IN THE COURT OF APPEALS OF IOWA

No. 0-855 / 10-1129
Filed February 9, 2011

IN RE THE MARRIAGE OF CHRISTOPHER MICHAEL SCHEAR AND SHELLY KAY SCHEAR

Upon the Petition of
CHRISTOPHER MICHAEL SCHEAR,
Petitioner-Appellant/Cross-Appellee,

And Concerning
SHELLY KAY SCHEAR,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Dallas County, Gary G. Kimes, Judge.

Christopher Schear appeals, and Shelly Schear cross-appeals, from various provisions of a dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Thomas Foley, Leslie Babich, and Kodi A. Brotherson of Babich Goldman, P.C., Des Moines, for appellant.

Catherine K. Levine, Des Moines, Carmen E. Eichmann, Des Moines, and Scott Bandstra, Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.

DANILSON, J.

Following the dissolution of his five-year marriage, Chris Schear appeals from portions of the decree fixing the physical care and visitation for the parties' two children, as well as the property distribution, child support, and attorney fees. Shelly cross-appeals, arguing the district court erred in denying her request for spousal support. In our de novo review, we affirm the physical care provisions of the dissolution decree, with modifications to the visitation schedule. We conclude that documents not made part of the record were used to determine Chris's income and, accordingly, we remand for a modification of his child support obligation. We affirm the alimony and property provisions of the dissolution decree, except to modify by omitting the requirement that Chris be required to reimburse Shelly for the net equity she received from the sale of her premarital home. We also modify the award of trial attorney fees, and decline to award Shelly appellate attorney fees.

I. Background Facts and Proceedings.

Chris and Shelly Schear married in January 2005. They have two children (ages three and four). After their marriage, the parties lived in a home in West Des Moines that Chris purchased in 2001. Chris and Shelly separated in June 2009, and Shelly moved to a home she purchased in Altoona. Chris remained in the marital home. Chris is thirty-seven years old and is in good health. Shelly is thirty-four years old and is in good health except for some continuing pain in her

neck, shoulders, and lower back as a result of a car accident she was involved in when she was fourteen years old.[1]

Chris earned his associate's degree from NIACC, and Shelly earned her associate's degree from DMACC. The parties met in October 2003 when they both worked for Principal Financial—Chris as an IT network analyst and Shelly as a marketing assistant. Shortly after the birth of their first child, the parties agreed that Shelly would reduce her hours to thirty hours per week from forty hours per week, due to stress, fatigue, and feeling overwhelmed.[2] She has continued to work thirty hours per week since that time. Shelly explained that even if she wanted to, the option to increase to forty hours per week is not currently available for her due to the economy. Shelly works from approximately 9:00 a.m. to 3:00 p.m. Monday through Friday, and earns $27,072 annually.

Chris was terminated from Principal for unauthorized Internet use in 2005 and thereafter obtained employment at Ruan Transport Company as a manager of network services. He continues to work in that capacity and earns $79,573 annually. Chris works from 8:00 a.m. to 5:00 p.m. Monday through Friday.

After their first child was born, the parties agreed that Shelly's mother, Kay, would provide daycare when Shelly went back to work. Kay stayed overnight with the family during the workweek, arriving on Sunday evening and leaving Friday late afternoon, and was paid $150 per week for her care. This arrangement continued after the birth of the parties' second child as well. Kay

[1] Shelly testified that these issues have not interfered with her ability to care for the children.

[2] The child was "an extremely colicky baby," and Shelly also developed mastitis after the birth.

also provided care for the children when Chris and Shelly were at home. She would normally wake the children in the morning and get them ready for the day while Chris and Shelly were preparing to go to work. She also helped with meals and laundry. Shelly transported the older child to and from preschool on her way to work.

Chris filed for dissolution of the parties' marriage on February 18, 2009. Shelly testified that Chris's involvement with the children completely turned around at that time, with him wanting to be involved with everything. Although the parties continued to live together in the marital home, they established "informal rules" in which they alternated days in providing complete care for the children, intending to "simulate" a schedule where the party providing care was completely responsible for the children. They also followed this schedule on the weekends.

In June 2009, Shelly purchased a home in Altoona and moved out of the family home. The district court entered a temporary order granting the parties joint legal custody of the children and establishing a shared physical care schedule where Chris had the children overnight on Sundays and Mondays, Shelly had the children Tuesdays, Wednesdays, and Thursdays, and the parties alternated weekends. Chris also had visitation on Thursday evenings on the weeks he did not have the children over the weekend. The court ordered Chris to pay temporary child support in the amount of $775.55 per month.[3] Shelly's request for temporary alimony and attorney fees was denied.

[3] The temporary order also addressed Shelly's requirement to maintain health insurance for the children, and ordered Chris to pay seventy-four percent and Shelly to

Chris and Shelly met with Joyce Feddersen, a licensed mental health therapist at Mercy Hospital, for three co-parenting counseling sessions during the pendency of these proceedings.[4] The parties discussed custody issues and reviewed possible visitation schedules. Feddersen's notes reflect that the goal of the sessions was to help the parties learn how to communicate better with each other. Shelly also met with Feddersen for individual counseling. It was at one of those sessions that Shelly presented Feddersen with an e-mail from Chris stating that if Shelly did not agree to joint physical custody, he would expose what he views as damaging information about Shelly and her family. As a result of Chris's behavior at their third session, Feddersen refused to have additional sessions and opined that Chris was "accusatory and judgmental" and that his negative behavior made it impossible for the parties to adequately communicate. Chris later filed a motion in limine to prohibit Shelly from calling Feddersen as an expert witness at trial.

The dissolution trial was held over four days in March 2010. The main issue at trial was physical care of the parties' two children. The court overruled Chris's motion in limine and allowed Shelly to call Feddersen to testify as to any opinion she had gleaned in her counseling sessions as to the issue of physical care of the children.

The court entered its decree in June 2010, and awarded joint legal custody with Shelly having primary physical care of the children, noting:

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pay twenty-six percent of the children's daycare, preschool, and uncovered medical expenses.

[4] Two of these sessions took place in April 2009, and the third session took place in October 2009.

"Christopher has taken an active part in his children's lives, but his participation and interaction primarily has occurred after he filed the divorce petition." The court further explained:

> Christopher views the divorce proceedings as a competition, as reflected in an email to his girlfriend that stated he has "limited time to gain an advantage." The Court finds that the parties cannot communicate with each other regarding the parenting of the children.

The court set a visitation schedule of alternating weekends and one midweek evening visitation, as well as alternating holidays and two weeks in the summer. Chris was ordered to pay $1275.31 per month in child support. The court denied Shelly's request for alimony, stating: "Shelly enjoys a similar lifestyle in her home in Altoona and does not need alimony to ensure a standard of living comparable to that she enjoyed during the marriage." The court ordered Chris to pay Shelly the $19,165 equity in her premarital home as part of the property division. The court also ordered Chris to pay $11,112.60 of Shelly's attorney fees. The parties now appeal.

II. Scope and Standard of Review.

An action for dissolution of marriage is an equitable proceeding, so our review is de novo. Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). We are not bound by the district court's findings of facts, but we give them deference because the district court has a firsthand opportunity to view the demeanor of the parents and evaluate them as custodians. *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa

2004). Our determination depends on the facts of the particular case, so precedent is of little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

III. Testimony of Joyce Feddersen.

The parties met with Joyce Feddersen for three co-parenting counseling sessions in April and October 2009. Feddersen is a mental health therapist who has been licensed in Iowa since 1985. Chris's answers to interrogatories, entered as an exhibit at trial, discussed in detail the counseling sessions with Feddersen.

In December 2009, Chris filed a motion in limine raising several grounds to prohibit Shelly from calling Feddersen as an expert witness to testify as to any opinion she had on the issue of physical care. On appeal, Chris continues to maintain that Feddersen should not have been permitted to testify as she was not appointed a custody evaluator in the case; Feddersen served as a custody mediator[5] and was prohibited by court rules from testifying; and her testimony was confidential pursuant to Iowa Code section 622.10 (2009).

We first observe that the mediation rules cited by Chris relate only to lawyer mediators.[6] Because Feddersen is not a lawyer, she was not prohibited from testifying by the rules cited by Chris. Feddersen was also not appointed as a custody evaluator but like any expert, her testimony was entitled to be given as

[5] Feddersen stated she met with the parties for "co-parenting counseling." She explained that the sessions were improperly referred to as "custody mediation" in her paperwork. The district court had the opportunity to observe the witness and make determinations as to her credibility, and we give deference to the district court's findings as to this issue on appeal. *See Zebecki*, 389 N.W.2d at 398.

[6] In his motion in limine, Chris cites various rules in Chapter 11 Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes.

much weight as it deserved, considering her education, experience, the reasons given for the opinion, and all other evidence in the case. *See In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994). However, the fact finder is not bound by the expert's opinion. *Nicolou v. Clements*, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994).

In respect to Chris's claim that Feddersen's testimony was a breach of confidentiality, Iowa Code section 622.10 (2009) provides in relevant part:

> A . . . counselor [or] mental health professional . . . who obtains information by reason of the person's employment, . . . shall not be allowed, *in giving testimony,* to disclose any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline.

Id. at § 622.10(1) (emphasis added). Section 622.10 also provides an exception to the privilege in certain circumstances:

> The prohibition does not apply to cases where the person in whose favor the prohibition is made *waives* the rights conferred . . . .

Id. at § 622.10(2) (emphasis added).

The district court considered Chris's motion in limine at the beginning of trial, and stated:

> [B]oth parties have been fully aware of the intention to call Ms. Feddersen in this matter since [December 2009]. It is the Court's understanding in reviewing the answers to interrogatories that Chris actually requested counseling through Joyce Feddersen at Mercy and he set that up. . . . In addition, it appears to me that the primary issue before this Court, even though they are all important, is the physical care of the children. It seems to me that the report of Ms. Feddersen would be helpful to the Court in its consideration particularly to that issue. Certainly there is no surprise here today with calling Ms. Feddersen to testify. I am certainly not going to allow her to testify as to settlement discussions. Everybody knows that that is inappropriate. But I am going to allow her to testify if it

> can be helpful to the Court. . . . And to the extent you want a specific ruling as to 622.10, it is overruled.

Feddersen proceeded to testify, but was guarded in her answers in fear that Chris would sue her or Mercy Hospital. She agreed that Chris had not consented to her testifying, and stated she would only talk about Shelly. With that limitation, Feddersen proceeded to offer her opinion (that she had gleaned from her meetings with Shelly, both individually and with Chris) that Shelly would be the better parent to have primary physical care of the children.

On appeal, Chris again alleges that Feddersen should not have been allowed to testify as to confidential and privileged communications she had with him. *See id*.; *In re Marriage of Hutchinson*, 588 N.W.2d 442, 446 (Iowa 1999) (noting that section 622.10 prohibits "testimonial use of confidential information"). Shelly disagrees, and states that the district court properly allowed Feddersen to testify because the "focus of the trial was custody of the children," and because Chris waived his right to confidentiality by his answers to interrogatories in which he repeatedly referred to custody "counseling." *See Ashenfelter v. Mulligan*, ___ N.W.2d ___, ___ (Iowa 2010) (prohibition does not apply when the party claiming the privilege brings the medical records into issue).

On our de novo review of the record, we give no weight to Feddersen's testimony, as we find there was ample other evidence for the court's decision in regard to physical care.

IV. Custodial Issues.

A. Physical Care. Chris contends the district court should have awarded joint physical care of the children, or in the alternative, extraordinary visitation to

Chris.[7] In support of this contention, Chris states that the children "were thriving under the [temporary] arrangement and the regular and relatively equal contact with both parents"; that he and Shelly are both suitable custodians; and that the court erred in finding the parties are unable to communicate. Chris also points to Shelly's health issues as a reason for a shared care schedule.

Shelly states the district court's ruling on the physical care arrangement is proper. She points to Chris's admissions that he did not provide much care for the children when they were younger; his lack of involvement in the children's speech therapy; Chris's intimidating and threatening e-mails to her; and the parties' inability to agree about daily matters concerning the children. Shelly further states that her health issues do not interfere with her ability to parent.

The court is to determine physical care placement according to which parent can minister more effectively to the children's long-term best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996). "The objective of a physical care determination is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity." *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007); *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998) ("The critical issue in determining the best interests of the child is which parent will do

[7] Chris argues the district court's decree includes provisions that are "clearly over-reaching and/or patently inequitable," and cites as examples the order that the parties not to refer to significant others or spouses as mother or father of the children, and the award to Shelly of final decision-making authority as to where the children attend school and daycare. We decline to specifically address these concerns where it appears Chris has raised them more as examples as to why the decree is inequitable as a whole, rather than specific arguments with supporting authority.

better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other.").

Our supreme court has enunciated the following nonexclusive factors to be considered when determining whether a joint physical care arrangement is in the best interests of the children: (1) "approximation," or what has historically been the care giving arrangement for the children between the parents; (2) the ability of the parents to "communicate and show mutual respect"; (3) the "degree of conflict" between the parents; and (4) the ability of the parents to be in "general agreement about their approach to daily matters." *Hansen,* 733 N.W.2d at 697-99; *In re Marriage of Berning,* 745 N.W.2d 90, 92 (Iowa Ct. App. 2007).

In this case, it is clear that between the parties, Shelly was the primary caregiver for the children for the first several years of their lives. In the evenings when both parties were home, Shelly and her mother provided most of the care for the children. Chris stated that Shelly's mother was the main caregiver for the children and admitted he did little to help with their daily care. As Chris testified, "There isn't much to be active in their life. [They] can't walk and crawl and [are] laying on a baby blanket." Shelly was also the primary caregiver on the weekends. Shelly was involved in every speech therapy session the children attended, and later she was interactive and helpful at the children's preschool. Chris only became more involved in the children's care about the time these proceedings were initiated and the children were two and three years of age.

The record shows several incidents of conflict and lack of communication between the parties. Although the parties are, for the most part, complimentary in their parenting and relationships with the children, Chris was explosive at times

and controlling toward Shelly. Shelly also recalled Chris calling her names in front of the children. Shelly's testimony is supported by Chris's answers to interrogatories in which he was (by his own admission) overly critical of Shelly. The answers demonstrate Chris's negative and accusatory behavior toward Shelly.

The district court also noted differences in the parties' approach to daily matters concerning the children. The record supports the finding that the parties have disagreed in regard to the children's pediatrician, daycare provider, and preschool.

In making its final decision, the district court found Shelly had exhibited a greater involvement and interaction in the children's lives and activities. *See In re Marriage of Crotty*, 584 N.W.2d 714, 717 (Iowa Ct. App. 1998) ("We give consideration to each parent's role in child raising prior to a separation in fixing primary physical care."). It also found Shelly had demonstrated a higher level of maturity and ability to communicate with Chris, which would allow her to better provide care for the children and further their relationship with Chris. In addition, the court noted Chris's statement to his girlfriend that he viewed the divorce proceedings as a competition in which he had "limited time to gain an advantage."

We find the district court rendered its decision based on the appropriate legal factors and assessment of credibility. Because the district court had the opportunity to observe the demeanor of the witnesses, we give weight to its findings, particularly with respect to credibility. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Upon our de novo review of the facts and

circumstances in this case, we find no reason to disturb the district court's award of primary physical care of the parties' children to Shelly for the reasons and facts we have recited. Accordingly, we affirm the physical care decision of the district court.

B. Visitation. Chris requests midweek overnight visitation, longer weekend visitation, four weeks visitation during the summer, and one-half of winter and spring breaks.[8] In the event we affirm the district court's physical care decision, Chris urges that his visitation schedule is too limited and, in fact, is more restrictive than Shelly agreed to in her testimony.

We recognize that midweek visitation schedules should be closely scrutinized on a case-by-case basis. *See In re Marriage of Gulsvig*, 498 N.W.2d 725, 727 (Iowa 1993) (rejecting any midweek visitation rights upon finding that such visitation would not be in the best interests of the child); *In re Marriage of Fish*, 350 N.W.2d 226, 230-31 (Iowa Ct. App. 1984) (denying any midweek visitation upon concluding it would involve "excessive shifting of the child between parents and could impair the child's sense of stability"). However, unless midweek visitation with the non-physical care parent is unduly disruptive, such visitation is appropriate where the parents live in close proximity to each other. *See In re Marriage of Toedter*, 473 N.W.2d 233, 235 (Iowa Ct. App. 1991)

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[8] In this respect, we observe that the district court entered a decree nearly adopting verbatim Shelly's proposed findings of fact and conclusions of law that included the proviso for no midweek overnight visits. As our supreme court recently reiterated:

> We encourage our district courts not to adopt verbatim the proposed findings of fact and conclusions of law prepared by counsel. It is the district court's duty to independently determine the facts, articulate the controlling law, and apply the controlling law to the facts. A court should never abdicate this essential duty of the judicial branch of government to counsel or the parties before the court.

NevadaCare, Inc. v. Dep't of Human Servs., 783 N.W.2d 459, 465-66 (Iowa 2010).

(recognizing a healthy parent-child relationship is to be encouraged and nourished and granting overnight visitation during the week); *In re Marriage of Muell*, 408 N.W.2d 774, 778 n.1 (Iowa Ct. App. 1987) (finding liberal visitation including one overnight visit per week was in the best interests of the children).

In this case, we find that Chris should receive a midweek overnight visitation on the week he does not have weekend visits with the children. In reaching this conclusion, we note that the parties live approximately thirty minutes apart in the Des Moines area, and both have normal and consistent work schedules. During her testimony, Shelly agreed to an overnight visit every week:

> During the week I would like the children to be with Chris one overnight a week and that would depend on the weekends he has the children, that would be on Thursday overnight, and on the weekends I have the children there is a Tuesday overnight so there is not a huge gap in the times he sees the children.

We agree that Chris should be awarded one midweek overnight visitation. Both parties agreed to one midweek overnight visitation each week, such visitation would best allow for continuing and frequent contact with both parents, and is in the best interests of the children. *See id*. (concluding that midweek overnight visitation was appropriate considering both parties agreed and the parties reside in the same town only a short distance apart).

We further conclude it is in the children's best interests that Chris have increased visitation during the summer and spring and winter breaks. We modify Chris's visitation schedule as follows:

1. Overnight visitation on Thursday evenings during each week Chris does not have a weekend visit, from 5:30 p.m. on Thursday until Friday at 8:00 a.m. or when school starts.

2. Overnight visitation on Tuesday evenings during each week Chris has a weekend visit, from 5:30 p.m. on Tuesday until Wednesday at 8:00 a.m. or when school starts.

3. Four weeks of summer visitation, to be exercised in two two-week intervals.

4. Beginning the year the oldest child attends school, Chris shall have visitation beginning at 5:30 p.m. on the day that school releases for Christmas vacation until 10:00 a.m. on December 25. The following year, Chris shall have visitation beginning at 10:00 a.m. on December 25 until 5:30 p.m. on the evening before school reconvenes after Christmas vacation. The parties shall continue alternating this Christmas schedule for each year thereafter.

5. Beginning the year the oldest child attends school, Chris shall have visitation beginning at 5:30 p.m. on the day that school releases for spring break until 5:30 p.m. on the mid-day of the spring break. The following year, Chris shall have visitation beginning at 5:30 p.m. on the mid-day of the spring break until 5:30 p.m. on the evening before school reconvenes after spring break. The parties shall continue alternating this spring break schedule for each year thereafter.[9]

6. The parties shall share in providing transportation for the children. If the parties are unable to agree otherwise, Shelly shall minimally be responsible for providing return transportation for the children from Chris's visitation that concludes at 5:30 p.m. preceding a school day. Shelly shall also be responsible for providing return transportation for the children over holidays and Christmas and spring breaks when the children are in Chris's care. All transportation not provided by Shelly shall be provided by Chris.

All other aspects of the district court's decree pertaining to visitation are affirmed. We emphasize these visitation periods, coupled with those granted by the court decree, are the minimum periods. The parents are expected to actively encourage positive relations between the other parent and the children.

[9] This provision assumes the children's school recognizes a traditional spring break. If not, the parties should divide any spring break time evenly, and alternate years on that schedule.

V. Child Support Calculation.

Chris argues it was improper to include income from the Iowa State University Foundation in his gross income for purposes of calculating child support. Chris states that no evidence in regard to income from the Iowa State University Foundation was presented at trial. However, in her proposed findings of fact and conclusions of law, Shelly included documentation claiming Chris's 2009 income was higher than he testified at trial (based on his 2009 W-2 from Ruan Transport), and that he had $4251 in additional income from the Iowa State University Foundation. Shelly failed to move to reopen the record to submit the documents. Chris alleges the court erred in adopting Shelly's proposed findings because the findings included documentation (namely, Exhibit J-1) that was not properly offered and admitted to the court.

We agree. "In calculating child support, the first step is to determine the parents' current monthly net income from the most reliable evidence presented." *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 51 (Iowa 1999). Here, the 2009 Ruan W-2 showing Chris's income to be $84,242.55 and the 2009 Iowa State University Foundation W-2 showing Chris's income to be $4251.25 submitted by Shelly after trial were never offered, admitted, or subjected to objection. *See* Iowa R. App. P. 6.801. Facts not properly presented to the court during the course of the trial should not have been considered by the district court and will not be deemed admitted on appeal. *See Rasmussen v. Yates*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994)

Chris also contends it was inequitable to use Shelly's actual earnings, rather than her earning capacity, in computing her gross income. He points to

her voluntary decision to work thirty hours per week after the birth of the parties' first child, and states there is no reason she could not now work forty hours per week. For purposes of calculating child support, it may be appropriate to consider earning capacity rather than actual earnings when a parent voluntarily reduces his or her income or decides not to work. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997). Before using earning capacity rather than actual earnings we must find that if actual earnings were used, "substantial injustice would occur or adjustments would be necessary to provide for the needs of the child and to do justice between the parties." *Id*.

Upon our review of Shelly's "employment history, present earnings, and reasons for failing to work a regular work week," we agree with the district court's conclusion that Shelly's income should not be calculated on a forty-hour work week. *See id*. (noting factors to consider when assessing whether to use the earning capacity of a parent). Chris presented no evidence to support the finding that Shelly could work an additional ten hours per week (either at her current job at Principal or anywhere else), other than merely stating that she could. Shelly testified that she decreased her hours during the marriage upon agreement with Chris. She also testified that her former supervisor at Principal was unable to increase her hours due to the economy. Without evidence to support Chris's contention, we cannot find that "substantial injustice" would result by using Shelly's actual earnings to calculate child support.

On remand, the district court shall recalculate support without regard to the W-2 income statements attached to Shelly's proposed findings of fact and

conclusions of law. The recalculation shall also afford Chris any extraordinary visitation credit to which he may be entitled.

VI. Property and Alimony Issues.

Property division and alimony should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). Alimony is not an absolute right; an award depends upon the circumstances of the particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). In making an award of alimony, the court considers the factors set forth in Iowa Code section 598.21A(1). *See In re Marriage of Olson*, 705 N.W.2d 312, 315 (Iowa 2005).

A. Property Division. Chris contends the district court's determination that his property settlement payment to Shelly should include $19,165 for the value of Shelly's premarital home is inequitable. He contends the court failed to consider the value of Chris's premarital property, and the fact that both parties used premarital assets to pay for joint expenses and debts.

Iowa Code section 598.21(5) requires the court to divide "all property, except inherited property or gifts received by one party" equitably between the parties. "This broad declaration means the property included in the divisible estate includes not only property acquired during the marriage by one or both of the parties, but property owned prior to the marriage by a party." *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005) (citing *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994)).

Premarital property is not set aside like gifted and inherited property. *Fennelly*, 737 N.W.2d at 102; *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa

Ct. App. 1996). The district court should not separate a premarital asset from the divisible estate and automatically award it to the spouse who owned it prior to the marriage. *Fennelly*, 737 N.W.2d at 102; *Sullins*, 715 N.W.2d at 247. Rather, property brought into the marriage by a party is merely a factor among many to be considered under section 598.21(5). *Schriner*, 695 N.W.2d at 496. "This factor may justify full credit, but does not require it." *Miller*, 552 N.W.2d at 465. Other factors under section 598.21(5) include the length of the marriage, contributions of each party to the marriage, the age and health of the parties, each party's earning capacity, and any other factor the court may determine to be relevant to any given case. *See Fennelly*, 737 N.W.2d at 102.

Considering the facts and circumstances of this case, we agree with Chris that setting aside the value of Shelly's premarital home would be inequitable, because Chris's premarital property was not set aside to him and that both parties used their premarital property to pay joint expenses and debt. Here, Chris and Shelly each owned a home at the time the parties were married. Shelly sold her home and moved in with Chris. The value of Shelly's home ($19,165) was deposited in the parties' joint account and used to pay joint expenses and debts. During the marriage, the parties also used the money in Chris's premarital Roth IRA ($12,101) to pay joint credit card debt. To make the property division equitable in this case, we modify by eliminating the requirement that Chris reimburse Shelly for the net equity she received from the sale of her premarital home.

B. Alimony. On cross-appeal, Shelly argues the district court erred in failing to grant her request for alimony in the amount of $750 per month for five

years. She contends an award of alimony is appropriate in this case, considering her depression, continuing medical problems from a childhood car accident, her monthly expenses, and the disparity of the parties' incomes.

In concluding "this is not an appropriate case for alimony," the district court stated:

> Shelly has requested rehabilitative alimony. This is a relatively short-term marriage of five years. All of Shelly's health issues preceded the parties' marriage. At the time of their marriage, Christopher and Shelly had approximately the same amount of formal education. Shelly completed some undergraduate courses during the marriage. Although Shelly testified that she would like to go back to school, there were no definite plans. Finally, the parties did not live an extravagant lifestyle during their marriage. They lived in a house purchased by Christopher three years before their marriage and lived a comfortable life with their two children. Shelly enjoys a similar lifestyle in her home in Altoona and does not need alimony to ensure a standard of living comparable to that enjoyed during the marriage.

Although our review is de novo, the district court is given considerable latitude in determining spousal support. *See Anliker*, 694 N.W.2d at 540. "We will disturb that determination only when there has been a failure to do equity." *Id.* We conclude the district court's decision not to award alimony is equitable for the reasons recited by the district court.

VII. Attorney Fees.

Attorney fee awards are not a matter of right but rather rest within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). Consideration is given to the financial condition of the parties and their respective abilities to pay. *In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977). Any award of attorney fees must be fair and reasonable. *Id.* To

overturn an award of attorney fees, the complaining party must show the trial court abused its discretion. *Romanelli*, 570 N.W.2d at 765.

Chris argues the court should not have ordered him to pay $11,112.60 to Shelly for trial attorney fees in light of the fact that a "large amount of Shelly's attorney fees were incurred for legal proceedings which resulted in her being sanctioned by the court."[10] The sanction required Shelly to pay $500 towards Chris's attorney fees, which remains unpaid. Chris further requests that if the court determines he should pay a portion of Shelly's attorney fees, he should be allowed to make that payment by transferring the award from one of his retirement accounts via a Qualified Domestic Relations Order. We conclude the district court did not abuse its discretion in ordering Chris to pay some of Shelly's attorney fees, considering the parties' financial conditions and respective abilities to pay. We also recognize that, at the time of trial, Chris owed more than $26,000 in attorney fees. Both incurred some legal fees in proceedings resulting in Shelly being sanctioned. We modify Shelly's award of attorney fees to $5000.

Chris also alleges the district court abused its discretion in requiring him to pay the full expert witness fee for Feddersen in the amount of $1250. He contends the maximum the court can assess to him is $150 for the day

[10] In July 2008, after the court entered an order on temporary matters, Shelly filed an application for temporary alimony and attorney fees. Chris resisted the motion and thereafter filed a motion for sanctions.

In his motion for sanctions, Chris alleged that "the absence of provisions regarding alimony and attorney fees was specifically negotiated between the parties," and that Shelly was now seeking "an impermissible second bite at the proverbial apple in violation of the parties' explicit agreement" that he would not pay any temporary alimony or attorney fees to Shelly. After a hearing, the court determined Shelly's application was "not well grounded in fact . . . and was filed for improper purpose such as to harass or cause an unnecessary increase in the cost of litigation." The court imposed a sanction upon Shelly by requiring her to pay $500 towards attorney fees incurred by Chris.

Feddersen was called to testify. *See* Iowa Code § 622.72 (stating that additional compensation for expert witness testimony shall not exceed $150 per day); *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992) ("Experts giving deposition testimony are entitled only to the $150 fee."). We agree with Chris that taxation of costs for Feddersen in excess of this amount was error.

Shelly requests an award of $5000 in appellate attorney fees. When determining whether to award such fees, we look to the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *See McKee v. Dicus*, 785 N.W.2d 733, 740 (Iowa Ct. App. 2010). Here, we decline to award Shelly any appellate attorney fees.

VIII. Conclusion.

In our de novo review, we affirm the physical care provisions of the dissolution decree, with several modifications to the visitation schedule to allow Chris more visitation and to require the parties to share in providing transportation for the children. We give no weight to Feddersen's testimony, as we find there was ample other evidence for the court's decision in regard to physical care. We conclude that documents not made part of the record were used to determine Chris's income and, accordingly, we remand for a recalculation of his child support obligation without regard to exhibits outside the record and affording Chris credit for extraordinary visitation to which he may be entitled. We affirm the alimony and property provisions of the dissolution decree, with the modification that Chris not be required to reimburse Shelly for the net equity she received from the sale of her premarital home. We modify the award

of trial attorney fees and limit court costs for Feddersen's expert witness fee to $150. We decline to award Shelly appellate attorney fees. Costs on appeal are taxed equally to Chris and Shelly.

AFFIRMED AS MODIFIED AND REMANDED.