism, anxiety, depression, allergies, asthma, acid reflux, high cholesterol, carpal tunnel in her hands, back problems, and feet problems. Her most problematic malady in recent years apparently has been severe depression, which she claims caused her to quit or lose several of her previous jobs. Vanita sought counseling for the depression and was on medication for it at the time of trial. She asserts her feet problems prevent her from standing for long periods of time. When she was younger Vanita utilized the Del-Con shield

as a form of birth control and later found out that she suffered major health problems as a result of the shield. A class action lawsuit was filed concerning the shield. Vanita joined the lawsuit and eventually received about \$88,000 as her share of the settlement proceeds.

Over the years Vanita has had a number of surgeries to treat difficulties with urination, bladder infections, a herniated disc in her neck, and carpal tunnel syndrome. She had gallbladder surgery, from which complications ensued. Vanita takes several prescription medications for her various maladies. Despite all of her health concerns, at the time of trial none of Vanita's doctors restricted her ability to work in any way, she had never applied for Social Security disability benefits, and she testified she did not believe she was disabled and that she was sure there were jobs she could acquire.

David was fifty-eight years old at the time of the trial, has a high school diploma, and is apparently in good health. David joined the Army in 1966, shortly after graduating from high school. He was on active duty from February to August 1967 and then served in the Army Reserves for an additional twenty-four years. From this, he has earned a military pension which he will be able to draw upon at the age of sixty in March of 2008. He estimates that twenty percent of the points he has accumulated toward the pension were derived before the marriage. He expected monthly payments of \$617.87 beginning in March 2008. The pension has a provision for a surviving spouse. David asked that the trial court not divide the pension but instead provide Vanita with offsetting property equal to its present value, which he calculated at \$74,412.39.

At the time of the parties' marriage David worked for Spiegel Construction but was laid off the first winter of their marriage. He then took a job at Tschiggfrie, for which he worked approximately eighteen years. David left Tschiggfrie to begin his own construction business, Bries Construction, around 1988. Bries Construction focuses mainly on concrete work for sidewalks and driveways and thus is seasonal work, generally running from April through December. During the off season David completes the year-end paperwork for the business and begins bidding jobs and doing maintenance on the trucks and equipment for the next season. The business is a subchapter S corporation, and both David and Vanita are stockholders and officers. David is also an employee of the corporation, which entitles him to unemployment compensation during the winter months. The income from the business has varied over the years. David's Social Security earnings statement reflects that his income averaged around \$25,000 per year from 2000 to 2004. However, he testified that in 2006 the price of gas and materials both went up significantly and greatly affected his income, as jobs were costing him more than he had bid them for thus directly decreasing his profits. He plans to continue working in construction until age sixty-five and then retire.

The parties lived separately for a period of two years prior to the dissolution trial. David moved into an apartment while Vanita remained in the marital home. Pursuant to the parties' agreement, David assumed the costs of both residences and supporting Vanita, including paying for the mortgage on the marital home, his own rent on the apartment, car payments, insurance, utilities,

vehicle gas costs, health insurance, Vanita's cell phone, and giving Vanita \$100.00 per week for expenses. In order to accommodate, in part, his increased expenses David increased the wages his company paid to him. On his corporate income tax return for 2006 David reported he had paid himself \$28,800. The return indicates that the corporation experienced a loss of \$7,439 in order to accommodate his increased wages.

## **II. DISTRICT COURT DECISION.**

The trial court's property division resulted in David receiving \$247,530.54, including Bries Construction and the entire \$74,412.39 value of his Army pension. Out of this award David was ordered to pay the approximately \$6,500 mortgage debt on the marital home remaining after the mortgage (\$35,469) was reduced by the liquidation and application to the mortgage of the parties' protective life annuity (\$26,852) and whatever their 2006 tax refund turned out to be.<sup>1</sup> The court ordered that any tax consequences associated with the liquidation be paid by David. Vanita received a \$255,927.19 property award, including the marital home.

As part of its property division the court ordered David's Central Pension Fund divided between the parties by a qualified domestic relations order, awarding David \$70,351.95 and Vanita \$59,483.60; awarded Vanita the U.S. Allianz High Five contract worth \$40,477.97 and the Dupaco CD in the amount of \$2,750.62; awarded David the 1978 Chrysler Cordova and his business vehicles,

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<sup>1</sup> Although the parties were not certain what their tax refund would be for 2006, it had been approximately \$2,000 for the previous year and for purposes of generally determining what mortgage debt remained as David's responsibility on the marital home we assume it will be about the same for 2006.

and awarded Vanita the 1966 Mustang convertible and the 2005 Pontiac Vibe; and adopted the parties' agreement on the distribution of other assets and debts.

Vanita was not awarded alimony. The trial court found that traditional alimony was not warranted, despite the length of the parties' marriage, because Vanita had the demonstrated ability to maintain employment and be self-sufficient. The court found rehabilitative alimony was also not appropriate to assist her with her recent educational endeavors because those endeavors would not substantially increase her earning capacity. The court ordered David to pay \$1,500 in Vanita's trial attorney fees and to pay all court costs.

Vanita appeals, contending the court erred in not awarding her traditional and rehabilitative alimony before she reaches retirement age, continued traditional alimony after she reaches retirement age, and a portion of David's Army pension.

### **III. SCOPE AND STANDARDS OF REVIEW.**

In this equity case our review is de novo. Iowa R. App. P. 6.4. 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 fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

#### **IV. MERITS.**

Before addressing the issues presented, we note briefly some general principles concerning property division and spousal support. Iowa is an equitable distribution state, which means the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.* When distributing property we take into consideration the criteria codified in Iowa Code section 598.21(5) (2007). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). Property division and spousal support should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998).

##### **A. Spousal Support.**

Vanita contends the trial court erred in denying her rehabilitative and traditional alimony until her retirement and continuing traditional alimony after she reaches retirement age. She argues the evidence shows that despite her motivation there is little likelihood she will become fully self-supporting before she retires and she will have only minimal retirement income while David will have significant retirement income.

“[Spousal support] is an allowance to the spouse in lieu of the legal obligation for support.” *In re Marriage of Sjulín*, 431 N.W.2d 773, 775 (Iowa

1998). Spousal support is not an absolute right; an award 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). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 589.21A(1). *Dieger*, 584 N.W.2d at 570. Even though our review is de novo, we accord the district court considerable discretion in making spousal support determinations and will disturb its ruling only where there has been a failure to do equity. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa Ct. App. 1997). We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking spousal support will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). We also consider the distribution of property, Iowa Code § 598.21A(1)(c).

The parties were married for thirty-six years. Vanita is fifty-five years of age and is a high school graduate. She had no post-high school education until she began attending a community college in the fall of 2005. Vanita was still taking courses there at the time of trial. She has had numerous health issues over the years. However, at the time of trial it appeared that most of those problems had either been resolved or were being managed with treatment and medication. None of her doctors had placed any restrictions on her ability to work. Vanita has an extensive and varied employment history, during which she

has earned anywhere from \$7.00 per hour up to \$16.45 per hour. Her employment has given her substantial experience in several areas.

David is fifty-eight, holds only a high school diploma, and is in apparent good health. He has worked in construction his entire life and has been the owner and employee of his own construction company for nearly twenty years. He has had an average annual income from 2000-2004 of approximately \$25,000. He was also in the Army Reserves for twenty-four years, earning a military pension with a present value of approximately \$74,412.39. As noted above, the trial court's property division awarded Vanita approximately \$8,400 more than David, and David would be required to pay about \$6,500 out of his award. This resulted in Vanita's property award being about \$15,000 greater than David's.

An alimony award will differ in amount and duration according to the purpose it is designed to serve. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997). Rehabilitative alimony was conceived as a way of supporting an economically dependent spouse through a limited period of education or retraining following divorce, thereby creating incentive and opportunity for that spouse to become self-supporting. *In re Marriage of Francis*, 442 N.W.2d 59, 63 (Iowa 1989); see also *In re Marriage of O'Rourke*, 547 N.W.2d 864, 866 (Iowa Ct. App. 1996). Because self-sufficiency is the goal of rehabilitative alimony, the duration of such an award may be limited or extended depending on the realistic needs of the economically dependent spouse,

tempered by the goal of facilitating the economic independence of the ex-spouses. *Francis*, 442 N.W.2d at 64.

Traditional or permanent alimony is usually payable for life or for so long as the dependent spouse is incapable of self-support. *Hettinga*, 574 N.W.2d at 922.

[T]he spouse with the lesser earning capacity is entitled to be supported, for a reasonable time, in a manner as closely resembling the standards existing during the marriage as possible, to the extent that that is possible without destroying the right of the party providing the income to enjoy at least a comparable standard of living as well.

*In re Marriage of Hayne*, 334 N.W.2d 347, 351 (Iowa Ct. App. 1983). The economic provisions of a dissolution decree are “not a computation of dollars and cents, but a balancing of equities.” *Clinton*, 579 N.W.2d at 839.

After considering all of the factors relevant to possible alimony awards, we agree with and find no abuse of discretion in the trial court’s decision to not award rehabilitative or traditional alimony.

We agree with the trial court that Vanita’s present and intended educational endeavors are not likely to substantially increase her earning capacity, and may in fact detrimentally affect her long-term economic circumstances when her age, the significant additional debt she would have to incur to finish the degrees she contemplates earning, and the probable income she would earn after acquiring the degrees, are all considered. Thus, the general goal of rehabilitative alimony, to support an economically dependent spouse through a period of retraining to allow that spouse to reach a level of

income to become self-sufficient, would not be met through such an award in this case.

In addition, despite the length of the parties' marriage, we also agree with the trial court that traditional alimony is not appropriate under the specific facts and circumstances of the case at hand. First, with her lengthy and varied employment history Vanita has shown she has the ability to maintain long-term employment and be self-sufficient and the record does not indicate any reason she is not able to do so at the present time should she so desire. It appears that all of her health issues, whether mental or physical, that might have interfered with some of her employment in the past are currently under control with treatment or medication. She has no current work restrictions, and testified she does not see herself as disabled or unable to work.

Second, over the two years since the parties' separation both David's and Bries Construction's financial circumstances have deteriorated. David has had to absorb the increased expenses of maintaining two households and supporting Vanita. The increased costs of gas and materials in 2006 not only directly impacted Bries Construction's profits but also led to David not getting as many jobs lined up for 2007 as he had been able to arrange for in prior years. In order to meet his increased expenses, David had to increase his wages from Bries Construction as well as borrow additional money from his AmerUs and State Farm life insurance policies. The increase in business expenses and the required increase in David's wages had caused the business to experience a loss of \$7,439 for 2006. In addition, the trial court ordered that David pay the

approximately \$6,500 balance on the mortgage of the marital home as well as any tax liability from the liquidation of the annuity used to pay part of the mortgage. Thus, despite the length of the parties' marriage, we do not believe it is possible for David to continue to support Vanita in a manner closely resembling the standards existing during the marriage without destroying his own right to enjoy at least a comparable standard of living. See *Hayne*, 334 N.W.2d at 351. His earning capacity is not substantially greater than hers.

Third, Vanita received about \$15,000 more property than David received.

We conclude that a present award of traditional alimony to Vanita under the specific facts and circumstances of this case would not be equitable.

Vanita further claims the trial court erred by not awarding her traditional alimony after she reaches retirement age. We disagree. She has worked outside the home for nearly all of her adult life and has no doubt acquired significant Social Security retirement benefits. Furthermore, Vanita still has approximately ten years to work before she reaches retirement age and can acquire additional Social Security credits and perhaps other retirement assets. In addition, she did receive a substantial portion of the Central Pension fund. The record thus shows that Vanita received a property award of about \$256,000, including pension benefits presently worth almost \$60,000, and will no doubt have significant Social Security retirement benefits.

For these reasons as well as the reasons set forth above regarding the denial of a present award of traditional alimony, we agree with the trial court's

discretionary decision to not award traditional alimony to begin after Vanita reaches retirement age.

**B. Army Pension.**

Pensions are divisible marital property. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006); *see also In re Marriage of Branstetter*, 508 N.W.2d 638, 640 (Iowa 1993) (“Pensions in general are held to be marital assets, subject to division in dissolution cases, just as any other property.”); Iowa Code § 598.21(5)(i) (stating vested and unvested pensions are circumstances to be considered in equitably dividing property). Pensions are considered in formulating an equitable distribution of property. *In re Marriage of Scheppele*, 524 N.W.2d 678, 679 (Iowa Ct. App. 1994). However, the fact that pensions are considered marital property does not necessarily mean they must be divided. *In re Marriage of O’Connor*, 584 N.W.2d 575, 576 (Iowa Ct. App. 1998). Rather, the courts do what is equitable. *Id.* at 576-77. There are two accepted methods of dividing pension benefits: the present-value method and the percentage method. *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996).

At the time of the trial, David’s Army pension benefits were vested and would soon be matured, and he was to begin drawing them in March of 2008. *See Benson*, 545 N.W.2d at 254 (stating benefits are “matured” when “all requirements have been met for immediate collection and enjoyment” and “vested” when an employee “has rights to *all* the benefits purchased with the employer’s contributions to the plan. . . .”). We conclude the trial court did not err by including the pension as part of the property division at its present value.

Because we believe the court's overall property division, which included the Army pension, is equitable, there is no reason to deal with the Army pension separately.

**V. DISPOSITION.**

We affirm the trial court's decree in all respects.

**AFFIRMED.**

**IN THE COURT OF APPEALS OF IOWA**

No. 7-786 / 07-0614

Filed January 30, 2008

**IN THE INTEREST OF**

**RACHEL SCHROCK,**

Minor Child-Appellant,

**SAMUEL SCHROCK,**

Petitioner-Appellant,

**vs.**

**DIETER GEORGE ERDELT**

**AND EDNA SCHROCK,**

Respondents-Appellees.

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Appeal from the Iowa District Court for Fayette County, James L. Beeghly (Motion to Dismiss), Jon C. Fister (Recusal Order), and Stephen C. Clarke (Order of Dismissal), Judges.

Plaintiff appeals from the district court's order dismissing his petition seeking a declaratory judgment. **REVERSED AND REMANDED.**

Todd Locher, Farley, for appellant minor child.

Mark Roeder, Manchester, for appellant Samuel Schrock.

Timothy Luce of Anfinson & Luce, Waterloo, for appellee Dieter George Erdelt.

Edna Schrock, Lavallo, Wisconsin, pro se.

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).

**VOGEL, J.**

Samuel Schrock appeals from a district court order dismissing his declaratory judgment petition for lack of subject matter jurisdiction. The petition requested the district court in Fayette County to declare as void a judgment issued by the district court in Buchanan County. We reverse and remand.

**Background Facts.** Samuel and Edna Schrock were married in December 2003. A few months later, Edna gave birth to Rachel and caused Rachel's birth certificate to reflect Samuel as her father.<sup>1</sup> In July of 2004 Edna, Samuel, and Rachel moved from Buchanan County, Iowa to Wisconsin. Shortly after the family moved, Dieter Erdelt filed a petition in the Iowa District Court for Buchanan County alleging he was the father of Rachel and seeking joint legal custody along with visitation rights.<sup>2</sup> Dieter named Edna as a party to the suit; neither Samuel nor Rachel was named as a party and a guardian ad litem was not appointed for Rachel. After a hearing, the district court found that Samuel was Rachel's legal father but Dieter was Rachel's biological father, and granted visitation rights to Dieter. The court further found, "Dieter's petition does not seek to overcome Samuel's legal paternity or disestablish him as Rachel's legal father." Dieter filed a motion to enlarge, which requested, among other things, the court disestablish Samuel as the father. On December 2, 2005, the district court granted the motion, disestablished Samuel's paternity of Rachel,

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<sup>1</sup> See Iowa Code § 252A.3(4) (2003)(deeming child born during a marriage to be a child of the parties to the marriage); see also *Callender v. Skiles*, 591 N.W.2d 182, 185 (Iowa 1999) (defining an "established father" as a father whose paternity "has been established by some means authorized by law").

<sup>2</sup> There has been considerable activity in the Buchanan County district court regarding little Rachel. Only the highlights, sufficient to bring us to the issue presented on appeal, will be noted here.

established Dieter as Rachel's legal father, and approved Edna and Dieter's agreed upon visitation schedule.

***Declaratory Judgment Action and Procedure.*** On May 25, 2006, Samuel filed a petition in the Iowa District Court for Fayette County seeking a declaratory judgment that the Buchanan County judgment was void because neither he nor Rachel was made a party to the suit and a guardian ad litem was not appointed to represent Rachel's interests. He filed the petition in Fayette County because this was the county of Dieter's residence. See Iowa Code §§ 616.5 and 616.17 (2005) (stating that unless otherwise provided, an action must be brought in the county of the defendant's residence). On June 9, 2006, Dieter filed a motion to dismiss, or in the alternative, to move the case to Buchanan County, arguing that the Buchanan County ruling could not be collaterally attacked in Fayette County. After an unreported hearing, the district court (Judge Beeghly) on July 31, 2006, summarily denied the motion. On August 11, 2006, Samuel filed a motion for summary judgment asking the court to declare the Buchanan County ruling void. On March 1, 2007, following another unreported hearing on the matter, the district court (Judge Clarke) dismissed Samuel's petition after finding it did not have jurisdiction. Samuel appeals from the dismissal of his petition.

***Scope of Review.*** We review a district court's order of dismissal for lack of subject matter jurisdiction for errors at law. *Klinge v. Bentien*, 725 N.W.2d 13, 15 (Iowa 2006); see also *In re Marriage of Engler*, 532 N.W.2d 747, 748 (Iowa 1995) (stating questions of jurisdiction, authority, and venue are legal issues and are reviewed for correction of errors at law).

**Dismissal Order.** In the present case, Samuel's petition requested the Fayette County district court to declare the Buchanan County judgment void because Samuel was not made a party nor did he receive proper notice of the Buchanan County suit and because Rachael was not made a party nor was a guardian ad litem appointed to represent her interests. Iowa R. Civ. P. 1.211, 1.212; see Iowa Code § 600B.41A (requiring notice to be served upon any parent of the child and a guardian ad litem be appointed to represent the child in an action to overcome paternity); see also *Heyer v. Peterson*, 307 N.W.2d 1, 5 (1981) (voiding a custody ruling where the father was not notified custody was at issue in a proceeding to determine paternity and the father defaulted). A judgment made without notice to the proper parties is void and has no legal value; therefore it may be attacked in any proceeding, direct or collateral, and at any time. *Rosenberg v. Jackson*, 247 N.W.2d 216, 218 (Iowa 1976); 46 Am. Jur. 2d *Judgments* § 29 at 404-05 (2006). The district court dismissed Samuel's petition characterizing the petition as a direct attack or "an attempt to invoke some form of appellate jurisdiction." It thereby determined the Fayette County district court did not have "subject matter jurisdiction to hear an appeal over a court of coordinate jurisdiction." The Fayette County district court did not discuss venue nor reference the prior order of July 31 denying a change of venue.

The term "jurisdiction" has been used to refer to both subject matter jurisdiction and the authority of the court to hear the case before it. *Engler*, 532 N.W.2d at 748-49. "Subject matter jurisdiction refers to the authority of a court to hear and determine cases of the general class to which the proceedings in question belong, in contrast to the authority of the court to hear the particular

case then occupying the court's attention." *Id.* at 749 (internal quotations omitted). The distinction between these two concepts becomes important when the issue of waiver arises. *State v. Mandicino*, 509 N.W.2d 481, 482 (Iowa 1993). "Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel. But where subject matter jurisdiction exists, an impediment to a court's authority can be obviated by consent, waiver or estoppel." *Id.*

The issue here concerns the authority of the district court sitting in Fayette County to hear this particular case, rather than whether the court had subject matter jurisdiction. Clearly, Iowa district courts have subject matter jurisdiction to hear a declaratory judgment action and to declare a prior judgment void. See Iowa R. Civ. P. 1.1101 (providing district courts with authority to hear declaratory judgment actions); *Klinge*, 725 N.W.2d at 16 (stating a judgment entered without subject matter jurisdiction may be collaterally attacked (citing *Rosenberg*, 247 N.W.2d at 218 (voiding a judgment for lack of personal jurisdiction))). This jurisdiction is statewide. See Iowa Code § 602.6101 (establishing a unified trial court that has exclusive, general, and original jurisdiction over all civil and criminal proceedings, except where the legislature has provided otherwise); *In re Marriage of Rathe*, 521 N.W.2d 748, 749 (Iowa 1994) (discussing that Iowa's district courts have statewide jurisdiction over all appropriate matters and the remedy for bringing an action in an improper county is a change of venue). Therefore, because the Fayette County district court had jurisdiction to hear Samuel's petition, we must next examine whether it had authority to proceed. See *Engler*, 532 N.W.2d at 749 (finding that venue was a question of the district court's authority rather than subject matter jurisdiction).

In examining whether the district court had authority to entertain this particular case, we review where venue was proper and whether any challenge to that venue was waived. We agree with the Fayette County district court that Samuel's petition is a direct attack on the judgment rendered in Buchanan County. See *City of Chariton v. J.C. Blunk Constr. Co.*, 253 Iowa 805, 818, 112 N.W.2d 829, 836 (1962) ("An action in equity to set aside a judgment . . . is a direct challenge to the judgment."); *Brown v. Tank*, 230 Iowa 370, 374, 297 N.W. 801, 803 (1941) (stating a suit that attempts to declare a judgment void in a proceeding instituted for that specific purpose is a direct attack). We also agree with the Fayette County district court that when a petitioner is directly attacking a judgment as void, proper venue lies in the same county that issued the judgment. See generally Iowa R. Civ. P. 1.1510 (providing that where an action seeks to enjoin a proceeding, proper venue lies in the county where such proceeding is pending or judgment was obtained); *Hawkeye Ins. Co. v. Huston*, 115 Iowa 621, 627, 89 N.W. 29, 31 (1902) (stating that when "the object of an action is to declare a judgment or final order invalid, the action must be brought in the court in which the judgment or order was obtained" (citations omitted)).

However, in this case any challenge to venue being in Fayette County was waived. Dieter filed a motion to dismiss, or in the alternative, to move the case to Buchanan County. See Iowa R. Civ. P. 1.808 (providing that an action brought in the wrong county may be prosecuted there unless the defendant moves for a change in venue before answering). On July 31, 2006, the Fayette County district court summarily denied the motion. Dieter did not move the district court to enlarge or amend its conclusions of law. Iowa R. Civ. P. 1.904(2) (providing

that a party may move for the court to enlarge or amend its findings and conclusions). The case therefore proceeded to a hearing with another judge presiding and with venue resting in Fayette County. On appeal, Dieter does not challenge the July 31 adverse ruling, but simply maintains that Fayette County did not have jurisdiction to hear the case and that such jurisdiction cannot be conferred by waiver or consent. Dieter, too, has confused the court's jurisdiction with venue and the court's authority to hear a case. "Venue is a matter of proper situs, not jurisdiction." *Rathe*, 521 N.W.2d at 749. While initially Dieter did properly move to change venue to Buchanan County, that motion was denied and Dieter has abandoned that argument both in the district court and now on appeal. As a result, Dieter has waived any challenge to the district court's July 31 ruling denying a change of venue to Buchanan County and the resulting authority of the Fayette County district court to hear this case. See Iowa R. App. P. 6.14; *Mandicino*, 509 N.W.2d at 483 (holding "an impediment to a court's authority can be obviated by consent, waiver, or estoppel").

The district court's order dismissing Samuel's petition for lack of subject matter jurisdiction did not reference the prior July 31 ruling that denied a change of venue. We do not disagree with the district court's rationale following *Hawkeye Insurance Company* that Buchanan County may well have been the proper county in which to bring this action. *Hawkeye Ins. Co.*, 115 Iowa at 627, 89 N.W. at 31. However, as the change of venue to Buchanan County had already been denied in the prior July 31 order, venue necessarily then rested in Fayette County where the action proceeded. With no further objection or appeal of that order, challenges to venue were waived. Therefore, the Fayette County

district court had the authority to proceed to hear the case. We accordingly reverse the district court's ruling dismissing Samuel's petition on the grounds that it did not have jurisdiction to hear the case.

***Recusal Order.*** Finally, Samuel contends the district court (Judge Fister) erred in expressing personal opinions regarding the merits of the case in an October 16, 2006 order of recusal. We agree the order of recusal did state personal opinions which were unnecessary and could be prejudicial to Samuel. Therefore, we reverse and remand for the district court to strike these comments from the record.

**REVERSED AND REMANDED.**

**IN THE COURT OF APPEALS OF IOWA**

No. 7-899 / 07-0169  
Filed January 30, 2008

**IN RE THE MARRIAGE OF VINCENT J. GOODLIFFE  
AND REBECCA E. GOODLIFFE**

**Upon the Petition of  
VINCENT J. GOODLIFFE,**  
Petitioner-Appellant,

**And Concerning  
REBECCA E. GOODLIFFE,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Don C. Nickerson,  
Judge.

A father appeals a district court order denying his request for modification  
of physical care and legal custody provisions of dissolution decree. **AFFIRMED.**

Judy Johnson and Eric Borseth of Borseth Law Office, Altoona, for  
appellant.

Angela Gruber-Gardner of Marks Law Firm, Des Moines, for appellee.

Heard by Eisenhauer, P.J., and Baker, J. and Nelson, S.J.

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

**BAKER, J.**

This case involves two people who agreed to split custody of their two children. Both children are doing well in their respective homes. The problem arises because one of the parties moved approximately an hour-and-a-half away, requiring a modification of the prior agreement. Both sought to modify physical care and, at a minimum, visitation required change based on the move.

**I. Background and Facts**

Vincent and Rebecca were married on November 18, 1991. Two children were born of this marriage, Andrea in October 1992, and Alisa in March 1998. During the marriage, the couple lived in the Des Moines area. Approximately two months after the decree was entered, Vincent moved to Afton.

Andrea is a good student who was enrolled in the talented and gifted program in the Des Moines Public School District. She continues to be a good student and currently participates in volleyball, band, chorus, and other activities in her new school.

Alisa is also a good student. Dr. Sheila Pottebaum, Ph.D., has diagnosed Alisa with attention deficit disorder and Asperger's Syndrome, a form of autism which is characterized by difficulty with changes and a preference for sameness. Alisa has been involved in the special education program at her elementary school in the Des Moines Public School District and has had the same special education teacher since kindergarten. The Des Moines schools have a specialized autism team to work with Alisa. She initially required an associate, but no longer needs one. Although she now spends the majority of her day in the regular classroom, she continues to have difficulty with social interaction and

behavior. These difficulties require continued contact with her special education teacher. Dr. Pottebaum, who has treated Alisa since 2002, does not recommend any change for her regarding her school placement or home routine.

The couple separated in 2004. A stipulated decree of dissolution of marriage was entered on March 18, 2005. The decree provided for joint legal custody of the children. Vincent was awarded physical care of Andrea, and Rebecca was awarded physical care of Alisa. A detailed visitation schedule was entered whereby Vincent had visitation with Alisa every Thursday night and weekend, and Rebecca had visitation with Andrea every Monday and Wednesday from 5:00 a.m. until 3:30 p.m. the following day, and every Friday from 5:00 a.m. until 9:00 a.m. Saturday morning. At the time of the decree, Vincent and Rebecca lived in close proximity, and both children attended school in Des Moines.

On June 5, 2005, Vincent moved to Afton, which is approximately one-and-one-half hours from Des Moines to live with Tami, who he married on February 14, 2006. Tami has three children from a previous marriage who reside with Vincent, Tami, and Andrea in Afton.

On February 17, 2006, Rebecca married David. They have one child together, born July 13, 2006. David has four other children from a previous marriage. When David exercises his visitation (every other weekend and holidays), David's children stay with Rebecca, David, Alisa, and the baby.

Rebecca and Vincent were Jehovah's Witnesses during their marriage and raised their children accordingly. Both have been disfellowshipped. Vincent no

longer believes in nor practices the Jehovah's Witnesses doctrine. Rebecca remains loyal to the doctrine and continues to raise her children in the religion.

Rebecca has been diagnosed with multiple sclerosis (MS). During the marriage, she was hospitalized several times, and for limited times was confined to a wheelchair, due to the disease. She has also sought treatment for depression. Both her MS and depression have improved since the dissolution.

Since Vincent's move to Afton, which made the visitation arrangements as established in the decree unworkable, the parties have experienced conflict, especially related to where Andrea would attend school. In June 2005, Vincent initiated an investigation by the Iowa Department of Human Services (DHS) alleging David's child was sexually abusing Alisa. DHS investigated the claim and concluded the abuse allegations were unfounded. Dr. Pottebaum expressed concern with Vincent's handling of the incident, and stated "Alisa has been clear in our office that the concerns occurred in the father's home."

On August 8, 2005, Rebecca filed a petition for relief from domestic abuse. Among her complaints were allegations that Alisa was being sexually abused by a child in Vincent's home, that he was using an unregistered babysitter, and that he had removed Andrea from her school. Following an August 18, 2005 hearing, the petition was dismissed because Rebecca had "failed to prove that [Vincent] committed domestic abuse assault" upon her.

Despite Rebecca's objections, Vincent enrolled Andrea in the East Union School District. Vincent also wrote a letter to the school stating Rebecca was not to visit with or take Andrea from the school without his permission because he had primary custody and "the schedule that was made . . . is no longer in effect

due to the fact that it creates both an unstable and unrealistic environment.” The letter further advised the school that Vincent had contacted the sheriff’s office, and the school was to call the sheriff’s office if they had “any trouble” with Rebecca. Andrea started school at East Union on August 22, 2005. Rebecca drove to Afton to get Andrea because Vincent had not returned her pursuant to the visitation agreement. Vincent refused to allow Rebecca to see or talk to Andrea. When Rebecca went to the school, school officials and the Union County Sheriff would not allow her to leave with Andrea. They requested she leave the school, and Rebecca complied.

On August 24, 2005, Rebecca reported to law enforcement officials that Vincent broke into her home, held a knife to her throat, and told her that if she did not drop the child custody issue, she would never see the children again. Police investigation revealed that, at the time Rebecca claimed Vincent was at her home, he was with co-workers on his way to work. On August 31, 2005, Rebecca filed a petition for relief from domestic abuse regarding the alleged incident, which was dismissed for failure to present sufficient evidence to enter a protective order. Rebecca was charged with filing a false report to law enforcement and ultimately entered an Alford plea to the charge.

On November 30, 2005, Rebecca filed a petition to modify decree of dissolution, seeking physical care of Andrea due to Vincent’s move to Afton. Vincent filed an answer seeking sole legal custody and physical care of both Andrea and Alisa. The district court denied the parties’ petitions to modify the decree and ordered liberal and reasonable visitation to be agreed upon by the parties. (In the event they were unable to agree upon a visitation schedule, the

court ordered visitation every other weekend and alternating weeks during summer break.) Vincent appeals, contending the district court erred by failing to modify custody to award him physical care of Alisa, and by failing to award him sole legal custody of both children.

## II. Merits

Our review in equity cases is de novo. Iowa R. App. P. 6.4. We are not bound by the district court's findings of facts, but we give them deference because the district court had a firsthand opportunity to view the demeanor of the parents and evaluate them as custodians. *In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998); see also Iowa R. App. P. 6.14(6)(g). When we determine physical care, our primary consideration is the best interests of the children. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999).

To change custodial provisions of a dissolution decree, the petitioner must prove by a preponderance of the evidence conditions since the decree was entered have so materially and substantially changed the children's best interest make it expedient to make the requested change. The party seeking to take custody from the other must also prove an ability to minister more effectively to the children's well being.

*In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995) (internal citations omitted).

A "substantial change in circumstances" involves changed conditions which are material as opposed to trivial, permanent or continuous as opposed to temporary, "and must be such as were not within the knowledge or contemplation of the court when the decree was entered." *In re Marriage of Pals*, 714 N.W.2d 644, 646-47 (Iowa 2006) (citations omitted). "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 Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980).

The district court found, and the parties do not dispute, that “Vincent’s relocation with Andrea constituted a substantial change in circumstances sufficient to modify the custodial and visitation provisions of the parties’ decree.” The question on appeal, therefore, is whether Vincent has met the heavy burden of proving that he can more effectively minister to the children’s well being.

Factors a court must consider to determine what child custody arrangement is in the children’s best interests include:

- a. Whether each parent would be a suitable custodian for the child.
- b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
- c. Whether the parents can communicate with each other regarding the child’s needs.
- d. Whether both parents have actively cared for the child before and since the separation.
- e. Whether each parent can support the other parent’s relationship with the child.
- f. Whether the custody arrangement is in accord with the child’s wishes or whether the child has strong opposition, taking into consideration the child’s age and maturity.
- g. Whether one or both the parents agree or are opposed to joint custody.
- h. The geographic proximity of the parents.
- i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.
- j. Whether a history of domestic abuse, as defined in section 236.2, exists.

Iowa Code § 598.41(3)(a-j) (Supp. 2005).

### **A. Physical Care**

Vincent contends the district court erred by failing to modify custody to award him physical care of Alisa because he proved he has a superior ability to

minister to her needs. He argues that the record raises concerns about Rebecca's ability to provide Alisa with the care and supervision that she requires.

"The characteristics of each child, including age, maturity, mental and physical health" is an important consideration in child custody determinations. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). The district court conducted a careful analysis of Alisa's needs, specifically noting Dr. Pottebaum's recommendation that her parents refrain from changing Alisa's school placement or home routine. We agree with the district court's conclusion that

Rebecca's home provides Alisa with greater stability and predictability than Vincent's home. The effect on Alisa of removing her from her mother's home and her school would be severe due to her Asperger's Syndrome. Alisa received special education at Morris Elementary which has substantially aided her in handling her disorder. While the East Union school officials testified that they could manage Alisa's special needs, there are no personnel specifically trained to address Asperger's Syndrome.

Alisa's unique characteristics, including the severe effects of removing her from her home and school and disrupting her routine, weigh heavily in favor of Alisa remaining in Rebecca's physical care.

Vincent next argues that the characteristics of both parents require more attention than was given by the district court. See *Winter*, 223 N.W.2d at 166 (noting the "characteristics of each parent, including age, character, stability, mental and physical health" as a factor to be considered in determining child custody). He contends that, "[g]iven Rebecca's ongoing battle with MS, the Court should question what type of environment she is providing for the children." The district court specifically noted Rebecca's treating physician's statement that her MS "does not result in her inability to care for her children." The court also

noted that she has sought treatment for her depression and her condition has improved. Upon our de novo review of the record, we agree with the district court's conclusion that Rebecca's "physical condition does not prevent her from being able to care for her children."

Vincent also contends there are issues with Rebecca's household that warrant concern. Specifically, he asserts that when David's children visit, there are seven children in the home, and the "emotional environment in Rebecca's home is also lacking." While Rebecca's home may be crowded at times, if Vincent were awarded physical care of Alisa, she would be the fifth child living in his home on a regular basis. The district court specifically noted that Rebecca is able to be home with the children during the week because she works primarily on weekends, she administers well to Alisa's needs, and Alisa has thrived in Rebecca's care as evidenced by her improvement at school. We agree with the court's conclusion that Rebecca's home offers relative advantages for Alisa. Vincent has failed to demonstrate he can provide a superior home.

Vincent also contends the district court erred in not according proper weight to Rebecca's attempted alienation. "In determining custody we can give great weight to a parent's attempt to alienate a child from her other parent if evidence establishes the actions will adversely affect a minor child." *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992) (citation omitted). Vincent points specifically to Rebecca's claim to police that he broke into her home and threatened her, for which she was charged with filing a false report to law enforcement, as evidence of her attempted alienation. Rebecca counters that Vincent attempted to alienate the children from Rebecca by filing a child abuse

complaint with DHS. We agree with the district court that “[s]ince their separation and divorce, the parties have engaged in actions which cause this court to question their judgment to effectively parent.” A careful review of the record reveals that both parties have done things to undermine the children’s relationship with the other parent. Neither parent has demonstrated a superior ability to support the other’s relationship with the children. See Iowa Code § 598.41(3)(e); see also *Winter*, 223 N.W.2d at 166-67 (“Determining what custodial arrangement will best serve the long-range interest of a child frequently becomes a matter of choosing the least detrimental available alternative.”).

Vincent also argues the district court’s ruling prevents significant emotional and physical contact between the children. Split physical care occurs when each parent has physical care of one child. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). It is generally disfavored because it deprives siblings of the benefit of continuous association with each other. *Id.* Split physical care is appropriate, however, where it promotes the long-range best interests of the children. See, e.g., *id.* at 245-46 (approving split physical care where the siblings were separated for fifteen months and the “situation [did] not appear to have been detrimental to the children”).

In this case, the district court noted that, despite living in separate households, the girls share a close bond. Further, the district court’s order did not create a split physical care arrangement—the parties stipulated to the arrangement at the time of the dissolution. The change in circumstances, i.e., the move, was of Vincent’s own making. *Cf. Ellis v. Ellis*, 262 N.W.2d 265, 268 (Iowa 1978) (denying modification of support obligation where the party’s

inability to pay was voluntary). Given his prior agreement to the arrangement, and the fact that it was his move to Afton that made the established visitation arrangements unworkable, we find Vincent's current concern that split physical care deprives Alisa of frequent contact with Andrea to be simply disingenuous.

For the foregoing reasons, we conclude the district court properly denied Vincent's petition to modify custody and award him physical care of Alisa.

### **B. Legal Custody**

Vincent further contends the district court erred by failing to modify custody to award him sole legal custody of both children. He argues that the intense hostility between him and Rebecca and their inability to communicate effectively precludes an award of joint custody.

Joint legal custody is favored whenever it is reasonable and in the children's best interests. Iowa Code § 598.41(1); *In re Marriage of Brainard*, 523 N.W.2d 611, 614 (Iowa Ct. App. 1994). "Hostility between parents and their inability to effectively communicate, however, may preclude an award of joint custody." *Marriage of Brainard*, 523 N.W.2d at 614 (citation omitted). A court may award sole legal custody where there is clear and convincing evidence that "joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed." Iowa Code § 598.41(2)(b).

"The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances." *Marriage of Winnike*, 497 N.W.2d at 173. While the record contains numerous examples of Vincent and Rebecca's hostility toward

each other and their inability to communicate, we find the circumstances of this case are not sufficiently compelling to justify setting aside joint custody in favor of awarding Vincent sole custody of the children. We hope the parties recognize the need to decrease their hostility, improve their communication, and work together in their daughters' best interests.

For the foregoing reasons, we conclude that the district court properly denied Vincent's petition to modify custody to award him sole legal custody of both children. We also affirm that portion of the order.

### **C. Attorney Fees**

Rebecca requests an award of 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. *In re Marriage of Castle*, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981). We determine Rebecca was forced to defend the district court's decision and was successful in her defense. We therefore award her \$1000 in appellate attorney fees.

### **III. Conclusion**

Having considered all issues presented on appeal, we find the custody and placement provisions set forth by the district court are appropriate.

**AFFIRMED.**

**IN THE COURT OF APPEALS OF IOWA**

No. 7-905 / 07-0375  
Filed January 30, 2008

**IN RE THE MARRIAGE OF JASON LEON MACE  
AND TRACY LYNN MACE**

**Upon the Petition of  
JASON LEON MACE,**  
Petitioner-Appellant,

**And Concerning  
TRACY LYNN MACE,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Harrison County, Timothy O'Grady,  
Judge.

Jason Mace appeals the district court's denial of his application to modify  
a stipulated joint physical care arrangement. **REVERSED AND REMANDED.**

Ann Long, Missouri Valley, for appellant.

Lloyd Bergantzel, Council Bluffs, for appellee.

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

**VAITHESWARAN, J.**

Jason Mace appeals the district court's denial of his application to modify a stipulated joint physical care arrangement.

***I. Background Facts and Proceedings***

Jason and Tracy Mace are the parents of two minor children. In 2005, Jason petitioned for a dissolution of the parties' marriage, based on Tracy's use of methamphetamine. He obtained an order immediately placing the children with him, pending a hearing. One month later, the juvenile court adjudicated the children in need of assistance and ordered continuing placement with Jason.

Tracy began participating in services designed to address her drug addiction. She and Jason subsequently implemented a joint physical care arrangement. Based on Tracy's successes and the recommendations of service providers, the juvenile court essentially ratified the de facto joint physical care arrangement; while the court left care, custody, and control of the children with Jason, Tracy was afforded visitation of up to a half a week at a time. The court also granted the district court concurrent jurisdiction over custody, visitation, and support issues. The district court, in turn, approved the parties' stipulation to joint legal custody and joint physical care of the children.

Days later, methamphetamine was again found in Tracy's system. As a result, the juvenile court, which had not closed the child-in-need-of-assistance action, placed the children with Jason and restricted Tracy to supervised visitation.

Jason petitioned to modify the district court's custody order based on Tracy's recent methamphetamine use and association with "known drug users."

Following a modification hearing, the district court concluded Jason had not demonstrated a substantial change in circumstances warranting modification of the decree. Jason appealed.

## **II. Analysis**

The custodial provisions of a dissolution decree should be modified “if it has been established that conditions since the decree have so materially and substantially changed that the children’s best interests make it expedient to make the requested change.” *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005). The change must be more or less permanent, must relate to the welfare of the children, and must not have been contemplated by the court when the decree was entered. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other parent must also show the ability to render superior care. *Melchiori v. Kooi*, 644 N.W.2d 365, 368-69 (Iowa Ct. App. 2002).

Jason cites several factors in support of his contention that these standards were satisfied. We need address only one: Tracy’s drug use.

### **A. Substantial and More or Less Permanent Change of Circumstances**

When the stipulated custody order was entered, tests showed Tracy had been drug-free for approximately one year. Shortly thereafter, methamphetamine was detected in her system. This was not an isolated relapse. Tracy again tested positive a few months later and, in addition, several drug screens appeared to have been tampered with. We conclude Tracy’s renewed drug use after the stipulated custody order was entered amounted to an essentially permanent and substantial change of circumstances.

**B. Not Contemplated**

Turning to the question of whether Tracy's drug use was contemplated when the custody order was entered, the district court correctly found that Jason knew of her past drug use. We also have no reason to disagree with Tracy's assertion that, with any addiction, a relapse is a possibility. However, these facts do not mandate a conclusion that Tracy's return to drug use was contemplated by Jason. As noted, Tracy had been drug-free for a year before the custody order was entered. When Jason agreed to a joint physical care arrangement he believed Tracy "was going to be off drugs." We are not convinced Jason should have contemplated her relapse days later and her continued drug usage for months thereafter.

**C. Children's Welfare**

The next question is whether Tracy's drug use related to the welfare of the children. *Frederici*, 338 N.W.2d at 158. Tracy used methamphetamine after the children were removed from her care for a second time and a month before she became pregnant with a third child. At the modification hearing, she minimized the effect of her drug use, stating she did not believe it had a negative impact on her parenting. While there is no question Tracy loves her children, we conclude her continued use of methamphetamine evinces a disregard for the children's welfare.

**D. Superior Caretaker**

As noted, Jason also had to show he was the superior caretaker. *Melchiori*, 644 N.W.2d at 368. We believe he made this showing. Although he used marijuana and methamphetamine years earlier, he made concerted efforts

to change his lifestyle. He underwent random drug-testing by his employer and testified that it was not worth sacrificing his job for drugs. Additionally, he passed a drug test administered by the Department of Human Services. He testified “I have a very strong belief, if you set strong enough goals and want something more in life for yourself, it’s very easy.”

Jason was also actively involved in the children’s education. He attended an open house and parent/teacher conferences at the Head Start program in which both children had been enrolled and he received a certificate for volunteering in the classroom. Tracy, in contrast, was not actively involved in the children’s education.

Despite Tracy’s drug use, Jason additionally expressed a desire to foster a relationship between Tracy and the children. He testified “they need their mother in their life.” While noting concerns that her drug use and the drug use of her companion jeopardized the children’s safety, he hoped random drug-testing of both would help protect the children during visits with Tracy.

Finally, several professionals testified it was in the children’s best interests to place physical care with Jason. A court-appointed special advocate pointed to the negative impact of Tracy’s association with a drug-user. A Department social worker cited Tracy’s past drug use and the people she associated with. A child welfare worker noted Tracy’s questionable sobriety, her relationship with a drug user and her unstable employment. While these recommendations are not binding, they may be given weight. *In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa 1993).

We conclude Jason established he was the superior caretaker.

**III. Disposition**

Jason should have been granted physical care of the children.<sup>1</sup> We reverse the modification ruling and remand for further proceedings consistent with this opinion.

We deny Tracy's request for appellate attorney fees, as she did not prevail on appeal.

**REVERSED AND REMANDED.**

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<sup>1</sup> Jason did not seek a modification of the joint custody provision. Because he did not request it, we do not modify the order to afford him sole custody of the children.

**IN THE COURT OF APPEALS OF IOWA**

No. 7-913 / 07-0730  
Filed January 30, 2008

**Upon the Petition of**  
**JENNIFER SWATEK BRIGGS,**  
Petitioner-Appellee,

**And Concerning**  
**DANNY JO SWATEK BRIGGS,**  
Respondent-Appellee,

**ANDREW IVERSON,**  
Intervenor-Appellant.

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

Intervenor appeals following the ruling that he had waived his right to  
contest the paternity of his biological sons. **REVERSED AND REMANDED**  
**WITH DIRECTIONS.**

Timothy Ament of Gartelos, Wagner & Ament, Waterloo, for appellant.

John Rausch, Waterloo, for appellee, Jennifer Swatek Briggs.

D. Raymond Walton of Beecher Law Office, Waterloo, for appellee, Danny  
Jo Swatek Briggs.

Heard by Eisenhauer, P.J., and Baker, J. and Nelson, S.J.\*

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

**BAKER, J.**

In this appeal, we address a biological parent's claim to the paternity of twin boys. The district court ruled that he waived his right to establish paternity of the children. We reverse and remand.

**Background Facts and Proceedings.**

Jennifer Swatek-Briggs and Danny Jo Swatek-Briggs were married in 1994. Jennifer met Andrew Iverson in 1999 and began a sexual relationship that eventually resulted in Jennifer's pregnancy. Danny Jo and Jennifer conducted themselves publicly as if Danny Jo was to be the biological father. In June 2000, twin boys, Dylan and Dalton, were born. On September 13, 2005, Jennifer filed a petition seeking to dissolve her marriage to Danny Jo. After discovering he was the twins' biological parent, Andrew intervened in the dissolution action, asking the court to establish his paternity and to disestablish Danny Jo as parent.

Following a hearing on the petition and Andrew's intervention request, the court ruled that Andrew had waived his right to establish his own paternity by failing to timely attempt to determine the children's paternity. It further ruled that Jennifer should serve as the twins' physical caretaker. Andrew appeals from this order. He contends the court erred in finding that he had waived his right to seek paternity of the twins.

**Scope of Review.**

This matter was filed in equity and tried in equity. Furthermore the right of a parent to his or her child is a constitutional right. Therefore, our review is de novo. *Huisman v. Miedema*, 644 N.W.2d 321, 324 (Iowa 2002); *State v. Hallum*, 606 N.W.2d 351, 354 (Iowa 2000). Respectful consideration is given to the trial

court's factual findings and credibility determinations, but not to the extent where those holdings are binding upon us. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001).

### **Equitable Parenthood.**

Andrew first claims the court erred in establishing equitable parenthood in Danny Jo. He directs this court to Iowa Code section 600B.41A.6, which essentially provides that under certain circumstances, even if the court determines that DNA test results exclude the established father as the biological father, it may dismiss the petition to overcome paternity and preserve the established paternity determination. However, Andrew concedes that the "trial court failed to even address this statute, ruling instead, that Andrew had waived his rights to parent the children." Therefore, we believe section 600B.41A(6) played no part in the court's decision and that the theory of equitable parenthood was not at issue. These issues are not preserved for appellate review. Rather, the court's ruling was premised on its conclusion Andrew *waived* his right to establish paternity, and we proceed to address that theory in the following section.

### **Waiver of Right to Establish Paternity.**

The district court found that Andrew

knew of [Jennifer's] pregnancy, he knew that the children were born just slightly less than nine months after the last time he had sex with [Jennifer], and he knew that [Danny Jo's] paternity was inconsistent with the description [Jennifer] had given him of their relationship.

Based on these findings, it determined that Andrew waived his right to establish his own paternity. It therefore preserved Danny Jo's paternity by reason of

marriage at the time of the children's birth. Accordingly, we proceed to address Andrew's claim on appeal that the court erred in finding a waiver.

Generally speaking, "waiver is an intentional relinquishment of a known right." *Huisman*, 644 N.W.2d at 324. The essential elements of waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right. *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982).

It is generally recognized that waiver concedes a right, but assumes a voluntary and understanding relinquishment of it, and it is an essential element of a waiver that there exists an opportunity for choice between a relinquishment and an enforcement of the right in question, so that voluntary choice is the very essence of a waiver.

*Travelers Indem. Co. v. Fields*, 317 N.W.2d 176, 186 (Iowa 1982).

Waiver can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended. *Continental Casualty Co. v. G. R. Kinney Co., Iowa*, 258 Iowa 658, 660, 140 N.W.2d 129, 130 (1966). When the waiver is implied, intent is inferred from the facts and circumstances constituting the waiver. *Id.* The party asserting waiver bears the burden of proof. See *Grandon v. Ellingson*, 259 Iowa 514, 521, 144 N.W.2d 898, 903 (1966).

In *Callender v. Skiles*, 591 N.W.2d 182, 192 (Iowa 1999), our supreme court found that a putative father of a child with an established father may have standing to challenge paternity under the Due Process Clause of the Iowa Constitution. It stated that

[a]lthough we recognize a right for [the putative father] to petition the court to challenge paternity in this case, we also recognize this

right can be lost by waiver, which may be the threshold question to consider before addressing paternity. If the challenge is not a serious and timely expression of a meaningful desire to establish parenting responsibility, it may be lost.

*Callender*, 591 N.W.2d at 192. The court left it to the district court to determine whether the principles of waiver preclude a challenge in each particular case. *Id.* The court recognized time to be a critical element of this inquiry, as well as the efforts to establish a relationship. *Id.* Therefore, in light of these considerations, we review the relevant facts in the record.

Andrew and Jennifer last had sex in September of 1999, and after that time their romantic relationship ended. In October of that year, Jennifer took a pregnancy test. She informed Andrew that the test was negative. In November, however, she discovered she was pregnant and later that month informed Andrew of the pregnancy and that Danny Jo was the father. According to Jennifer, she was initially informed by her doctor that her due date was September 4, 2000. Jennifer claimed she was “very clear” to Andrew that he was not the father, and Andrew, based on the reported September 2000 due date, calculated that he could not have been the father. As it turned out, the twins were born approximately nine months after the two last had sex. Jennifer claimed they were early.

Because Danny Jo had a vasectomy in 1983, he knew he could not be the father. He and Jennifer, however, acted publicly as if he were going to be the

biological father, telling some people that she had been inseminated artificially.<sup>1</sup> Andrew was not aware that Danny Jo had undergone a vasectomy.

On the day the twins were born, Jennifer spoke to Andrew by telephone from the hospital and informed him of the births. She claimed she was merely calling to inform a friend who also happened to be there at a birthday party. Andrew first saw the twins about a week later when Jennifer called him to ask if he would accompany her and the boys to the mall.

At some time in 2003, Andrew was approached by Jennifer's uncle Robby, who questioned whether Andrew was actually the boys' father due to their physical similarities. Apparently having enough doubt to inquire further, Andrew questioned Jennifer again about the boys' parentage. She again denied that Andrew was the father. Andrew believed her and he pressed the issue no further.

Andrew did not learn of his paternity until Jennifer and Danny Jo's dissolution proceedings began and Jennifer asked him to take a paternity test. Upon learning that he was the father, he immediately hired legal counsel to assert his rights. Counsel filed an intervention in Jennifer and Danny Jo's dissolution proceedings and petitioned the court to establish Andrew's parental rights. He also initiated ongoing contact with his children. He bought them gifts, had the boys overnight in his home, spent the night at their home, met with their teachers, and decorated a bedroom in his house for the boys.

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<sup>1</sup> At trial Jennifer claimed it was Danny Jo's idea to use the artificial insemination story, while Danny Jo testified that Jennifer informed him that she had, in fact, been artificially inseminated and that he believed her.

There exists no dispute under either the facts in the record or the positions of the parties that Andrew had a right. There further does not appear to be any issue of whether he had actual knowledge that the twins were his. The two essential issues presented are whether Andrew had constructive knowledge that the twins may have been his and whether he voluntarily relinquished his right to claim to be their father.

On the issue of knowledge, it has been stated

[w]aiver is an act of understanding that presupposes that a party has knowledge of its rights, but chooses not to assert them. It must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of the party's rights or of all material facts upon which they depended. Where one lacks knowledge of a right, there is no basis upon which waiver of it can rest. Ignorance of a material fact negates waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact.

A person makes a knowing and intelligent waiver when that person knows that a right exists and has adequate knowledge upon which to make an intelligent decision. Waiver requires a knowledge of the facts basic to the exercise of the right waived, with an awareness of its consequences. That a waiver is made knowingly and intelligently must be illustrated on the record or by the evidence.

Am. Jur. Estoppel, § 202.

We do not view this as a situation where Andrew was “content to let another man raise a child that was possibly his own” or took “an extended holiday from the responsibilities of parenthood.” *Huisman*, 644 N.W.2d at 326. This is a situation where Andrew had no reasonable basis to believe he was the father of the twins.

“[Waiver] is largely a matter of intent which may be ascertained from a person’s conduct.” *Babb’s Inc. v. Babb*, 169 N.W.2d 211, 213 (Iowa 1969).

Andrew's conduct is consistent with his lack of knowledge that he was the father. Although a friend of Jennifer, he took no special interest in the twins until it was determined that he was in fact the father. Upon learning the true state of affairs, he was galvanized into action. He took an immediate interest in them by pursuing a more personal relationship, and he immediately sought a legal determination of his rights. These actions were of a nature entirely distinct from his previous relationship with the boys, which could be characterized as a casual one through his friendship with their mother. These new interactions are entirely consistent with Andrew's position that it was not until the dissolution proceedings and subsequent DNA testing that he discovered he was, in fact, the boys' biological father. Waiver can be express, "shown by the affirmative acts of a party," or implied, "inferred from conduct that supports the conclusion waiver was intended." *Id.* We do not believe that waiver can be inferred from Andrew's actions.

This case can be distinguished from *Huisman*, in which the supreme court affirmed a trial court determination that the biological father had waived the right to establish his paternity. *Huisman*, 644 N.W.2d at 326. There, the biological father was told within days of the child's birth that he was the father but did not attempt to assert his rights for another seven years. *Id.* at 322. Rather, "he remained content to let another man raise a child . . . because it served his own need to keep his affair with [his son's] mother a secret." *Id.* at 326. In this case, however, Andrew had no such knowledge of his parentage. And while he did perhaps have some suspicion that he could have been the twins' father, he did act on that suspicion by making inquiries to Jennifer, only to be greeted with

strong and apparently convincing denials. There is no cover-up. The case for waiver was much stronger in *Huisman* than it is here.

**Conclusion.**

Accordingly, upon our de novo review, we conclude Andrew did not have a sufficient level of constructive knowledge that the children were his. Further, we do not find his actions were consistent with a voluntary relinquishment of his right to establish his paternity in Dylan and Dalton. We therefore reverse the trial court's determination on the issue of waiver. Andrew requests that we enter an order disestablishing Danny Jo as the father and establishing paternity in Andrew. We decline this request and remand for a new trial on the issue of whether Danny Jo can preserve his established paternity determination under the theory of equitable parenthood.

**REVERSED AND REMANDED WITH DIRECTIONS.**

**IN THE COURT OF APPEALS OF IOWA**

No. 7-916 / 07-0891  
Filed January 30, 2008

**IN RE THE MARRIAGE OF AMY H. THOMPSON AND THEODORE TIMOTHY THOMPSON**

**Upon the Petition of  
AMY H. THOMPSON,**  
Petitioner-Appellant,

**And Concerning  
THEODORE TIMOTHY THOMPSON,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,  
Judge.

Amy Thompson appeals from the physical care, property division, and attorney fee provisions of the decree dissolving her marriage to Theodore Thompson. **AFFIRMED AS MODIFIED AND REMANDED.**

Dawn Long of Howes Law Firm, P.C., Cedar Rapids, for appellant.

Sheree Smith of Wilson, Matias, Hauser & Adams, Cedar Rapids, for appellee.

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

**MILLER, J.**

Amy Thompson appeals from the physical care, property division, and attorney fee provisions of the decree dissolving her marriage to Theodore (Ted) Thompson. We affirm the judgment of the district court as modified herein and remand for further proceedings.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Amy and Ted were each twenty-six years of age at the time of the February 2007 dissolution of marriage trial. Each graduated from high school in 1999, Amy in Illinois and Ted in Iowa. Amy attended a community college in Illinois from 1999 to about 2002, but has not received a degree. Ted entered the Coast Guard shortly after high school.

Amy and Ted met and began dating in about July 2001, while Ted was stationed in Kenosha, Wisconsin. Amy was living with her mother in Round Lake, Illinois. Amy shortly became pregnant with the parties' first child, Emily. Ted moved in with Amy and Amy's mother in October 2001.

Emily was born April 10, 2002. Amy was working part-time. She received eight weeks off work and then returned to part-time work. By about the end of 2002 Amy was pregnant with the parties' twins, Kelsey and Madison.

Amy experienced problems with her pregnancy and by June 2003 had been hospitalized two times. Ted finished his duty with the Coast Guard in June 2003, secured employment in Iowa, and moved to a home near Walker, Iowa, that the parties had purchased with assistance from Ted's parents. The parties were married on July 12, 2003.

Amy was placed on bed rest the last three months of pregnancy, from about June 2003 until the twins were born September 9, 2003. In October 2003 Amy and the parties' three young daughters moved to Iowa and joined Ted. Ted shortly thereafter obtained employment at Maytag, where he continued to work the second shift at the time of trial.

Amy filed a petition for dissolution of marriage in February 2006. In about May 2006 Amy's twenty-nine-year-old brother, William, moved from Illinois to Iowa to be closer to Amy and to assist her. He moved in with the parties in about July 2006. Amy's application for temporary custody and support resulted in an August 31, 2006 order. As the parties were still living together, the district court ordered that they share custody of the children, alternating weeks of visitation, beginning with Amy, from 6:00 p.m. on a Sunday to 6:00 p.m. the following Sunday. The court reserved the issue of child support and ordered that the matter of attorney fees be determined upon final hearing.

Amy and Ted separated in September 2006 when Amy moved, with the parties' children and William, to a mobile home in Marion, Iowa, that she had purchased with funds for the down payment provided by her grandmother. Ted remained in the parties' residence near Walker. In November 2006 Amy again requested temporary support, alleging under oath that she had not received any voluntary support from Ted. On November 16, 2006, the district court ordered Ted to pay temporary child support of \$679 per month, beginning December 1, 2007.

Amy and William plan that William will remain with Amy until the twins begin school in the fall of 2008. At the time of the February 2007 trial Amy's mother was planning to move to Iowa to be near Amy and the children.

## **II. THE DISTRICT COURT DECISION.**

Following a multiple-day trial, the district court in relevant part (1) ordered joint legal custody of the children, (2) placed the children in Ted's physical care, subject to Amy's rights of visitation, (3) ordered Amy to pay child support, (4) divided the parties' property, and (5) denied Amy's request for attorney fees.

## **III. SCOPE AND STANDARDS OF REVIEW.**

In this equity case our review is de novo. Iowa R. App. P. 6.4. 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). Because we review both the facts and the law de novo, we need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but instead make such findings and conclusions as from our de novo review we find appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(g). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

#### **IV. MERITS.**

##### **A. Physical Care.**

When deciding issues of physical care, the controlling consideration is always the best interest of the children. Iowa R. App. P. 6.14(6)(o); *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998). The objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The critical issue in determining children's best interests is which parent will do better in raising them; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). We consider a number of factors, including the children's needs and characteristics, the parents' abilities to meet the children's needs, the relationship of the children with each parent, the nature of each proposed home environment, and the effect of continuing or disrupting the children's current status. See Iowa Code § 598.41(3) (2007); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974).

While not the singular factor in determining which placement would best serve the children's best interests, we give significant consideration to placing them with the primary caregiver. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). We also examine who can and will best support the other parent's relationship with the children. See *In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988) (stating a parent's attempt to isolate and alienate children from the other parent is a factor to be given weight in a custody determination).

Emily claims the trial court erred in awarding Ted physical care of the children. Upon our de novo review, for the following reasons we agree.

The evidence clearly and convincingly shows that as between the parties Amy has accepted and had the very great majority of the responsibility for the care and nurture of the parties' children. From Emily's April 2002 birth until June 2003 Amy was working only part-time while Ted was in the Coast Guard full-time and gone from home for periods of twenty-four and forty-eight hours. Ted was involved in Emily's care during this time, but Amy provided the very great majority of her care.

From June 2003 to October 2003 Amy, with the assistance of her family, provided Emily's care and later the twins' care, as she remained in Illinois while Ted had moved to Iowa.

Amy moved to Iowa in October 2003, at about the time Ted began employment at Maytag, on the second shift, employment that continued at the time of trial. From then until Amy obtained part-time, seasonal employment in September 2004, she was responsible for the very great majority of the children's care as Ted was working full-time and she was not working outside the home.

Amy worked part-time from September 2004 to January 2005. Her work hours were from 5:00 a.m. until 9:00 a.m., hours that the children spent part of sleeping. Ted cared for the children from when they awoke until Amy returned home by 9:30 a.m. Amy was largely responsible for the children's care the remainder of the day, as Ted often napped and then left for work by about 2:30 p.m.

From January 2005 to September 2005 Amy remained at home with the children and had the very great majority of the responsibility for their care. In September 2005 she again secured part-time employment, at a Menard's store, again with work hours of 5:00 a.m. to 9:00 a.m., employment that continued at the time of trial. Her work includes some weekends, and she has Wednesdays off. Because of the parties' work hours she maintained primary responsibility for the children's care until the August 31, 2006 temporary custody order. For the five months from the temporary custody order until trial the parties had approximately equal responsibility for the children's care.

Until the temporary custody order, as between the parties Amy had and accepted the almost exclusive responsibility for child care matters such as food shopping, cooking, clothes shopping, laundry, and making and keeping appointments with physicians. She has taken the children to church more than Ted has.

We find that Amy has been the children's primary caregiver, as the duration and amount of care she has provided for them greatly exceeds the duration and amount provided by Ted.

We are also convinced that Amy can and will better support Ted's relationship with the children than Ted can or will support Amy's relationship with them. When asked whether he could tell the children anything good about Amy, Ted replied in the negative. He readily acknowledged he had done nothing to encourage the relationship between the children and Amy.

Ted's actions both before and following the parties' separation support his acknowledgement. Prior to the separation he participated only minimally in any

interaction that Amy and the children had with Amy's extended family. On weekends that Amy worked in the early morning hours Ted would take the children and leave home for the day or both days, neither leaving a message nor calling to tell Amy where he and the children were. He would keep the children away from home until late in the evenings, and occasionally overnight. Although Ted asserts that Amy always knew where he and the children were, the evidence shows that they would at times be at his parents' home, at times at a cousin's home, at times at another cousin's home, and at times yet elsewhere, all without Ted informing Amy of the location or locations at which they would be.

Since the parties separated Ted has refused all requests from Amy to exchange visitation times. These have included reasonable requests to allow her and the children to visit an elderly, sick grandmother; to allow her and the children to travel during daylight hours when going to Illinois to visit at Christmas time; and to allow her and the children to attend a grandmother's funeral. Although Amy does not work on Wednesdays, Ted has refused her requests to have the children with her at times while he is working on Wednesdays. He justifies his behavior by explaining that it is, "Because the courts told me to have one week here and one week there," and acknowledges his intent that Amy have no time with the children "other than what's ordered."

On Amy's birthday Ted did not provide the children any time with her or have them call her. When the children are with Ted he does not have them call Amy. Amy calls to visit with the children, but Ted sometimes does not return her calls and other times greatly delays any response.

Ted does not inform Amy of medical care the children receive while in his physical care. Amy testified that on one occasion she became aware Ted had taken Kelsey to a doctor and received medication. She testified she asked Ted what was going on, what the medicine was, and when Kelsey needed to take it, and his response was, "Don't worry about it. You didn't pay for the bills. I did."

By way of contrast, Amy has supported and will support Ted's relationship with the children. She feels it is important that the children have a relationship with him. Prior to the parties' separation Amy encouraged and participated in the children's interaction with Ted's parents and other members of Ted's extended family. After the separation, for Ted's birthday Amy and the children made a picture frame, put a picture of the children in it, and gave it to Ted. For Christmas Amy and the children picked out a Christmas ornament, put the children's picture on it, and gave it to Ted.

Amy does keep Ted informed of how the children are doing while in her care. When a doctor recommended that Emily see a dentist and Amy took her to one, Amy wrote a note to Ted telling him she had done so. Amy recently took Kelsey to an emergency room for what turned out to be pneumonia. Upon leaving the emergency room she called Ted and left a message.

When the parties were together and the children were hurt, they would go to Amy. When they were upset, they would go to Amy. Amy is the parent to whom the children looked to meet their physical needs, take care of their physical pains, and meet their emotional needs.

We are not unaware of either Ted's concerns about Amy (and Amy's brother William) or Amy's concerns about Ted, all as mentioned in the trial court's

ruling. Among these the court noted that Amy had incurred an OWI charge shortly after the parties' separation, while further noting that the episode appeared to be "situational" and not "habitual;"<sup>1</sup> that Amy had arguably over-extended herself financially; and that Amy had exposed the children to a "relationship that is not their best interest to witness."<sup>2</sup> We note that with the exception of the three we have just listed, the trial court merely mentioned these matters as "concerns" of the parties and made no express findings that such "concerns" were well-founded or were a deciding factor in its physical care decision. We also note that Ted agreed that since the August 31, 2006 temporary custody order, "[T]he only thing that's been concerning is Amy got an OWI."

We have found that as between the parties Amy has provided the very great majority of the children's care, Amy can and will better support Ted's relationship with the children, and when the parties were together the children looked to Amy for their care and comfort. We conclude these facts outweigh the "concerns" of Ted noted by the trial court, and respectfully disagree with its conclusion that Ted will better support the relationship between the children and Amy than Amy will support the relationship between the children and Ted. We accordingly modify the trial court's ruling and place responsibility for the physical

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<sup>1</sup> Amy testified the incident occurred on her birthday, after the parties separated, when she did not have the children, and that she had never had any other criminal charge and did not regularly drink.

<sup>2</sup> Amy had developed a friendship or relationship with a male co-employee at Menard's. The district court did not mention, and apparently did not view with similar disapproval, the fact Ted had developed a friendship or relationship with a female, recently a co-employee of his, who with her small son was at times present in Ted's home when the parties' children were there and at times spent the night there.

care of the children with Amy, subject to Ted's rights of visitation and obligation to pay child support as determined by the district court on remand.

**B. Property Division.**

Amy claims the trial court failed to make a just and equitable property division, erring in determining the market value of the parties' home. The parties purchased the home in 2003 for \$81,000. Ted, with assistance from his father, did some renovating and remodeling, which would appear to add some value. However, there was testimony that the market value of homes on small, rural acreages, such as the parties' home is, had "really gone down" between the date of purchase and the date of trial.

The trial court valued the home at \$82,000. Although this figure is clearly at the low end of the possible values shown by the evidence, it is within the permissible range of the evidence. Where the value is within the permissible range of the evidence we will not disturb it on appeal. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999); *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997); *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994). We therefore affirm the trial court on this issue.

**C. Trial Attorney Fees.**

Amy claims the trial court abused its discretion by failing to award her trial attorney fees. An award of attorney fees lies in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award must be for a fair and reasonable amount, and based on the parties'

respective abilities to pay. *In re Marriage of Coulter*, 502 N.W.2d 168, 172 (Iowa Ct. App. 1993).

The trial court found that Ted earned \$37,812.00 in 2006, and expected to earn a comparable amount in 2007, and that Amy earned \$10,960.10 in 2006, and it was reasonable to expect her income would remain near that level.

Amy had already paid her attorney \$1,500.00. The trial court ordered that each party be responsible for his or her own attorney fees. Although the trial court would not have abused its considerable discretion by awarding Amy additional attorney fees, we are unwilling to conclude that under the circumstances its decision abused that discretion.

#### **D. Appellate Attorney Fees.**

Amy requests an award of \$4,000 appellate attorney fees, in part “incurred for the preparation of the Application for Stay Order and supporting brief . . . .”<sup>3</sup> Such an award rests in this court’s discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). The factors to be considered include the needs of the party requesting the award, the other party’s ability to pay, and the relative merits of the appeal. *Id.* We award Amy \$2,500 in appellate attorney fees.

#### **V. DISPOSITION.**

We affirm the trial court’s award of joint legal custody and modify the physical care provisions of the court’s decree by placing responsibility for the physical care of the children with Amy. Because our resolution of the physical care issue will require modification of the decree’s child support, visitation, and related provisions, we remand those issues to the trial court for such further

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<sup>3</sup> Amy filed an application seeking a stay of the trial court’s order placing physical care of the children with Ted. Our supreme court denied the stay in a July 25, 2007 order.

proceedings not inconsistent with our decision as may be necessary. In all other respects we affirm the trial court's decree.

We award Amy \$2,500 in appellate attorney fees. Costs on appeal are taxed one-fourth to Amy and three-fourths to Ted.

**AFFIRMED AS MODIFIED AND REMANDED.**

**IN THE COURT OF APPEALS OF IOWA**

No. 7-920 / 07-1070  
Filed January 30, 2008

**IN RE THE MARRIAGE OF HEATHER WOODWARD AND NATHAN MOHR**

**Upon the Petition of  
HEATHER RAE WOODWARD,**  
Petitioner-Appellant,

**And Concerning  
NATHAN LEE MOHR,**  
Respondent-Appellee.

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

Heather Rae Woodward challenges the custodial provision of the decree dissolving her marriage to Nathan Lee Mohr. **AFFIRMED IN PART AND REVERSED IN PART.**

Kara L. Minnihan of Minnihan Law Firm, Onawa, for appellant.

Joseph J. Heidenreich of Dresselhuis and Heidenreich Law Firm, Odebolt,  
for appellee.

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

**SACKETT, C.J.**

Heather Rae Woodward challenges the custodial provision of the decree dissolving her marriage to Nathan Lee Mohr. She contends she, not Nathan, should have been granted primary physical care of the parties' son born in October of 2003. She also contends if she is not awarded primary physical care she should be granted extraordinary visitation. She also argues the district court erred in making her responsible for the first \$250 of her son's medical expenses each year. We affirm the custody and visitation provisions. We reverse on the medical expense issue.

**Scope of Review.** Our standard of review in dissolution-of-marriage proceedings is de novo. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998). In a de novo review we examine the entire record and adjudicate anew the issues properly presented on appeal. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1982). We give weight to the fact findings of the trial 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 Grady-Woods*, 577 N.W.2d 851, 852 (Iowa Ct. App. 1998). We approach this issue from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992); see also *In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992).

**Background and Proceedings.** The parties married in September of 2004 and separated in March of 2005. Heather filed the petition for dissolution that led to this appeal in May of 2006. In July of 2006 the parties stipulated that a temporary custody order could be entered wherein they would share physical

care of their son on a week-to-week basis. Heather and Nathan conceded they had difficulty in communicating while sharing care, however they both cooperated and the shared physical care they stipulated to continue for ten months until the case came to trial in May of 2007. Prior to trial the parties had stipulated to the division of their assets and debts and agreed that the issues for trial be narrowed to child custody, visitation, child support, attorney fees, and court costs.

The district court heard testimony from a number of witnesses who were acquainted with the couple and their child. On May 8, 2007 the district court entered a decree of dissolution determining both parties were good parents but that Nathan should be primary custodian and Heather should have visitation. Heather was ordered to pay child support of \$134 a month. Nathan was required to provide medical insurance for Taylor. Heather was to pay the first \$250 of uncovered medical expenses and the balance of the expenses were to be allocated thirty percent to Heather and seventy percent to Nathan. Nathan was required to pay \$1000 towards Heather's attorney fees. Court costs were assessed one half to each party.

In reaching its custodial award the district court found the child was developmentally delayed and would require special assistance if he is to attain normal levels of development. The court further found that Nathan was the first parent to recognize the child's needs, whereas Heather did not initially recognize them and she rejected an education specialist's advice. The court found Nathan slightly more mature, stable, and responsible than Heather and found he was more likely to bring their child to mental and social maturity and properly provide for his physical health.

The child was born with a congenital heart defect and he had two surgeries in his first ten days of life and was kept in the hospital for a month following his birth. He had hearing problems that appear to have been resolved through medical intervention. He is developmentally delayed in a number of areas. At thirty-seven months old he was tested and his level of communication was at twenty-two months, his cognitive ability at nineteen months, and his social level was at twenty-seven months. He also appeared to have low oral motor skill in his lips and lower jaw and when speaking he has significant stuttering including multiple part and whole word repetitions. Educational experts opined the child will need pre-academic skill building as well as speech and language services and that he should attend pre-school special education all day every weekday.

**Primary Physical Care.** Heather contends that she has been the child's primary caretaker his entire life. We conduct a de novo review of physical care awards. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). The trial court found and we agree that the record shows that Heather was the primary caregiver during the first two years of the child's life. In assessing who should be a child's physical caretaker, we consider whether one parent has historically been the primary caregiver, although this factor is not controlling. *In re Marriage of Decker*, 666 N.W.2d 175, 178 (Iowa Ct. App. 2003). This consideration is given due weight; however, the court must consider all relevant factors in determining which parent is better able to provide for the long-term best interests of the child. See *In re Marriage of Kunkel*, 546 N.W.2d 634, 636 (Iowa Ct. App. 1996).

Granting a parent who has been the primary caregiver primary physical care provides continuity and stability and is generally the least disruptive alternative and the one most likely to promote the child's long-term interests. See *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007). The district court here reasoned and we agree that because the parties have shared the child's physical care for nearly a year, placement with Nathan would be no more disruptive than placement with Heather. Furthermore, the child was less than three years old when the joint care arrangement was made; thus, his memory of the time he was in Heather's primary care is less than it would be had he been older. We therefore proceed to consider other factors.

We recognize both parties have strengths and weaknesses. Their son was born when they both were of a young age. Following their separation they both took up residence with members of the opposite sex who also have a relationship with their child. Heather testified she had immediate plans to marry when the dissolution was completed, while Nathan indicated he may take more time before doing so. It appears from the record that Heather's boyfriend cares about the child and treats him with respect as does Nathan's girlfriend.

Both parties had a number of witnesses testify that they were the better parent. Nathan recognized the child had problems. Heather did not recognize the problems until the time of trial. Heather's witnesses testified they found the child to be perfectly normal. Evidence from professional educators, some of whom opined that Nathan should have custody, found the child to be seriously developmentally delayed. Heather's inability to recognize the child's delayed

development appeared to be the turning point for the district court in the custody dispute.

Our review of the record causes us to agree with the district court reasoning that Nathan should be named primary custodian.

**Visitation.** Heather was given visitation every other weekend from five o'clock in the afternoon on Friday until five o'clock in the afternoon on Sunday, and in addition, every Wednesday evening from five to eight o'clock. She was also given alternating holidays and three weeks in the summer. She contends she should have substantially more visitation. It was recommended by the educational experts that the child needed structure and consistency in care. We find nothing that supports granting Heather additional visitation.

**Uncovered Medical Expenses.** Heather contends the district court erred in requiring her to pay the first \$250 of uncovered medical expenses. Heather contends that under rule 9.12 of the child support guidelines, the district court was bound to order that Nathan pay for the first \$250 of uncovered medical expenses. Rule 9.12 provides:

In addition, the court shall enter an order for medical support as required by statute.

“Uncovered medical expenses” means all medical expenses for the child not paid by insurance. *The custodial parent shall pay the first \$250 per year per child of uncovered medical expenses up to a maximum of \$500 per year for all children. Uncovered medical expenses in excess of \$250 per child or a maximum of \$500 per year for all children shall be paid by the parents in proportion to their respective net incomes. “Medical expenses” shall include, but not be limited to, costs for reasonably necessary medical, orthodontia, dental treatment, physical therapy, eye care, including eye glasses or contact lenses, mental health treatment, substance abuse treatment, prescription drugs, and any other uncovered medical expense. Uncovered medical expenses are not to be deducted in arriving at net income.*

(Emphasis supplied).

Nathan disagrees with Heather's position. He contends that the issue must be addressed under Iowa Code Chapters 598 and 252E (2005), and rule 9.12 does not apply.

Iowa Code section 598.21B(3) provides:

Medical support. The court shall order as child medical support a health benefit plan as defined in chapter 252E if available to either parent at a reasonable cost. A health benefit plan is considered reasonable in cost if it is employment-related or other group health insurance, regardless of the service delivery mechanism. The premium cost of the health benefit plan may be considered by the court as a reason for varying from the child support guidelines. *If a health benefit plan is not available at a reasonable cost, the court may order any other provisions for medical support as defined in chapter 252E.*

(Emphasis supplied).

Nathan argues that neither he nor Heather have health insurance coverage at their places of employment, consequently 598.21B(3) authorizes the district court to order medical support as it sees appropriate as long as it is for medical support as defined in chapter 252E.

Iowa Code section 252E.1(9) provides:

9. "Medical support" means either the provision of a health benefit plan, including a group or employment-related or an individual health benefit plan, or a health benefit plan provided pursuant to chapter 514E, to meet the medical needs of a dependent and the cost of any premium required by a health benefit plan, *or the payment to the obligee<sup>1</sup> of a monetary amount in lieu of a health benefit plan*, either of which is an obligation separate from any monetary amount of child support ordered to be paid. Medical support is not alimony.

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<sup>1</sup> Iowa Code section 252E.1(11) defines obligee: 11. "Obligee" means a parent or another natural person legally entitled to receive a support payment on behalf of a child.

Heather is paying a modest child support. Consequently we do not disagree with the district court that requiring her to pay the first \$250 in uncovered expenses is equitable. However, rule 9.12 provides the custodial parent “shall pay” which language is mandatory. See Iowa Code § 4.1(30)(a). The word “shall” does not mean “may.” *State v. Lockett*, 387 N.W.2d 298, 301 (Iowa 1986). We also reject Nathan’s argument that we should address the issue under Iowa Code chapters 598 and 252E. There is no claim that the district court was asked to apply these chapters in allocating the child’s medical expenses between the parties. Nathan has been ordered to obtain medical insurance for the child and that provision has not been challenged on appeal.

The district court erred in ordering Heather to pay the first \$250 in unreimbursed medical expenses.

**Attorney Fees.**

Both parties request appellate attorney fees. Such an award rests within our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We do not award attorney fees. Costs on appeal are taxed seventy-five percent to Heather and twenty-five percent to Nathan.

**AFFIRMED IN PART AND REVERSED IN PART.**