

**IN THE COURT OF APPEALS OF IOWA**

No. \_\_-\_\_\_ / \_\_-\_\_\_  
Filed \_\_\_\_, 20\_\_

**IN RE THE MARRIAGE OF**

**H\_\_\_\_**

**AND**

**Upon the Petition of**

**H\_\_\_\_,**

Petitioner/Appellee/Cross-Appellant,

**And Concerning**

**W\_\_\_\_,**

Respondent/Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for \_\_\_\_\_ County, \_\_\_\_, Judge.

A mother appeals from the district court's ruling dissolving her marriage.

**AFFIRMED AS MODIFIED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West  
Des Moines, for appellant.

\_\_\_\_\_, Des Moines, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

**VOGEL, P.J.**

W\_\_\_\_ appeals from the district court's ruling dissolving her marriage to H\_\_\_\_. She asserts (1) the district court's spousal support award was inequitable in amount and duration, (2) the court wrongly applied the former child support guidelines, (3) the visitation schedule was not in the children's best interest, and (4) the court incorrectly found H\_\_\_\_ must preapprove the children's medical expenses. She also requests appellate attorney fees. H\_\_\_\_ cross-appeals, asserting the court erred in denying his Iowa Rule of Civil Procedure 1.904(2) motion to include specific orders regarding joint legal custody.

We affirm the visitation schedule, but modify the spousal support award, and conclude the child support guidelines in effect July 1, 20\_\_, should have been utilized. We also strike the provision that H\_\_\_\_ must pre-approve medical expenses. As for H\_\_\_\_'s cross-appeal, we affirm the district court's denial of his post-trial motion.

**I. Background Facts and Proceedings.**

H\_\_\_\_ and W\_\_\_\_ were married in 19\_\_. Three children were born of the marriage: A\_\_\_\_, born in 19\_\_; B\_\_\_\_, 20\_\_; and C\_\_\_\_, 20\_\_. During the marriage, H\_\_\_\_ completed a dental degree in 19\_\_, followed by a medical degree in 19\_\_. He went on to become a board certified plastic surgeon in 20\_\_. W\_\_\_\_ began her master's degree program in social work prior to the marriage, but completed it in 19\_\_. Although W\_\_\_\_ was employed as a social worker, in 20\_\_, with the birth of the second child, the couple jointly decided that W\_\_\_\_ would stay home to raise the children. To accommodate H\_\_\_\_'s career development, the

family moved several times, finally locating in Des Moines in 20\_\_\_. In January 20\_\_\_, the parties separated. During the separation, H\_\_\_\_\_ paid W\_\_\_\_\_ \$10,000 per month, in addition to making the mortgage payments and covering other household expenses.

Following a trial, in September 20\_\_\_ the court granted W\_\_\_\_\_ and H\_\_\_\_\_ joint legal custody of the parties' three children, with W\_\_\_\_\_ having physical care, and H\_\_\_\_\_ liberal visitation. The court found H\_\_\_\_\_ 's annual income, for purposes of calculating child support, to be \$889,000, and imputed W\_\_\_\_\_ 's earning capacity to be \$30,000, as she had stayed home with the children the previous eight years. In addition to a property award, the court awarded W\_\_\_\_\_ \$5000 per month in rehabilitative alimony for a period of one year. The court further ordered H\_\_\_\_\_ carry the medical insurance for the children, and pay for all medical expenses, but ordered those expenses be pre-approved by H\_\_\_\_\_.

W\_\_\_\_\_ appeals and H\_\_\_\_\_ cross-appeals.

## **II. Standard of Review.**

We review dissolution orders de novo. Iowa R. App. P. 6.907. However, the district court had the advantage of listening to and observing the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006).

### III. Spousal Support Award.

We first address W\_\_\_\_'s contention that the district court's award of spousal support was inequitable in amount and duration. She asserts based on the length of the marriage, her sacrifice in putting her career on hold, and H\_\_\_\_'s potential for future income, the rehabilitative alimony award of \$5000 per month for twelve months is unfair. H\_\_\_\_ responds that the denial of traditional and reimbursement alimony, and award of rehabilitative alimony was appropriate.

"The payment of alimony is not an absolute right; rather, whether a court awards alimony depends on the particular circumstances of each case." *In re Marriage of Becker*, 756 N.W.2d 822, 825 (Iowa 2008). The legislature has listed certain factors a court should consider when deciding whether to award spousal support. Iowa Code § 598.21A(1)(a)-(j) (2009). These factors include:

- a. The length of the marriage.
- b. The age and physical and emotional health of the parties.
- c. The distribution of property . . . .
- 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 selfsupporting 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.

*Id.* The court applies these factors in order to determine the proper award of alimony, based on three different spousal support options: traditional, rehabilitative, and reimbursement. *In re Marriage of Francis*, 442 N.W.2d 59, 63–64 (Iowa 1989). Traditional is typically payable for life, or so long as a spouse is incapable of self-support. *Id.* at 64. Rehabilitative offers support for a period of time while the economically dependent spouse is re-educated and able to become self-supporting. *Id.* at 63. Reimbursement spousal support allows the spouse receiving the support to share in the other spouse’s future earnings. *Id.* at 63; see also *Becker*, 756 N.W.2d at 827–28 (minimizing the strict categorization of the types of spousal support).

H\_\_\_\_ and W\_\_\_\_ were married for sixteen years. At the time of the marriage, both were students; after graduation, W\_\_\_\_ worked as a social worker, while H\_\_\_\_ went to dental, then medical school and was a medical resident. After seven years of marriage, they mutually decided W\_\_\_\_ would stay home with the children. The family saw H\_\_\_\_’s income steadily increase from approximately \$118,000 in 20\_\_, to \$400,000 in 20\_\_. In 20\_\_, H\_\_\_\_ opened a solo practice, and his income rapidly increased. At the time of trial, H\_\_\_\_’s annual income was \$889,000, whereas W\_\_\_\_, having been out of her career for eight years, was imputed an earning capacity of \$30,000.

In the dissolution decree, the district court awarded W\_\_\_\_ rehabilitative alimony of \$5000 per month for twelve months. In setting this amount and duration, the district court considered her property award, finding,

The respondent will exit this marriage with \$379,930.00 as a property settlement. At 5 percent interest she could earn \$18,996.50 per year from that settlement. Additionally she will receive \$53,484.00 per

year in child support, which should reduce the financial support she would need to provide her children, and she can earn \$30,000.00 per year in wages. Those amounts total \$102,480.50 per year.

W\_\_\_\_ asserts that it is not feasible that she could put the full property settlement of \$379,930 to work for her such that she could earn \$18,996.50 in annual interest. While the valuations the court recited were correct, we agree with W\_\_\_\_'s position, as the total property settlement incorporates items that will not earn interest for her immediate benefit, i.e. assets from her 401K, miscellaneous household items, and a car. While she is receiving over \$300,000 in cash, she asserts that money will be used for the purchase of a home, leaving little to garner the interest income relied on by the district court in its estimation of her annual income. We agree.

Applying the factors under Iowa Code section 598.21A(1), we believe the district court awarded W\_\_\_\_ an appropriate amount of spousal support but that she is entitled to a longer duration of support. W\_\_\_\_ is leaving the marriage with a need for rehabilitative alimony, in order to be trained to re-enter the work force, but also is entitled to maintain a comfortable standard of living, as she enjoyed during the last several years of the marriage, for that period of time it will take her to become self-sufficient. See *Becker*, 756 N.W.2d at 827. Based on W\_\_\_\_'s situation, it is unnecessary to characterize the spousal support award as strictly rehabilitative or traditional. *Id.* (explaining that it is not the labels courts use, but the factors mandated by the legislature in section 598.21A(1) that control the award of spousal support). Therefore, we believe it is necessary to modify the spousal

support ordered by the district court, and grant W\_\_\_\_ alimony of \$5000 a month for five years.<sup>1</sup>

#### **IV. Child Support Guidelines.**

On July 1, 20\_\_, the most recent revisions to the Iowa Child Support Guidelines became effective. Trial in this matter concluded on January 8, 20\_\_, and the district court issued its decision on September 29, 20\_\_, applying the guidelines in effect prior to July 1, 2009. W\_\_\_\_ asserts the court should have applied the most recent child support guidelines, and wrongly applied the former guidelines. H\_\_\_\_ concurs.

Iowa Court Rule 9.1 states, “The child support guidelines contained in this chapter are hereby adopted, effective July 1, 20\_\_. The guidelines shall apply to cases pending on July 1, [20\_\_.]” “Pending” has been construed to include those cases on appeal. *See In re Marriage of Roberts*, 545 N.W.2d 340, 343 n. 2 (Iowa Ct. App. 1996); *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991) (applying the new guidelines in effect at the time a decision was issued). Therefore, we find the child support obligation must be recalculated according to the child support guidelines that became effective July 1, 20\_\_. W\_\_\_\_ recalculated the child support award according to the new guidelines to be \$4910 per month for three children, and H\_\_\_\_ agreed. We therefore modify the child support award to \$4910 per month for three children, with a reduction of \$4279 for two children, and \$3035 for one child.<sup>2</sup>

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<sup>1</sup> Spousal support shall terminate if W\_\_\_\_ dies or remarries prior to the expiration of five years. The support will also terminate if H\_\_\_\_ dies prior to the expiration of five years.

<sup>2</sup> As the district court found, the date child support commences is October 1, 2009.

**V. Visitation.**

W\_\_\_\_\_ next asserts the visitation granted H\_\_\_\_\_ was excessive and not in the children's best interests. She argues it does not support the parties' historical caregiving roles. In determining visitation rights, the governing consideration is best interest of the child; liberal visitation rights are in the children's best interests. See *In re Marriage of Drury*, 475 N.W.2d 668, 670 (Iowa Ct. App. 1991). In determining the appropriate amount of visitation, we are guided by the principle that a court should order such visitation as will ensure a child the opportunity for maximum continuing physical and emotional contact with the noncustodial parent. See Iowa Code § 598.41(1). The district court found the liberal visitation schedule allowed H\_\_\_\_\_ "to be actively involved in the day-to-day responsibilities of raising his children" and for "maximum, quality family time with both parents and is in the best interest of the children."

While historically W\_\_\_\_\_ stayed home with the children, H\_\_\_\_\_ has made a concerted effort to maximize his time with the children and arrange his work schedule to be a part of their daily lives. The evidence supported that the children have become familiar with a liberal visitation routine since October 2008 and we see no reason to disturb the district court's decision.

**VI. Medical Expenses.**

The district court ordered H\_\_\_\_\_ to maintain health insurance for the children and pay "100 percent of reasonable non-covered medical expenses preapproved by the petitioner." W\_\_\_\_\_ maintains the necessity of pre-approval is unjustified and not in the children's best interest. We find the phrase "reasonable

non-covered medical expenses” sufficiently protects H\_\_\_\_ from incurring excessive expenses. The provision “pre-approved” invites unnecessary conflict between H\_\_\_\_ and W\_\_\_\_, and we therefore strike the provision from the order.

### **VII. Cross-Appeal.**

H\_\_\_\_ cross-appeals, asserting the court erred in denying his rule 1.904(2) motion to include specific orders with respect to visitation and information about the children. He requested the enlargement and modification to clarify the rights and responsibilities of each parent with respect to joint legal custody and H\_\_\_\_’s visitation. The district court denied the entirety of H\_\_\_\_’s motion. We find Iowa Code section 598.1 sufficiently defines joint legal custody and the district court’s opinion supports that by providing additional details on child custody matters, and affirm the district court’s decision.

### **VIII. Attorney Fees.**

W\_\_\_\_ seeks attorney fees on appeal. “An award of attorney fees is not a matter of right but rests within the court’s discretion and the parties’ financial positions.” *In re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa Ct. App. 1996). We review the needs of each party seeking the attorney fees, the ability of the other party to pay, and the relative merits of the appeal. *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). After considering the appropriate factors, we award attorney fees of \$3000 to W\_\_\_\_. Costs on appeal assessed to H\_\_\_\_.

**AFFIRMED AS MODIFIED.**