IN THE COURT OF APPEALS OF IOWA

No. 2-1097 / 12-1015
Filed February 13, 2013

**IN RE THE MARRIAGE OF MARIA T. WHITE
AND RODNEY E. WHITE**

**Upon the Petition of
MARIA T. WHITE,**
Petitioner-Appellee,

**And Concerning
RODNEY E. WHITE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Jefferson County, Annette J. Scieszinski, Judge.

Rodney White appeals economic and custodial provisions of a decree dissolving his marriage to Maria White. **AFFIRMED.**

Diana L. Miller and Ashleigh E. O'Connell of Whitfield & Eddy, P.L.C., Mount Pleasant, for appellant.

Marlis J. Robberts of Robberts & Kirkman, L.L.L.P., Burlington, for appellee.

Heard by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Rodney White appeals the economic and custodial provisions of a decree dissolving his marriage to Maria White. He alleges the district court erred in (1) imputing income to him based on the court's determination of his "earning capacity"; (2) valuing and equitably distributing the parties' marital assets and debts; (3) reducing his hours of visitation in comparison to the parties' temporary visitation schedule; (4) failing to consider relocation by Maria; and (5) awarding Maria trial attorney fees. Maria requests appellate attorney fees. Upon our review, we affirm.

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

Rodney ("Rod") and Maria married in 1999. They have three children, born in 2000, 2005, and 2008. The parties separated in January 2011, and Maria filed a petition for dissolution of marriage on February 28, 2011. Both parties continued to live in Mt. Pleasant, Iowa.

Trial on the petition was held in February 2012. At the time of the trial, Rod was thirty-four years old. Rod competed in the 1996 and 2000 Olympic Games in the sport of archery. Thereafter, he began numerous home-based businesses related to his love of archery and hunting. At the time of trial, his main business was Land and Game, a brokerage wherein he sold mostly recreational land. At trial, he explained that his business served a niche market, dealing with high-end buyers who want to buy a farm and customize it to fit their needs from a hunting perspective. He testified there "[were not] a whole lot of sales, and . . . with the economy, [his business] had kind of crashed a bit." Nevertheless, he still almost exclusively sold hunting properties. He testified that

business, along with a few other odd property jobs, including habitat work, building food plots, and removing timber, were his only sources of income at that time, and his only focus.

The amount of Rod's income was disputed. He testified at trial his annual income was $18,000, based upon an average of his five prior year's self-employment income. However, at his prior deposition, he testified he hoped he could earn up to $50,000 a year. When asked if he was capable of earning more than $18,000 a year, Rod answered it was dependent upon numerous factors. At the time of trial, he testified he had only two residential listings, but in some weeks he worked as many as fifty hours. He also testified that he and two partners had recently invested quite a bit of money and time in a business venture, but ultimately they were not able to get the project going. He acknowledged that during the pendency of the dissolution proceedings he deposited an average of $5000 a month into his bank account, and he was spending that amount. Additionally, he testified that he would be paying rent to his parents in the amount of $1400 per month, or $16,800 a year. When pressed as to how he would pay that amount given his stated income of $18,000 a year, he testified "based on the past . . . I have not had an issue paying my bills whatsoever," but he would not further account for any income.

At the time of trial, Maria was thirty-three years old. During the parties' marriage, Maria was a full-time homemaker and bookkeeper for Rod's businesses. She had recently acquired her real estate broker's license, and she had an office in North Liberty, Iowa. At the time of trial she was commuting from

her home in Mt. Pleasant to the office. Maria's income of $19,619 was undisputed.

Another issue at trial was the parties' ability to communicate. Rod testified that Maria was unwilling to communicate with him and became angry when discussing finance-related issues. He also testified she used the children as a bargaining chip, holding him to the letter of the district court's temporary visitation order when he did not do what she wanted. Yet, also admitted into evidence were Maria's recordings of a few phone calls she had with Rod early in the case, wherein Rod was angry, rude, uncooperative, and, at times belittling, while she, with the knowledge she was recording, was generally unresponsive. Rod testified that, in June or July 2011, he told Maria he would only communicate with her via text messages or email, based upon his first attorney's recommendation and with the knowledge he planned to use the writings as trial evidence. The text messages back and forth from the parties were admitted, and they generally showed the parties communicating well, including Maria asking and Rod accepting that the children have extra time with him when she was unavailable.

During the parties' marriage, Maria and Rod formed a joint partnership, White Oak Properties, LLC, also known as White's Labs, in which Maria bred and sold pedigreed dogs. Maria testified after the parties' separation and her moving from the marital residence, she no longer had a place to take care of the dogs and could not afford to continue paying the expenses related to the business. She testified she and her attorney sent Rod's first attorney several letters asking if Rod wanted the business or what his wishes were concerning the business. Rod testified he believed he only saw one letter from his attorney at that time.

Maria testified she then began selling the puppies and dogs because she could not care for them and some were sold for prices lower than her normal asking price. She testified a few puppies were even given away for free, due to the necessity to find them a person who could provide for them. Maria sent Rod text messages after selling the dogs so he would know their selling prices. Maria further testified that the business had been completely wound down and did not have any value left. Rod disputed the value of the business, assigning it a value of $23,500. He testified he believed there were more dogs than Maria claimed, and he stated he believed the negative income reported on their tax returns was not a true representation of the income realized from the business. However, he admitted he was not aware of any assets owned by the business.

Rod testified about his work in improving the marital property to increase the sales amount. He testified the sellers required numerous repairs upon the property that he himself handled, and he testified he believed he should be compensated for the work he performed. However, he admitted the sellers were friends of his and allowed him to live rent-free in the house for two months after the closing when he was making the repairs.

Maria testified that Rod sold marital property, including his truck, a tractor, a mower, a drill seeder and some other equipment. She testified that of the approximately $31,500 in equipment sold, she received nothing. Rod testified he did sell the equipment but testified he did so to make payments on the parties' credit card debt and to pay off his truck. However, he did not have receipts showing where the money went.

Another issue disputed by the parties was a realty franchise they purchased. Maria testified the franchise was worth $5000, and they had received an offer for that amount, but the offer was ultimately withdrawn because Rod did not respond. Rod testified that the offer had a noncompete agreement in it that would conflict with his recreational land sales. He said his prior attorney responded to the offer but they never heard back. He testified he believed the business had no value because the only thing it "really came with was protected territory around Mt. Pleasant."

Both parties requested primary physical care[1] of the children. Rod testified that he believed he should have primary physical care because of Maria's communication issues and her occasional late working hours. Maria testified that she had always been the children's primary caregiver, and it was in the children's best interest that she continue as such. The older children's therapist also testified that he believed shared custody was not in the parties' children's best interests, but he acknowledged his personal belief was that shared custody was never in a child's best interest. He recommended essentially that the temporary visitation schedule be continued because it was working well for the children, and they had already become accustomed to that routine.

Another issue in dispute was whether or not Maria would be moving to where her office was located. Rod testified Maria had indicated that she would

[1] "Primary physical care" is not defined in Iowa Code chapter 598 (2011); nevertheless, we recognize the term is commonly used by parties, their counsel, and the courts, including this one.

be moving to Iowa City after the divorce, and other witnesses also so testified. Maria testified she had no plans to do so at that time.

On April 9, 2012, the district court entered its decree dissolving the parties' marriage. The decree's opening paragraph states:

> In many ways, this case is one of paradox. Throughout the trial record some claims are boldly and repeatedly made, despite obvious contradiction in truth. In all, the parties have spent over $60,000 litigating their disputes in this case, and now the spin stops: the true state of the facts is now declared.

Ultimately, the court found that Rod was not credible, specifically noting:

> Early in this litigation he ruled out communication with Maria except in writing—meaning by text or email—so that he could arm himself with proof of what was said between them. He claims that he was worried about being falsely charged with domestic violence—even though there is no history of abuse in the household, and never any reports made to law-enforcement authorities. Rod's unusual tact in suppressing communication opportunities was done, apparently, with the acquiescence if not the advice of his initial litigation counsel. The proof he kept bears indicia of being orchestrated for litigation purposes. Rod compiled records of conversations that purport to prove devotion to his children. For example, he adopted a practice of lacing his written comments with the important principles his attorney said the trial judge would look at in a custody suit.

The court imputed to Rod an annual gross income of $45,000. The court granted Maria primary physical care of the children, and it set forth a visitation schedule for Rod that had less visitation time than was provided in the temporary visitation order. The court specifically found:

> Rod unfairly criticizes Maria's parenting abilities and in both testimony and demeanor, he exhibits a deep resentment toward her. He cannot acknowledge a respect for any of her accomplishments as a parent—even those delivered over all the years she was a full-time homemaker and essentially, the children's full-time caretaker. Rod's charges about her shortcomings are unproven; moreover, most are proven to be wholly false. His assertions are nonetheless, relentless and intended to burden her.

> The extraordinary energy and time Rod uses to belittle Maria in this trial record is, at best, a diversionary litigation tactic when viewed in the context of Maria's solid record of caregiving.

The court noted Maria had no present intention to move and did not further discuss the matter in its ruling.

Relevant to issues raised here, the court, in distributing the parties' marital assets and debts, found the parties' partnership White Oak Properties/White's Labs had no value. The court found the appraisal, done at Maria's request, was "substantially accurate in its recitation of the scope of the parties' personal property and in its fair market valuations." The court found the appraisal charge should be considered a marital obligation. Additionally, the court found most of the money Rod obtained in selling marital equipment was not accounted for and should be included in the economic settlement. Concerning the remaining funds held in escrow from the sale of the marital home, the court found the net proceeds should be shared. Finally, the court ordered Rod to reimburse Maria for $10,000 of her legal costs sustained in the litigation.

Rod now appeals.

II. Scope and Standards of Review.

We review dissolution of marriage cases de novo. Iowa R. App. P. 6.907; *In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011). We decide the issues raised anew, but we do so with the realization that the district court possessed the advantage of listening to and observing firsthand the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we credit the factual findings of the district court, especially as to the demeanor and believability of witnesses, but are not bound by them. Iowa R. App. P.

6.904(3)(g); *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007). Similarly, we "ordinarily defer to the [district] court when valuations are accompanied by supporting credibility findings or corroborating evidence." *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999); s*ee also In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). "Ordinarily, a trial court's valuation will not be disturbed when it is within the range of permissible evidence." *In re Marriage of Wiedemann*, 402 N.W.2d 744, 748 (Iowa 1987). Stated another way, we afford the district court considerable latitude in its property distribution determination pursuant to the statutorily enumerated factors, and disturb its finding only when the award is inequitable. *In re Marriage of Anliker*, 694 N.W.2d 535, 542 (Iowa 2005). In custody matters, our overriding concern is the best interests of the children. Iowa R. App. P. 6.904(3)(o). Finally, we note that because we base our decision on the unique facts of each case, precedent is of little value. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009).

III. Discussion.

On appeal, Rod contends the district court erred in five respects: (1) imputing income to him based on the court's determination of his "earning capacity;" (2) valuing and distributing the parties' marital assets and debts; (3) reducing his scheduled visitation in comparison to the parties' temporary visitation schedule; (4) failing to consider relocation by Maria; and (5) awarding Maria trial attorney fees. However, each issue asserted by Rod ultimately challenges the district court's determination that he was not credible and that Maria was. He asserts the district court's

> findings are replete with 'facts' unsupported by the record or directly refuted by reliable, independent evidence. . . . [T]he district court's seemingly deliberate indifference to reliable, independent evidence, coupled with the contemptuous tone directed toward [Rod] in the [d]ecree, calls into question the equitably ability of the courts determinations and decision.

Accordingly, we first address the district court's credibility determinations.

A. Credibility.

As noted above, although we review the case anew, it is the district court that listens and observes both the parties and witnesses firsthand. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). For that reason, we generally defer to the district court's credibility findings. *See id.* And there is good reason for us to pay very close attention to the trial court's assessment of the credibility[2] of witnesses:

> A trial court deciding dissolution cases "is greatly helped in making a wise decision about the parties by listening to them and watching them in person." In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented.

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984) (internal citations omitted). A witness's facial expressions, vocal intonation, eye movement, gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the transcript. Hidden attitudes, feelings, and opinions may be detected from this "nonverbal leakage." Thomas Sannito & Peter J. McGovern, *Courtroom Psychology for Trial Lawyers* 1 (1985). Thus, the trial judge is in the best position to assess a witness's interest in the trial, their motive,

[2] "Credibility" in this context, we believe, goes beyond mere truthfulness; it encompasses a witness's motive, candor, bias, and prejudice.

candor, bias, and prejudice. Nevertheless, even a dry reading of this trial's transcript reveals some apparent inconsistencies in Rod's testimony and supports the finding that he was less than credible. We address these inconsistencies as they pertain to the issues discussed below.

B. Income.

Rod first claims the district court erred in using an earning capacity rather than his actual earnings to determine his child support obligation. We do not agree. "In setting an award of child support, it is appropriate to consider the earning capacity of the parents." *In re Marriage of Flattery*, 537 N.W.2d 801, 803 (Iowa Ct. App. 1995). However, before the court utilizes earning capacity rather than actual earnings, a finding must be made that if actual earnings were used, a substantial injustice would result or that adjustments would be necessary to provide for the needs of the child and to do justice between the parties. *Id.*; *see also* Iowa Ct. R. 9.11(4).

The district court found that "[o]n this trial record, it is appropriate to regard Rod's income production ability as $45,000 annually; such an imputation of income is necessary to protect the children's economic security, and to do justice between the parties." Although the court did not make any more specific determinations in the ruling, because our review is de novo, we may make our own findings and conclusions on the issues properly raised before us. *See Lessenger v. Lessenger*, 156 N.W.2d 845, 846 (1968). In making this determination, we examine not only present earnings but also such things as employment history, earnings history, and reasons for the parties' current employment situation. *In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa

1997). Additionally, in determining if we will use earning capacity rather than actual earnings, we consider whether, "in order to meet the needs of the children and do justice between the parties," "the parent's inability to earn a greater income is self-inflicted or voluntary." *In re Marriage of McKenzie*, 709 N.W.2d 528, 533 (Iowa 2006); *see also In re Marriage of Duggan*, 659 N.W.2d 556, 562 (Iowa 2003) (stating "[u]nder our case law, a party may not claim inability to pay child support when that inability is self-inflicted or voluntary." (citation omitted)).

Upon our de novo review, we agree with the district court that a substantial injustice would result to Maria and the children if Rod's actual earnings were used to determine his child support obligation, rather than imputing his earning capacity. Rod is self-employed and has the ability to work a busier schedule; indeed, since the filing of the dissolution petition, Rod has cut his schedule back to spend more time with the children. While that is commendable, the reduction of his income is self-inflicted or voluntary. Moreover, Rod's answers on cross-examination at trial concerning his income were evasive:

> Q. I asked you [at your deposition] if you were capable of earning $50,000 a year in your current niche? A. And I actually indicated "I would hope so, but I can't answer that."
>
> Q. Sir, are you capable of earning more than $18,000 a year? A. It just depends on the current financial situation of the year and what buyers are out there.
>
> Q. Yes or no, sir? A. I can't answer yes or no. I'm sorry.
>
> Q. I'm going to direct you to answer yes or no. . . .
>
> Q. Are you capable of earning more than $18,000 a year net? A. It would depend on expenses. I honestly can't answer that yes or no. I cannot predict what the economy does or what my opportunities are.
>
> Q. But you're not looking for work anywhere else? A. No. If I go to work at a $9-an-hour job, I would make $9 an hour. Why would I go and do that and then sacrifice the time with my children

> when my job currently can be built around the time with my children?

Similarly:

> Q. . . . I'm confused, because if you make $18,000 a year, how can you spend $16,800 a year on rent? A. If you recall throughout those, a lot of our payments were made with cash from the sale of dogs throughout those time periods. And so whenever you deduct the expenses from those accounts back through there, you'll also notice a lot of those payments were made.
>
> Q. No, no, I'm not talking past. I'm talking right now. How can you put down that you're going to be paying . . . 1,400 a month in rent . . . when you're stating that your total income for the year that you're asking the [c]ourt to use for child support purposes is $18,000? A. [Maria's counsel], you're developing my court case, or we're developing—the attorneys are developing my child support payment based on the past. So I am telling you based on the past that I have not had an issue paying my bills whatsoever.
>
> Q. So, sir, you're telling me that $18,000 isn't really your income; is that correct? A. You need to define what is net income and what is gross income.
>
> Q. Sir, you put down $18,000 as your gross income in your [child support guidelines worksheet]. A. As my net income, that is correct.
>
> Q. That's your net income, not your gross income? A. I believe so.

In addition to his unwillingness to answer straightforward questions, the evidence shows Rod was depositing and spending approximately $5000 per month, but there was no evidence presented showing where that money came from and where it went. Consequently, regardless of whether Rod chooses to list or sell more properties or start other businesses, he has additional income he has not disclosed. Given Rod's deposition answer that he believed he could make $50,000, the fact that $5000 a month equals $60,000 per year, and Rod's evasive testimony concerning his actual income, we find no error in the district court's finding that substantial injustice would result or that adjustments would be necessary to provide for the needs of the children and to do justice between the

parties if Rod's claimed actual income was used. Moreover, given those factors, the court's imputed annual gross income of $45,000 was clearly within the range of evidence. Accordingly, we affirm on this issue.

C. Property Distribution.

Partners to a marriage are entitled to a just and equitable share of the property accumulated during the marriage through their joint efforts. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). Iowa law does not require an equal division or percentage distribution, but rather merely requires us to determine what is fair and equitable under the circumstances. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). In determining what division would be equitable, courts are guided by the criteria set forth in section 598.21(5) (2011). *In re Marriage of Goodwin*, 606 N.W.2d 315, 319 (Iowa 2000). We look to the economic provisions of the decree as a whole in assessing the equity of the property division. *In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). Again, the district court is afforded wide latitude, and we will disturb the property distribution only when there has been a failure to do equity. *In re Marriage of Schriner*, 695 N.W.2d 493, 496 (Iowa 2005).

1. Appraisal Cost.

Rod argues the district court's assignment of the appraisal cost as a shared marital debt was inequitable. Although the appraiser was requested by Maria, we cannot find the district court's property distribution failed to do equity in this case. As the court pointed out, both parties "were involved in the substantive interactions with the appraiser . . . although there were pieces of property that the

parties failed to direct the appraiser to consider. . . ." Additionally, both parties relied on the appraisal for various valuations. We accordingly affirm on this issue.

2. White Oak Properties/White's Labs Value.

Rod also contends the district court erred in finding that the parties' partnership, White Oak Properties, had no value. Upon our review, we find the valuation was within the range of permissible evidence and was not inequitable under the facts of this case.

Rod admitted the business owned no assets. He complains that Maria did not give him prior notice of the sale of the dogs, but the evidence presented at trial established Maria notified Rod after every sale of the dogs. Ron offered into evidence text messages showing Maria sent him a text in September 2011 that she sold a one-year-old male pup for $200. She sent four more text messages concerning the dogs thereafter. The last text in evidence was sent almost a month after the first text, yet Rod took no action concerning her sales prior thereto. If he found it objectionable, he had a month to work out or stop the sales; instead, he did nothing at all and now complains. We affirm on this issue.

3. Rod's Sale of Marital Equipment.

Rod asserts the evidence introduced at trial did not support a finding that he raided the marital assets and dissipated the $31,430 he received from the sale of the equipment. He contends that it was inequitable for the district court to apportion the entire amount of money from the sale to him in the property and debt division because it "inequitably inflated the equalization payment awarded to Maria." We disagree.

Dissipation of assets is a proper consideration when dividing property. *Fennelly &* 737 N.W.2d at 104.

> In determining whether dissipation has occurred, courts must decide (1) whether the alleged purpose of the expenditure is supported by the evidence, and if so, (2) whether that purpose amounts to dissipation under the circumstances. The first issue is an evidentiary matter and may be resolved on the basis of whether the spending spouse can show how the funds were spent or the property disposed of by testifying or producing receipts or similar evidence. . . . Courts may also consider whether the dissipating party intended to hide, deplete, or divert the marital asset.

Id. at 104-05 (internal citations and quotation marks omitted).

Although Rod argues the "undisputed testimony at trial was that Rod resorted to selling the equipment because he had insufficient funds to float the monthly payments on the parties' debt," this issue was clearly disputed by Maria, and the district court found that Rod was not credible. Rod testified that he had paid debts that were not paid. Furthermore, he did not provide any receipts to support his claim that he applied the funds towards marital debts. Rod asserts the court "ignored the fact that [his] income alone was insufficient to keep up with the parties' monthly debt obligations and it indisputably was [he] alone who stepped up and took responsibility for payment of the parties' marital debt during the pendency of the litigation." However, the court clearly found Rod's asserted income was not credible. Upon our review, we find the district court's determination that Rod dissipated marital assets is supported by the evidence in the record. We therefore affirm its finding that Rod should be given a set-off for the dissipated assets.

4. Dissipation of the Parties' Realty Franchise.

Rod also contends the district court improperly found Rod dissipated assets by failing to accept an offer for the parties' realty franchise, valued at $5000 by the court. "We have previously determined that some conduct of a spouse which results in the loss or disposal of property otherwise subject to division at the time of divorce may be considered in making an equitable division of property." *In re Marriage of Burgess*, 568 N.W.2d 827, 828 (Iowa Ct. App. 1997).

Although he argues he "does not engage in traditional residential real estate sales, the non-compete was 'a serious problem' for him because it would preclude [him] from selling any properties with farmhouses on them, which is a common attribute of the properties he sells." He also asserts counsel for the offeror did not respond to his attempted negotiations regarding the non-compete clause. Rod supports these arguments with his own testimony, wherein he testified his attorney responded directly to the offeror's attorney, and "they never heard back from them." He also testified on cross-examination:

> Q. [The franchise]. You were offered $5,000 for the franchise name, and rather than take that $5,000, you have now let it go into noncompliance so you don't even own the franchise; correct? A. I think that that needs to be clarified that the offer that was presented to me was not just for $5,000. It included all of the office's equipment. It also included a noncompete clause which would not allow me to function normally as an active real estate agent in selling.
>
> Q. Yet you didn't address that in the divorce, you say your attorney sent some letter to whatever attorney— A. We responded to the attorney that sent the offer. The offer, it is my understanding that it came from their office, not from you. If it came from you, I was misinformed by my attorney.
>
> Q. Sir, you didn't even talk about that with Maria on how to maximize or respond, did you? A. Ma'am, yes, I did.

> Q. And, sir, that . . . franchise is now—is it revoked because of noncompliance? A. That was her business. I don't know what she's done with it.

Maria conversely testified that Rod never responded to the offer so it was declined. Maria testified the offeror for the franchise then bought a new franchise, and she was working at that franchise branch.

Although this is a closer issue, we find the district court's determination that the franchise's value should be assigned to Rod was supported by the evidence in the record. Upon our review, it appears Rod or his counsel did not even follow up with the offeror or Maria regarding the offer or sale of the franchise. And if they did, we agree with the district court's analysis:

> Rod refused to agree to the covenant-not-to-compete plank of the purchase prospect, so the opportunity for sale of that marital asset at that time, withered. Rod's decision to pursue his narrow market renders him with but two listings and only two buyer-agency agreements—scant traffic in his brokerage. Under these specific circumstances, it is fair to assign to him the . . . franchise at the $5,000 value.

We accordingly affirm on this issue.

5. Maria's Credit Card Debt.

Rod asserts the district court erred in including Maria's $20,000 credit card debt, which included approximately $5000 in attorney fees, in its property division calculation. It is true that Maria testified that some of her attorney fees were put on her credit cards after the parties' separation. However, the district court also included Rod's $27,000 credit card debt in the calculation. Rod testified his first attorney advised him to run up as much credit card debt as possible to, essentially, prevent Maria from being able to obtain credit. Many of the statements he provided showing his credit card debt merely stated the running

balance and did not detail what the charges were for. One statement that did include a description of each charge shows a payment to Whitfield & Eddy on May 5, 2011 of $165. While that amount is minimal, it is unclear whether or not he paid for his attorney fees on other credit cards, given there are no details and his evasive testimony. For example, he testified a friend loaned him $11,000 to pay his first attorney's retainer and fees, and he testified he repaid the loan. On his cross-examination, he was asked if he had evidence showing the debt and his repayment:

> Q. Have I not requested every single check and every single bank statement from you? A. I believe you've gotten them. As we did Maria and still have not received two of them.
>
> Q. And, Mr. White, that $11,344 is not in there anywhere, is it? A. Well, no, because I just paid him back.
>
> Q. How'd you pay him back? You gave him cash? A. Yeah.
>
> Q. So you just gave him $11,000 of cash? A. Correct.
>
> Q. And you have no receipt to show that, because you said you signed a Promissory Note. Surely you signed a receipt? A. Yeah. I guess I'm really kind of wondering why in the world—I mean, I told you I really don't—I mean, whatever you want to do with this stuff is fine. I'm really here for my kids, so if you'd like to move on, awesome, if you want to just—I don't understand what you want. Do you want a check for $11,000, Maria? Because. . . . Yeah. If you would like to keep continuing down this road of, I mean, we're wasting an incredible amount of time, and the focus really should be on the kids, not the financials. And I have no issue with paying Maria. That's been brought up several times, and I don't understand why we're doing this.

The district court did not find Rod to be credible, and given his lack of accounting for his charges and spending of marital assets, it appears the district court simply put all of his $27,000 debt and Maria's debt in to its property division calculation to be equitable to both parties. Given the murky state of the record, we cannot say the district court's judgment was inequitable. And, as Maria points

out, inclusion of her and Rod's credit card debts was actually a detriment to Maria, given his debt balance was $7000 higher than hers. We affirm on this issue.

***6. Proceeds from the Sale of the Marital Home in Escrow*.**

Rod argues the district court's award of the totality of the remaining escrow proceeds from the sale of the marital home to Maria was inequitable. He notes he put much time and effort into securing the highest possible selling price for the property by agreeing to improve the property at the purchasers' request. He also asserts Maria's decision not to pay off marital debts during the pendency of the case was irresponsible and to her benefit, as the court awarded the only remaining liquid asset to Maria outright. We find's the court's award was supported by the evidence in the record and equitable.

The testimony at trial evidenced that Rod put additional debt on the marital credit cards. Maria asked for an accounting of the debts Rod wanted to pay, and no documents were provided to her until a few weeks before the trial. We do not find her response was irresponsible or unreasonable, particularly given his lack of accounting for the sale of over $30,000 worth of marital assets. This too also supports the district court's determination that Maria was entitled to that liquid asset. Additionally, Rod was permitted to live in the home rent-free for two months after the closing, a benefit to him for making improvements on the property. We affirm on this issue.

D. Visitation.

1. Schedule.

Rod challenges the court's visitation schedule set out in the decree. Our top priority when considering visitation issues is the best interests of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). Generally, liberal visitation promotes the children's best interest. *Id.* In so far as is reasonable, courts should try to assure children "maximum continuing physical and emotional contact with both parents" after a divorce. Iowa Code § 598.41(1)(a).

In this case, the temporary visitation schedule in place during the pendency of the proceedings awarded Rod visitation every Tuesday and Thursday evenings and weekend visitation from 3:00 p.m. Friday to 8:00 p.m. Sunday. The court reduced his visitation, changing from every Tuesday and Thursday to either Tuesday or Thursday. The court also decreased the weekend visitation time by five hours, changing the schedule to 5:00 p.m. Friday to 5:00 p.m. Sunday. Upon our de novo review, we find no error in the district court's visitation schedule, given the court's findings of fact that "[w]hen the children are with Rod for visitations, he usually incorporates other actual caregivers into the mix," and that Rod has drawn the children "into the parental discord." Additionally, the court found that it was necessary for Maria to exercise the dominant care-giving role to shelter the children as much as possible from the emotional harm of being placed in the middle of ongoing parental rifts, specifically citing Rod's recorded statement to Maria that, unless she conceded

joint physical custody, she was "going to go through hell for the next [fifteen fucking] years" and the their "kids will know all of this."

Upon our de novo review, we find the district court's minimal reduction of visitation strikes the proper balance and is in the children's best interests, given Rod's disparagement of Maria to the children and his threats to involve the children in their disputes. Given the minimal reduction, the schedule would not be unduly disruptive to the children. We agree with the district court's conclusion and affirm on this issue. We note that the schedule permits additional visitation if agreed to by the parties, and hopefully once the proceedings are finished and time has passed, Rod can work with Maria, as their text messages evidence, to allow additional visitation time, provided such is in the children's best interests.

2. Transportation.

Rod also challenges the court's decree that Rod be solely responsible for any transportation associated with his exercise of visitation, arguing the district court failed to entertain his argument that Maria would move out of town. Here, Rod asks us to consider evidence outside the record. However, "[f]acts not properly presented to the court during the course of trial and not made a part of the record presented to this court will not be considered by this court on review." *Rasmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994); *see also In re G.R.*, 348 N.W.2d 627, 632 (Iowa 1984). We decline his invitation.

E. Trial Attorney Fees.

Rod argues the district court erroneously awarded Maria trial attorney fees. An award of attorney fees is not a matter of right, but rather rests within the district court's discretion. *In re Marriage of Hocker*, 752 N.W.2d 447, 451 (Iowa

Ct. App. 2008). We review the district court's award of attorney fees for abuse of discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). 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).

Here, the evidence shows Rod's income capacity was substantially more than Maria's actual income at the time of the trial. Due to their disparate earning capacities and in light of the litigation strategies employed by Rod, we cannot say the district court abused its discretion in awarding $10,000 in trial attorney fees to Maria. We therefore conclude the district court did not abuse its discretion when it awarded Maria attorney fees.

F. Appellate Attorney Fees.

Finally, Maria requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right. *Sullins*, 715 N.W.2d at 255. We consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id.* Applying these factors to the circumstances in this case, we award Maria $2500 in appellate attorney fees.

IV. Conclusion.

For all of the above stated reasons, we affirm the district court's decree dissolving the parties' marriage in its totality. Costs are assessed to Rod.

AFFIRMED.