IN THE COURT OF APPEALS OF IOWA

No. 3-416 / 12-1783
Filed June 26, 2013

**IN RE THE MARRIAGE OF LORI LINN HINSHAW
AND JAMES DEAN HINSHAW**

**Upon the Petition of
LORI LINN HINSHAW,**
Petitioner-Appellee,

**And Concerning
JAMES DEAN HINSHAW,**
Respondent-Appellant.

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

James Hinshaw appeals the decree dissolving his marriage to Lori Hinshaw. **AFFIRMED AS MODIFIED.**

Lee M. Walker of Walker, Billingsley & Bair, Newton, for appellant.

Donald J. Charnetski of Charnetski, Olson & Lacina, Grinnell, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

TABOR, J.

James Hinshaw challenges various aspects of the decree dissolving his marriage to Lori Hinshaw. He argues the district court inequitably divided the marital estate by overestimating his impending annual bonus and by failing to account for Lori's pretrial attorney fees and his post-separation debt payments. James also contends the court erred by awarding spousal support and by modifying the parties' visitation schedule with their twin daughters.

Based on a request from both parties, we modify James's equalization payment from $40,853 to $7420. We leave the remaining property distribution unchanged. Considering each party's financial circumstances and contributions to the marriage, we elect not to disturb the spousal support award. Because an alternating week physical-care cycle will offer the twins more continuity than the previous two-day, two-day, three-day rotation, we affirm the physical care ruling. Last, we award Lori $2000 in appellate attorney fees.

I. Background Facts and Proceedings

Lori and James married in October 2004. Their twin daughters are now eight years old.

James is a forty-eight-year-old high school graduate. Since 1999, James has worked as a site supervisor for an egg-production complex owned by Fremont Farms of Iowa, located near Malcom. James has two adult daughters from a previous marriage. Lori is forty-four years old. In 2002 she earned a two-year accounting degree from Indian Hills Community College. She has since worked as an accountant for several companies, including Fremont Farms. She

currently works full-time as a senior accountant at Engineered Plastic Components, Inc. in Grinnell.

In 2004 James and Lori created a limited liability company (LLC), which is ostensibly involved in farming. Fremont Farms pays James's annual bonus to the LLC so the amount does not appear on his regular payroll. The LLC then writes off farm expenses from horses, cattle, hay, and equipment. The farm is comprised of twelve acres of Conservation Reserve Program (CRP) land, twenty-four acres of pasture, and thirty-three tillable acres. James, Lori, and James's older daughters are listed as the putative owners, but the daughters do not receive any profit. In 2010 the LLC was administratively dissolved by the Iowa Secretary of State, though the Hinshaws continue to use it as a tax shelter.

On April 29, 2011, Lori filed a petition to dissolve the parties' marriage. When she moved out of the marital residence the following month, she and James signed an agreement they would share physical care of the children on a two-day, two-day, three-day rotation. The court filed a stipulated order setting physical care on those agreed-to terms. Then on May 23, 2011, the court entered a temporary order requiring James pay $956.15 per month in child support, $500 per month in temporary spousal support, and $5000 for Lori's attorney fees.

The district court held trial from April 18-19, 2012. The parties largely stipulated to the property distribution. Under the stipulation James would receive sole title to the farm real estate subject to the mortgage, and Lori would receive a $267,500 cash payment. They agreed to sell all jointly owned farm machinery at

auction as soon as possible, using the proceeds to pay the debt against the equipment and splitting the remaining amount between them. They would also sell their hay and cattle. James would receive all CRP payments, which total roughly $12,700 per year.

Each party would retain their personal vehicles and the debt associated with them, with James paying Lori $2500 to account for the difference in value between the two cars. Because Fremont Farms owns the marital home, it was not included in the marital estate. The parties agreed James would keep the majority of the personal property in the house except for a few items Lori listed and all other property she brought into the marriage. Lori would retain her entire pension, and James would pay $15,000 from his pension to her.

The parties disputed the estimated amount of James's 2011 bonus, which had yet to be paid at the time of trial. They also disagreed whether the property distribution should be adjusted to reflect James's pretrial $4840 cash gift to one of his older daughters to fund her vehicle purchase.

The district court's July 6, 2012 ruling ordered James and Lori to adjust their shared care schedule for the twins to a week-by-week rotation and to split the cost of childcare. In addition to providing health and dental insurance for the twins, James was ordered to pay $1072 per month in child support and three years of "transitional alimony" at $1000 per month. After confirming the stipulated property distribution, the court ordered James to pay an additional

$40,852 property equalization payment[1] to Lori, plus an additional $15,000 for her attorney fees.

Both parties submitted motions to amend and enlarge the July 6, 2012 order. The court regarded the motions as being filed after the August 30, 2012 decree dissolving the marriage. On September 12, 2012, James and Lori auctioned off their equipment and paid the associated $90,135.81 debt. The court held a hearing five days later at which it addressed both post-trial motions. The court denied James's motion in full, and he now appeals.

II. Scope and Standard of Review

We review challenges to a dissolution decree de novo. *In re Marriage of Kimbro*, 826 N.W.2d 696, 698 (Iowa 2013). We examine the entire record and adjudicate anew the issues presented. *In re Marriage of Rinehart*, 704 N.W.2d 677, 680 (Iowa 2005). Although we defer to the district court's fact-findings, especially concerning witness credibility, we are not bound by them. *In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). This deference acknowledges the district court has a firsthand opportunity to view the witnesses and hear the evidence. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009).

III. Analysis

A. Did the District Court Equitably Divide Marital Property?

James argues the district court inequitably divided the marital estate by failing to credit him with one-half of (1) Lori's pretrial attorney fees; (2) the farm

[1] The district court characterizes this amount as a "property reconciliation payment." For purposes of this appeal, we will use the term "equalization payment."

machinery debt he paid before the equipment was sold; and (3) his estimated $10,000 bonus rather than the $76,865 bonus amount assigned by the district court.

We divide marital property equitably, considering the factors set out in Iowa Code section 598.21(5) (2011). *McDermott*, 827 N.W.2d at 671. An equitable distribution of marital property does not require the assets be equally divided, though it is generally recognized the most equitable division is an equal split. *Kimbro*, 826 N.W.2d at 703.

James first contests the district court's calculation of his 2011 bonus. At trial, he presented his employer's previous annual payouts:

2006	$45,393
2007	$52,123
2008	$63,239
2009	$66,000
2010	$76,865

James then testified because of his poor work performance, he anticipated receiving only $10,000 for 2011.

The district court was skeptical his employer would so drastically decrease his annual dividend and opted instead to impute the amount of his 2010 bonus—$76,865—as his additional earnings for 2011. The court then added to that amount James's $4840 cash gift to his daughter and divided the sum in half to arrive at James's equalization payment.

On appeal James asserts the court should have instead adopted his $10,000 estimate. He does not dispute the $4840 cash gift disposition, and

concludes his equalization payment should total only $7420—one-half of each amount.

Lori acquiesces to James's computation and asks that we "treat [the $7420 payment] as a stipulated settlement, approve it, and order such decree modification accordingly." We regard Lori's invitation to be a concession and modify the decree to decrease the district court's $40,852 equalization payment to $7420.

James next contends because Lori used $8500 of the marital estate for attorney fees before trial, he should receive a credit for one-half that amount—$4250.[2] "Attorneys' fees incurred in dissolution proceedings are not marital debt." *In re Marriage of Hansen*, 733 N.W.2d 683, 703 (Iowa 2007). And allowing James credit for one-half of these attorney fees without reciprocally accounting for his pretrial attorney fees would cause inequity. *See id.* Accordingly, the court properly declined to factor Lori's pretrial fees into the property distribution.

Last, James argues because he made all debt payments on the parties' jointly owned machinery from their May 2011 separation until the September 2012 equipment sale, Lori should be responsible for either one-half of the $27,431.24 paid since separating, or one-half of the $3318.77 paid since trial.

The district court explained because James continued to collect farm-related income between the trial and auction, he should be responsible for farm debt as well:

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[2] James calculates this amount by subtracting from her $13,500 in pretrial attorney fees the $5000 temporary attorney fees the court ordered him to pay.

> While the parties did not specify the process of debt service between the time of trial, (April 18th when the settlement was confirmed by the parties and approved by the court) and the date of auction and settling up on machinery proceeds (September 12th[])], the status quo was what was shown at trial: James was collecting farm-related incomes and was making farm-related disbursements, including machinery debt service.

We affirm this status quo rationale and believe it applies retroactively to the parties' separation date.

B. Is Lori Entitled to Spousal Support?

The district court directed James to pay Lori spousal support in the amount of $1000 per month for three years. The court called the award "transitional alimony" and anticipated it would allow Lori to "secure more training to equip her with skills that could command higher pay."

Spousal support is not an absolute right, and accordingly any award depends upon the particular circumstances in each case. *In re Marriage of Schenkelberg*, 824 N.W.2d 481, 486 (Iowa 2012). Iowa courts have recognized traditional, rehabilitative or transitional, and reimbursement payments as the three forms of spousal support. *In re Marriage of Becker*, 756 N.W.2d 822, 826 (Iowa 2008). Reimbursement payments provide the spouse with a share in the other spouse's future income in exchange for the receiving spouse's previous contributions to that source of income. *Id.* Traditional spousal support is payable either for life or so long as the payee spouse is incapable of self-support. *Id.* Rehabilitative payments support an economically dependent spouse through a limited period of retraining or re-education following dissolution in an attempt to create opportunity and incentive for that spouse to become self-supporting. *In re*

Marriage of Shanks, 805 N.W.2d 175, 181 (Iowa Ct. App. 2011). The terms "rehabilitative alimony" and "transitional alimony" are interchangeable. *In re Marriage of Smith*, 573 N.W.2d 924, 926–27 (Iowa 1996).

> The following factors guide Iowa courts in making an award:
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> a. The length of the marriage.
> b. The age and physical and emotional health of the parties.
> c. The distribution of property made pursuant to section 598.21.
> d. The educational level of each party at the time of marriage and at the time the action is commenced.
> e. The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, responsibilities for children under either an award of custody or physical care, and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
> f. The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage, and the length of time necessary to achieve this goal.
> g. The tax consequences to each party.
> h. Any mutual agreement made by the parties concerning financial or service contributions by one party with the expectation of future reciprocation or compensation by the other party.
> i. The provisions of an antenuptial agreement.
> j. Other factors the court may determine to be relevant in an individual case.

Iowa Code § 598.21A. A district court enjoys considerable latitude in determining a spousal support award. *Schenkelberg*, 824 N.W.2d at 486. We will only disturb the award if it "fails to do equity between the parties." *Id.*

At trial Lori requested $1000 per month for five years. She now defends the district court's three-year award, highlighting James's higher income and lower living expenses.[3]

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[3] Lori also attacks certain evidence cited by James for being outside the record at the time of the dissolution decree and questions the extent to which James preserved error.

James contends Lori is not entitled to spousal support under the factors in section 598.21A. He insists a $200,000 disparity exists in the property division, and that uneven distribution along with the district court's $20,000 attorney fee award to Lori, points to the unfairness of including a spousal support obligation.

Preliminarily we note an attorney fee award serves a different purpose from spousal support payments. *Compare Shanks*, 805 N.W.2d at 181 (recognizing rehabilitative alimony's purpose as providing support for retraining or re-education) *with In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006) ("Whether attorney fees should be awarded depends on the respective abilities of the parties to pay." (internal quotation marks omitted)). And by using James's valuations, along with the amended equalization payment, we find Lori's property award is relatively equal to James's side of the ledger, given the size of the marital estate:[4]

Lori's Award

Property Settlement for Land	$267,500
Vehicle Equalization	$2500
Respondent's Pension	$15,000
Petitioner's Pension	$44,585
Amended Equalization Payment	$7420
Machinery	$81,564
Total Award	**$418,569**

She does not cite specific evidence she contends we should exclude, and both contentions lack supporting authority. "[W]e will not speculate on the arguments . . . then search for legal authority and comb the record for facts to support such arguments." *Hyler v. Garner*, 548N.W.2d 864, 876 (Iowa 1996). Without resolving Lori's procedural arguments, we address the merits of James's challenge.

[4] In James's calculation, he includes the same alimony payments he argues should be reduced (based on the allegedly uneven property distribution) to arrive at the $200,000 disparity between parties. He also adds $20,000 in attorney fee awards to increase both Lori's award and his debt.

James's Award	
Machinery	$81,564
Land	$546,358
Respondent's Pension	$75,115
Total Award	**$703,037**
Less Debt	
Property Settlement	$267,500
Vehicle Equalization	$2500
Pension Equalization	$15,000
Amended Equalization Payment	$7420
Total Debt	**$292,420**
James's Award Minus Debt	**$410,617**
Difference Between Parties	**$7952 (0.96%)**

After nearly eight years of marriage, both parties enjoy relatively good health. Each contributed to the marriage by working full-time and sharing in child care duties, though as noted by the district court, Lori "shouldered homemaking responsibilities." Lori now earns $45,000 annually compared to James's $123,552 base pay, plus his discretionary bonuses. He also receives annual payments from the CRP, which totaled $12,700 in 2011. Lori receives $956.15 per month in child support from James. His employer provides him a five-bedroom home at no charge while Lori pays monthly rent on a two-bedroom duplex. Although James's share of the estate is about one percent smaller than Lori's, his share includes the income-producing assets.

Lori testified the spousal support would help her "get back on [her] feet" as far as establishing a residence for herself and the children. The district court awarded alimony based on "[t]he disparity of parties' incomes, and the financial demands implicated in the adjustment from their lives together." The court

anticipated the payments would allow Lori "to secure training to equip her with skills that could command higher pay. Whether she seeks different employment or not, or whether she pursues updated training or not, is her option as she positions herself during the subsidized transition."

Although this reasoning reaches beyond the aim of transitional alimony and overlaps with reimbursement and traditional support, we do not demand such payments fall within only one of the three formats. *See Becker*, 756 N.W.2d at 827. Considering the statutory factors in section 598.21A, including both parties' financial circumstances and contributions to the marriage, we elect not to disturb the district court's considerable latitude in making this determination.

C. Should the District Court Have Modified the Physical Care Arrangement?

In determining a physical care award, the paramount concern is the children's best interest. *In re Marriage of Gensley*, 777 N.W.2d 705, 714 (Iowa Ct. App. 2009); *see* Iowa Code § 598.41 (setting out factors to consider). To foster stability and continuity, "the caregiving of parents in the post-divorce world should be in rough proportion to that which predated the dissolution." *Hansen*, 733 N.W. at 697. Our concern is not based on perceived fairness to the spouses, but what is in the best interest of the children, seeking an environment most likely to foster a long-term healthy environment, both physically and mentally. *Id.* at 695.

James's challenge is not to the amount of time spent with the twins. Their time spent with each parent remains proportional to what they experienced

before the decree. But James argues the court improperly modified the parties' agreed-to shared care arrangement, increasing the number of days the girls would spend with one parent before transitioning back to the home of the other parent. He asserts no testimony supports the court's characterization that the twins were "living out of a suitcase." James urges a return to the previously agreed-to arrangement.

Lori contends the weeklong rotation is a more appropriate schedule. She testified at trial that the two-day, two-day, three-day exchanges were "very disruptive" to the girls and transition days were especially emotional. She explained the short turnaround diminished the quality of interaction:

> I feel that they are living out of a suitcase. I mean, they bring belongings back and forth. They never really get comfortable and are able to be themselves because it's just rush, rush, rush . . . you pick them up and you get them home and you do dinner, and it just seems like the amount of quality time that you get with them in a two-day, two-day, three-day cycle is very limited.

Lori testified she signed the initial agreement "under duress only so [she] could leave the residence with [the] children." She had reservations about the arrangement from its inception, which continued at trial.

Fortunately the twins have two parents eager to care for them. And we understand James's desire to minimize the timespan between his visits with them. But our focus must be on the girls' best interest. We are persuaded by Lori's testimony that the frequent transitions are hard on the children and a longer stay with each parent would provide them more time to relax. We agree with the district court's decision to amend the earlier physical care arrangement to the weeklong format.

D. Does Either Party Deserve Appellate Attorney Fees?

Both parties request appellate attorney fees. Such an award is not a matter of right and rests within our discretion. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We determine whether an award is appropriate considering the needs of the party seeking the award, the other party's ability to pay, and whether the appeal required a party to defend the district court's decision. *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007).

James can more easily afford to pay attorney fees than can Lori. James brought the appeal, forcing Lori to defend the district court ruling. Aside from the stipulated modification between parties, we affirm the district court in full. We find it equitable to award Lori $2000 in appellate attorney fees. Costs are divided equally between the parties.

AFFIRMED AS MODIFIED.