IN THE COURT OF APPEALS OF IOWA

No. 0-398 / 09-1608
Filed August 25, 2010

IN RE THE MARRIAGE OF RUJUTA LAGU VIDAL AND PETER LEWIS VIDAL

Upon the Petition of
RUJUTA LAGU VIDAL,
Petitioner-Appellee,

And Concerning
PETER LEWIS VIDAL,
Respondent-Appellant.

Appeal from the Iowa District Court for Hancock County, Colleen D. Weiland, Judge.

Respondent appeals several provisions of the decree dissolving his marriage to petitioner. **AFFIRMED AS MODIFIED AND REMANDED.**

Brian D. Miller of Miller & Miller, P.C., Hampton, for appellant.

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellee.

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

SACKETT, C.J.

Peter Lewis Vidal appeals from a September 2009 decree dissolving his 1994 marriage to Rujuta Lagu Vidal. He contends the district court erred in (1) allowing him only three hours to present his case in chief and not allowing him to call witnesses who would have testified on issues of child custody and visitation, (2) giving a counselor the authority to expand or reduce his parenting time with the parties' minor child, (3) reversing its order allowing him discovery of Rujuta's foreign bank account, (4) allowing Rujuta to call an undisclosed expert witness, (5) not giving him sufficient credit for his premarital assets and gifted property, (6) computing child support and allocating uncovered medical expenses, and (7) awarding alimony and dividing the parties' property. We affirm as modified and remand.

I. SCOPE OF REVIEW.

We review the constitutional challenge to the court's decree de novo. *In re Marriage of Seyler*, 559 N.W.2d 7, 9 (Iowa 1997); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 865 (Iowa 1994). A trial court has considerable discretion in directing the course of the trial. *Nichols v. Kirchner*, 241 Iowa 99, 106, 40 N.W.2d 13, 17 (1949); *Fournier v. Fraternal Order of Eagles*, 368 N.W.2d 849, 852 (Iowa Ct. App. 1985). A review of the merits of the dissolution decree also is de novo. Iowa R. App. P. 6.907 (2009).

II. BACKGROUND.

The parties married in 1994. At the time Peter was forty-three and Rujuta was twenty. The parties' only child, a daughter, was born in 1999. Peter is a

dentist and has a practice in Garner, Iowa, that was well established at the time of marriage. Rujuta received education during the marriage and has held various jobs. The dissolution petition was filed on March 15, 2007. The parties owned real estate and personal property including motor vehicles. They have life insurance and retirement accounts. They also have debt.

In a decree filed September 9, 2009, the district court provided that the parties have joint custody of their daughter and Rujuta have physical care. The court also set forth what it termed a parenting schedule that included visitation for Peter and ordered the parties to abstain from the use of alcohol and controlled substances while the child was in their care. Peter was ordered to pay child support of $1253 a month. The court awarded Rujuta alimony of $2000 a month for twenty-four months and $1000 a month for thirty-six months. The court divided the property and debt and ordered Peter to pay $380,000 as an equalization payment and $10,000 of Rujuta's attorney fees and the court costs.

III. LIMITING TIME ALLOCATED TO TRIAL.

Peter contends the district court committed constitutional error in denying him due process in providing only three hours for him to present his case in chief on issues of child custody and visitation and in not allowing him to call certain witnesses to address these issues.

On June 4, 2008, the district court filed a pretrial order captioned: "Order Regarding Presentation of Trial" noting trial on the petition for dissolution was set for June 17, 2008, at 9 a.m. The order provided the court would first hear the direct and cross-examination of Rujuta and then the direct and cross-examination

of Peter. It further provided the court would then hear the parties' witnesses in the more traditional order of trial unless the parties by agreement took a witness out of turn. Several motions for continuances of the trial date were filed and granted. Trial was held on January 21, 22, and 23, 2009, on all issues except custody and visitation.

On April 22, 2009, the district court entered a second pretrial order that is the center of this dispute. The order provided, among other things, for the presentation of evidence on custody and visitation. It provided in relevant part:

> 3. Presentation of Evidence. The court has considered the schedule, taking into account the fair presentation of evidence and breaks. The order of presentation shall be as shown below. During each party's "additional evidence" and rebuttal, counsel shall plan and allow time for cross and redirect examinations of each witness presented within the time allotted to that party. All redirect examination of a party shall be presented during that party's allotted rebuttal time.
>
> Wednesday, April 29
> 9:00-11:15 Petitioner's direct examination (will include a 15 minute break)
> Early lunch
> 12:30-2:45 Respondent's direct examination (it will include a 15 minute break)
> Break
> 3:00-4:30 Cross examination of petitioner
>
> Thursday, April 30 (Clerk's office closes at 2:30 p.m.)
> 9:00-10:30 Cross examination of respondent
> Break
> 10:45-12:15 Petitioner's additional evidence
> Lunch
> 1:15-2:45 Petitioner's additional evidence continues
> Break
> 3:00-4:30 Respondent's additional evidence
>
> Friday, May 1
> 9:00-10:30 Respondent's additional evidence continues
> Break

> 10:45-12:15 Petitioner's rebuttal
> Lunch
> 1:15-1:45 Petitioner's rebuttal continues
> 1:45-2:45 Respondent's rebuttal
> Break
> 3:00-4:00 Respondent's rebuttal continues
> Conclude & adjourn
>
> 4. **Noncompliance.** Failure to comply with any provision in this order may result in the imposition of sanctions pursuant to I.R.C.P. 1.602(5).

Peter's attorney responded to the order by letter with a carbon copy to Rujuta's attorney asking if he could use the two hours allocated for rebuttal witnesses to call witnesses he would classify as case-in-chief witnesses.

The judge denied the request stating:

> I have ordered a very specific schedule for the parties' presentation of evidence for the purpose of keeping a tight rein on the trial schedule, which I believe is demonstrably necessary in this case. Case-in-chief evidence is by definition presented prior to the other party's opportunity to rebut, and I decline to amend the previously ordered schedule of presentation.

Peter then filed an objection to the scheduling order and a renewed request for additional time to present his case-in-chief. He contended that he was planning to call ten witnesses during his three-hour case-in-chief evidence. He listed four other witnesses who he wanted to call but believed he could not call because of the judge-imposed time restraints. All of the witnesses were specifically named and the motion supplied a brief summary of the testimony he believed each witness would give.

Of the fourteen named witnesses Peter contends here he was not allowed to call five. These witnesses and the summary of their testimony Peter presented to the court are:

Michelle Lehman – Ms. Lehman is employed by the Iowa Department of Human Services. Ms. Lehman would have testified regarding a child abuse complaint made by Rujuta against Peter Vidal relating to [the parties' child], and that said child abuse complaint was determined to be unfounded, and without merit;

John Heilskov – Mr. Heilskov would have testified regarding his first hand knowledge and experiences with both Peter Vidal and Rujuta Vidal and their respective parenting strengths and weaknesses. He would have testified regarding claims of spousal abuse alleged by Rujuta, as well as claims of child abuse alleged by Rujuta during the pendency of this action. He would have testified regarding who he believed would be better able to parent [the child] on a day to day basis;

Doug Suntken – Mr. Suntken would have testified regarding his first hand knowledge and experiences with both Peter Vidal and Rujuta Vidal and their respective parenting strengths and weaknesses. Mr. Suntken would have testified that Rujuta's claims of spousal abuse, and her claims that Peter was abusive to [the parties' child] were false, and motivated by Rujuta's desire to make sure there was no relationship between father and daughter;

Barb Heilskov – Mrs. Heilskov would have testified regarding her first hand knowledge and experiences with both Peter Vidal and Rujuta Vidal and their respective parenting strengths and weaknesses. She would have testified regarding claims of spousal abuse alleged by Rujuta, as well as claims of child abuse alleged by Rujuta during the pendency of this action. She would have testified regarding who she believed would be better able to parent [the parties' child] on a day to day basis;

Connie Suntken – Mrs. Suntken would have testified regarding her first hand knowledge and experiences with both Peter Vidal and Rujuta Vidal and their respective parenting strengths and weaknesses. She would have testified that the allegations of spousal abuse made by Rujuta were false, and that Rujuta's allegations of child abuse by Peter during the pendency of this action were also not true, and motivated by Rujuta's desire to destroy any relationship between father and daughter. She would have testified regarding who she believed was better able to parent [the parties' child] on a day to day basis;

Jim Amelsberg – Mr. Amelsberg would have testified regarding counseling services he has provided for both Peter Vidal and Rujuta Vidal. Mr. Amelsberg would have testified regarding specific mental health problems experienced by Rujuta during the parties' marriage.

Peter also contends that he was denied the opportunity to redirect witness Jennifer Hitchcock. After Hitchcock's cross-examination the following transpired:

> THE COURT: It's time for presentation for one hour before lunch of Rujuta Vidal's rebuttal evidence. Ms. Arzberger, when you're ready, you can do that.
>
> MR. MILLER: Excuse me, Your Honor. I'm sorry to interrupt. With the court['s] indulgence, I'd like to make a record. I don't even need a full minute, Your Honor.
>
> THE COURT: Nope. Go ahead. Just noting my time.
>
> MR. MILLER: I want the record to reflect that at this point, Your Honor, that Mr. Vidal – we're not resting his case. We have – I had follow-up questions to ask Ms. Hitchcock. I had Ms. Lehman from the Department also here to testify. I've got two other witnesses in the hallway to testify. I had other witnesses that I'd like to call in our case in chief who are listed in our objection and renewed motion for additional time that we filed with the court and the court has already ruled on. I think for purposes of making an appropriate record, I need to renew that objection and request for additional time to present our case in chief. I think that's the appropriate record I need to make on that issue, Your Honor.
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> . . .
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> THE COURT: The renewed motion and the record that you've made is sufficient to preserve that.
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> MR. MILLER: Thank you.
>
> THE COURT: Same ruling.

At the close of the evidence Peter renewed his objection to the schedule and noted that he did not need to use rebuttal time. He also renewed the objection in a post-trial motion.

Rujuta contends that the constitutional issue Peter now raises was not raised in the district court. She contends that both parties were treated in the same way,[1] Peter has not shown he was prejudiced by the order, and the testimony he contends he was precluded from presenting was covered by other witnesses. She also appears to argue that because the action had been filed for

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[1] Her brief states at the conclusion of the trial that there were additional witnesses she would have called but did not in reliance on the order.

an extended period and Peter's objection was not raised until six days before trial, it was not timely.

Peter preserved error and his objection was timely as he made his objection in quick response to the judge's order providing for presentation of custody and visitation evidence. His constitutional due process objection was raised in his written objections to the order and was raised by reference during trial and again in his post-trial motion. We address these issues.

A request to call a witness at trial broadly implicates the fundamental fairness and opportunity to be heard components of due process. *In re Marriage of Ihle*, 577 N.W.2d 64, 68 (Iowa Ct. App. 1998); *Bell v. Iowa Dist. Court*, 494 N.W.2d 729, 731 (Iowa Ct. App. 1992). We recognize the trial court is entrusted with wide discretion because the court is in a better position than are we to appraise the effect of a particular procedure on the parties. *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 609 (3rd Cir. 1995). Discretionary rulings of the trial court are presumptively correct and will be disturbed on appeal only upon a clear showing of abuse of discretion. *Glenn v. Carlstrom*, 556 N.W.2d 800, 804 (Iowa 1996); *Sheer Constr., Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 328, 334 (Iowa 1982).

The Iowa Rules of Civil Procedure "govern the practice and procedure in all courts of the state, except where they expressly provide otherwise or statutes not affected . . . provide different procedure in particular courts or cases." Iowa R. Civ. P. 1.101. These rules implicate the fundamental fairness and opportunity to be heard components but do not explicitly authorize a district court to set time

limits for a trial. But one can infer from these rules and the Iowa Rules of Evidence[2] that a trial court has the inherent power to control the case before it so trials are both fair and efficient, and the parties can secure a just, speedy, and inexpensive determination of every action, and eliminate unjustifiable expenses and delay. *See Ihle*, 577 N.W.2d at 67. Such a position also finds support in *Duquesne Light Co.*, 66 F.3d at 609-10.

Cases from federal courts and other states support a trial court's authority to set time limits and limit the number of witnesses. *See United States v. Solina*, 733 F.2d 1208, 1213 (7th Cir. 1984) (finding no abuse of discretion in limiting a party to four witnesses where party could not show benefit to additional witnesses' corroborating testimony); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1171 (7th Cir. 1983) (setting a period of time for trial not a per se abuse of discretion), cert. denied, 464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 266 (1983); *United States v. Fernandez*, 497 F.2d 730, 736 (9th Cir. 1974) (finding no abuse of discretion in allowing only five of parties' twenty-two prospective witness to corroborate party's testimony finding probative value was outweighed by undue delay); *United States v. Hildebrand*, 928 F.Supp. 841, 847-48 (N.D. Iowa 1996) (finding court may[3] limit number of witnesses to avoid cumulative testimony); *United States v. Reaves*, 636 F.Supp. 1575, 1580 (E.D. Ky. 1986); *Rondon v. State*, 711 N.E.2d 506, 516 (Ind. 1999) (holding no abuse of discretion

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[2] Iowa Rule of Evidence 5.102 requires the evidentiary rules to be construed to secure, among other things, the elimination of trial delay. Iowa Rule of Evidence 5.403 provides relevant evidence may be excluded for consideration of, among other things, undue delay, waste of time, and needless presentation of cumulative evidence.

[3] However, the court found an abuse of discretion in refusing testimony that was not cumulative.

in refusing to admit cumulative testimony); *State v. Jackson*, 226 S.E.2d 543, 544 (N.C. Ct. App. 1976) (holding no abuse of discretion in limiting witnesses who would have been cumulative); *McGregor v. State*, 885 P.2d 1366, 1379 (Okla. Crim. App. 1994) (stating court may limit a defendant's character witnesses particularly on collateral issues).

But the discretion of the trial court to manage trials is constrained by due process principles requiring all litigants to be given a fair opportunity to have their dispute resolved in a meaningful manner. *Ihle*, 577 N.W.2d at 67. Furthermore issues of custody and the care of children are of major public and private interest and are issues where the risk of erroneous decisionmaking can have serious implications for the children, the public, and the parents. *See id.* at 67.

While it is recognized that the trial courts should have discretion to impose restraints on a party's presentation without specifically ruling on each piece of evidence, it is also recognized the trial courts should not exercise this discretion as a matter of course, and witnesses should not be excluded on the basis of mere numbers. *See MCI Commc'ns Corp.*, 708 F.2d at 1171. Rather, a trial court should impose time limits only when necessary, after making an informed analysis based on a review of the parties' proposed witness lists and proffered testimony, as well as the parties' estimates of trial time, and trial time must be allocated even handedly. *See Duquesne Light Corp.*, 66 F.3d at 610. And a party should be allowed to fill its allotment with whatever evidence that party deems appropriate subject to rules of admissibility independent of the overall time limitation for the case being tried. *Id*. An allocation of trial time relied on by

the parties should not be taken away easily. *See id.* Making an allotment whereby the first party's cross-examination of the second party's witness is charged to the second party and vice versa makes it difficult for the parties to accurately budget the time allocated to their case in chief. *See id*. The time should also be allocated fairly and even handedly. *See id.*

We recognize a trial court's dilemma in balancing its demands, particularly where a party appears to consume time with witnesses who are repetitive or add little to the relevant issues in the case. More than one court has recognized that "[i]t has never been supposed that a party has an absolute right to force upon an unwilling tribunal an unending and superfluous mass of testimony limited only by his [or her] own judgment and whim." *See MCI Commc'ns Corp.*, 708 F.2d at 1171 (citation omitted). That said, we are bothered here by the absence of a showing that the district court engaged in any kind of analysis or that the court consulted the attorneys before entering the order. *See Tabas v. Tabas*, 166 F.R.D. 10, 12 (E.D. Pa. 1996) (noting in allocating a thirty-hour period for each party, the court had considered the parties' list of witnesses, disputed facts, and estimates of trial time). Here the court did not seek input from the attorneys or give the parties the opportunity to use their scheduled time as they saw fit. Peter's application to use rebuttal time for his case in chief was denied. This is contrary to the general notion that ordinarily a party should be allowed to fill its allotment with whatever evidence the party deems appropriate subject to rules of admissibility. *See Duquesne*, 66 F.3d at 610. The rebuttal time here was not used and the judge, to her credit, admitted there may have been alternate ways

for her to schedule, stating at the close of the trial, "So I agree and want to make clear that there may have been possibly been better ways to do that. And apparently that there would have been given the time that we have left." The district court's time frames were arbitrary, inflexible time limits and such are disfavored. *See Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1508-09 (9th Cir. 1995). Furthermore, the decision on allocation of cross-examination time to the party who called the witness could have made it difficult for the parties to allocate their time. The district court here abused its discretion in entering its order without considering the principles set forth above.

Peter must also show he suffered prejudice. *See* Iowa R. Evid. 5.103(*a*)(2) (stating error may not be predicated on the exclusion of evidence unless a substantial right of a party is affected and an offer of proof was made or the substance of the excluded evidence was otherwise identified). Prejudice is required to reverse on account of rigid time limits. *Henkel v. R & S Bottling Co.*, 323 N.W.2d 185, 193 (Iowa 1982); *Ihle*, 577 N.W.2d at 69.

The only claim of prejudice with reference to custody and visitation that Peter makes is a challenge to the district court's restriction from him traveling with his daughter more than five days at a time. Both parties were given two non-consecutive, uninterrupted one-week periods of parenting time with the child during the summer. Peter was also given extended visitation from August 1 to 17. Rujuta was not restricted in her travel with the child either within or out of the United States. The court also set out a number of specific requirements should either party seek to travel with the child; namely, for travel of more than one

overnight, the party should give the other fourteen days advance notice with a contact number and location of travel and accommodations for the child's daily contact by telephone or electronically with the other party. The district court has provided for the traveling parent to provide the other parent with daily contact with the child who is now over ten years old. These provisions provide the opportunity for the parties to know their child's whereabouts when traveling. We find the restriction of five days on Peter's travel arbitrary and recognize that had Peter been able to call the proffered witnesses, the restriction may not have been imposed. We modify the decree to strike the provision that Peter can only travel with the child for five days. Having done so we find no need to order a new trial or remand for further evidence on issues of custody and visitation.

IV. VESTING IN COUNSELOR RIGHT TO MODIFY VISITATION.

Peter next contends the district court committed error when it gave a court-ordered counselor or other unnamed counselor the right to expand or reduce his daughter's visitation.

The district court, after it made provision for custody and visitation, ordered the child at Peter's cost to have counseling with Sheila Pottebaum who could recommend changes in Peter's parenting time. The decree specifically provided:

> The counselor may make specific written recommendations to the parties as to the expansion or reduction of Peter's parenting time with [his daughter]. The parties *shall* implement recommended changes; unreasonable failure to do so may subject either party to contempt of court proceedings.

(Emphasis added.) Peter contends that the order vests what should be a judicial authority and discretion (that is, the authority to modify visitation) in a person who is not an Iowa District Court judge. We agree that the provision delegates the court's authority to one who has no jurisdiction to receive it and if a change is recommended, denies Peter the right to be heard prior to an amendment being made to the visitation provisions in the decree. *See In re Marriage of Seyler*, 559 N.W.2d 7, 10 (Iowa 1997). We modify to strike the provision of the set forth decree above.

V. REVERSAL OF ORDER COMPELLING DISCOVERY.

Rujuta had one or more foreign bank accounts. Peter served on Rujuta several requests for copies of bank statements of any or all foreign bank accounts where Rujuta was an owner or co-owner. On January 11, 2009, the district court ordered Rujuta to provide monthly bank statements for all India bank accounts since January 1, 2007, in which Rujuta had any sort of ownership interest within one week. Rujuta provided a letter from IDBA LTD Frabhadevi Branch dated January 13, 2009, indicating one account the institution had of hers had been closed on August 29, 2007, and the balance was transferred to a savings account in Rujuta's name and the name of another. A second sheet showed "total Balance 17,268.87 Cr."[4] On January 16, 2009, Peter filed a motion to compel production of ordered documents and for sanctions. The court denied the motion without comment.

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[4] Rajuta contends that this balance is in Indian rupees and thus equates to a balance of only about U.S. $350.

The district court has wide discretion on discovery issues and we reverse only when the discretion is abused or the grounds for the district court's action are clearly untenable. *In re Marriage of Meredith*, 394 N.W.2d 336, 338 (Iowa 1986). Peter contends the court's discretion was abused. Rujuta contends the court did not and points out that the information on the account was in India and that she had difficulty in obtaining that information she did receive. Rujuta provided information on what she contends is her only account in India. The court did not abuse its discretion. *See id.*

VI. ALLOWING EXPERT WITNESS NOT DISCLOSED WITHIN TIME REQUIRED TO TESTIFY.

Peter contends the district court abused its discretion in allowing Dennis Muyskens, a certified public accountant in Mason City, Iowa, to testify as an expert witness when he was not disclosed within the required time. Rujuta contends she showed good cause for the late notice contending it was the result of Peter's failure to provide financial documentation.

The district court in ruling on the issue noted that

> [B]oth parties have not complied with discovery in the spirit in which discovery is supposed to be complied with. Specifically, I think Dr. Vidal has been resistant to providing documents. And I think, Ms. Arzberger, you might have so much going on that you lose track sometimes of what's going on. . . . There has been a flurry of paperwork trying to get something from one party, trying to get something from another, asking for intervention by the court. I'm frankly surprised that either of you and that any of us can keep track what's been filed and what[ ] hasn't, and what's been complied with and what hasn't at this point because I find this case to pretty much be chaos. And clearly the court's . . . responses in rulings have not been effective in reining that in. At this point, I would find it inequitable to deny either party the opportunity to present her or his case in any way. . . . [A]t this

> point, I'm letting parties put in what they've got. Throw it at me. I'll make my decision, and we'll get your dissolution done. So that's my ruling. That's why I denied those motions.

We find no abuse of discretion here.

VII. INSUFFICIENT CREDIT FOR ASSETS BROUGHT TO THE MARRIAGE.

Peter contends Rujuta brought no assets to the marriage and he brought assets worth about $1,010,000. He contends that the assets remained or were sold, and in most cases the proceeds from the sales were used to purchase other assets. He contends the district court divided about $1,600,000 in assets. He contends if he were given full credit for assets he brought to the marriage that he would have $1,000,000 plus one-half of the $600,000 or about $1,300,000 and Rujuta would receive $300,000 in assets but that she is receiving nearly $600,000 in assets. Rujuta does not disagree that Peter brought substantial assets to the marriage and she brought few or none. The district court agreed finding that Peter brought substantial assets and presumably some debt to the marriage. The district court concluded that Peter should be allowed substantial but not full credit for the "premarital value of assets he brought to the marriage." Unfortunately the district court did not indicate what value it was attaching to these assets, and what credit it was giving Peter in premarital assets. Nor is there a computation of how the court arrived at the equalization payment for Rujuta. Peter has attempted in his brief to set forth the values allocated to each party and in doing so appears in most cases to be using the values the district court attached to property. Rujuta does not appear to disagree with Peter's

computation. We use it as a guide to the extent it comports with the district court's valuations.

Peter also has in his brief itemized the assets he contends he brought to the marriage valuing some at the time of marriage and using the district court's current valuation for some to arrive at the $1,010,000 figure. Most notably Peter values the dental practice and the accounts receivable at about $500,000 although Peter had challenged the valuation at trial. We cannot say, considering this fact and others, that the district court did not give adequate consideration to the property Peter brought to the marriage. We affirm on this issue.

VIII. GIFTED OR INHERITED PROPERTY.

Peter contends he did not get adequate credit for $10,000 that was gifted to him. The district court specifically found the money was used to purchase a storage building which was valued as a part of the parties' assets but there is no showing that the court gave Peter credit for it. We modify to find that Peter should have credit for the $10,000. A gift received during the marriage is the property of the party receiving the gift and it is not subject to division except upon a finding that the refusal to divide it is inequitable to the other party or the child of the marriage. *See In re Marriage of Fall*, 593 N.W.2d 164, 166 (Iowa Ct. App. 1999). Rujuta is receiving substantial property and also is receiving the benefit of property Peter brought to the marriage. This property valued at $10,000 should have been set aside to Peter.

IX. INCOME FOR CHILD SUPPORT PURPOSES.

Peter contends the court should have fixed Rujuta's annual income for child support purposes at $35,000, not at $11,000, her yearly earnings at a part-time job. He contends the $35,000 represents her earning capacity and we would agree. Effective July 1, 2009, Iowa Court Rule 9.11 was amended by adding numbered paragraph (4):

> The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

Rujuta is a registered nurse and also holds a bachelor's degree in communications. She is in good health. She has had higher earnings in the past. She acknowledged if she worked a forty-hour week as a registered nurse she could earn $37,000 annually. Rujuta also is receiving $2000 in monthly alimony, or $24,000 per year. The alimony was not considered as income to Rujuta nor as a reduction in Peter's income by the district court before applying the child support guidelines. In fixing child support, alimony may be considered by the court in an attempt to "do justice between the parties." *See In re Marriage of Lalone*, 469 N.W.2d 695, 697 (Iowa 1991).

Full-time employment as a registered nurse is available to Rujuta though she complains it is not available at the times she wishes to work. We recognize she is the custodian of the parties' one child who at this time is eleven years old. Rujuta has responsibility for her, but there are no other impediments to her working outside the home, and Peter has visitation with the child every other

weekend and Wednesday night and Thursday morning. The trial court's failure to consider Rujuta's earning capacity and the alimony Rujuta receives and Peter pays does not do justice between the parties. We remand the issue of child support to the district court to fix child support under the current guidelines, and in doing so consider both Rujuta's earning capacity and the alimony Rujuta receives and Peter pays.

X. ALLOCATION OF UNCOVERED MEDICAL EXPENSES.

Peter contends he should not have been ordered to pay ninety-one percent of their daughter's uncovered medical expenses. He contends it should be recomputed giving Rujuta an annual income of $35,000. On remand the district court should reallocate these expenses in accord with the income amounts used for determining child support.

XI. ALIMONY SHOULD NOT HAVE BEEN AWARDED.

Peter contends there is no basis for the award of alimony to Rujuta of $2000 for two years and $1000 for the next three years. He notes that with his financial support Rujuta earned an associate degree in science and an associate degree in nursing and a bachelor's degree in communications, and is a registered nurse. He contends this education obtained during the marriage enables her to be self-sufficient as a nurse or in other jobs and she also is receiving substantial assets and no debt. He points out that at the time of trial he was fifty-eight years old and had health issues and was nearing the end of his dental career while Rujuta is thirty-five years old and in good health.

Alimony is an allowance to the spouse in lieu of the legal obligation for support. *In re Marriage of Sjulin*, 431 N.W.2d 773, 775 (Iowa 1988). Any form of spousal support is discretionary with the court. *In re Marriage of Ask*, 551 N.W.2d 643, 645 (Iowa 1996). Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). The discretionary award of spousal support is made after considering the factors listed in Iowa Code section 598.21A(1) (2007). *Id.* We consider the length of the marriage, the age and health of the parties, the parties' earning capacities, the levels of education, and the likelihood the party seeking alimony will be self-supporting at a standard of living comparable to the one enjoyed during the marriage. *In re Marriage of Clinton*, 579 N.W.2d 835, 839 (Iowa Ct. App. 1998). 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). In marriages of long duration, both spousal support and nearly equal property division may be appropriate, especially where the disparity in earning capacity is great. *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997).

We affirm the alimony award but do consider the award of alimony in assessing the equity of the property division below.

XII. EQUITY OF PROPERTY DIVISION.

Peter contends that the property division was not equitable in several respects.

a. Failure to include debt. Peter contends the district court failed to consider a $32,224 debt on a condominium he received and $49,000 owed to GMAC for the purchase of a Cadillac Escalade valued by the district court at $35,000.

The district court found the condominium to have a value of $82,000 and a debt of $56,600. The value was that established by Rujuta's expert witness after having inspected the condominium on September 10, 2008. Peter testified that he still owed Fjetland Construction for improvements made to the building between May 2007 and March 2008; therefore Rujuta's appraiser considered the improvements in reaching its valuation. Rujuta contends the district court was correct because he made the improvements without her consent, plans to deduct the expense on his income tax, and he receives the asset so he will benefit from the deduction, and the district court ordered each party to assume the debts they incurred since separation.

The valuation was made after the improvements were in place. We generally value assets and liabilities at the time of trial. *See In re Marriage of Campbell*, 623 N.W.2d 585, 587 (Iowa Ct. App. 2001). There is no reason to depart from that rule here. This debt should have been considered.

The district court found that Peter asserted he owed $49,640 on the Cadillac Escalade which it valued at $35,000 but found no independent evidence to corroborate his assertion so did not consider it. Peter contends the debt was not disputed at trial and was listed on his exhibit W. He also contends that he verified the debt by attaching to his motion to enlarge documentation showing the

debt as of January 1, 2009, to be $49,000. Attached to the motion was a note from Peter's CPA with the installment contract on Peter's Escalade and the loan balance shown on his January financial statements was the $46,601.43. The sales contract showed he bought the car for $66,985 in October 2007 and was financed for about $58,000 of the purchase price. The district court denied both parties' motions to enlarge and amend.[5]

Rujuta does not dispute that the debt exists nor does she contend she objected to it at trial. Rather she argues that the car was purchased after they separated and Peter has had the benefit of its depreciation. We see no reasons to exclude this debt which is Peter's responsibility.

b. Unidentified bank account. Peter contends the district court charged him with an unidentified bank account.

Peter was awarded several accounts held at Liberty Bank. One account was identified by the district court as "Liberty Bank Checking account held in Peter's name with funds in the approximate value of $20,700.[6] He had a checking account at Liberty Bank which he showed in a January 26, 2009, affidavit of financial status as being in the amount of $3,993.27. Peter in a post-trial motion stated

> the Court's Ruling award[s] a Liberty Bank [account] to Peter valued at $20,700. Peter and his counsel have been unable to determine what account the Court is referring to in making said award . . . [and] [t]he Court should enlarge its ruling to provide more details about this account, including an account number, and then

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[5] Except it did provide that counseling expenses were to be paid in accordance with Iowa Supreme Court child support guidelines Rule 9.1.

[6] He was also given a Liberty Bank checking account held by Peter L. Vidal D.D.S., P.C. with funds in the approximate value of $25,600.

> allow the parties to consider the practical impact of said enlarged order.

Rajuta assumes this account with $20,700 existed and contends that in the forty days between reporting and time of trial the account was reduced by $17,000. While making these statements she neglects to show where in the record there is evidence supporting them. On our de novo review we find no evidence of the existence of a separate personal bank account that had $20,700. It should not have been considered an asset going to Peter.

c. Loan on dental practice. Peter contends the district court failed to consider a loan for dental equipment of $22,136. He notes that the decree recites that a dental practice equipment loan of $11,000 was asserted by Peter but that his exhibit demonstrating the total payoff due was not persuasive. He argues that a handwritten note of his office manager shows the $22,134 debt, and it is shown as a debt in said amount on both parties' affidavits of financial status. Rujuta acknowledges that it was shown on her financial affidavit but she argues she used the figure because that was the amount reported by Peter and she assumed it was correct. She contends that the handwritten notation on the exhibit was hearsay and she objected to it as hearsay.

It appears from Peter's testimony and the exhibit that the dental equipment was financed on two different contracts with Patterson Financial Services. Peter introduced a June 24, 2008, statement from Patterson Financial. Handwriting next to one equipment contract showed the payoff as $11,127.42 and the same handwriting showed the payoff of the second contract as $11,009.04. Rujuta objected to the handwriting as hearsay but made no

objection to the printed portion of the statement and stated that she had agreed that a person from Patterson did not have to come in and verify it. We, as did the district court, do not consider the handwriting. While there is no printed reference to the amount still due under the contract, it does indicate that two monthly payments on the contract were due as of July 15, 2008, in the amount of $830.97. We consider there is some debt to Patterson.

d. Income tax implications. Peter also argues that the district court did not give any consideration to tax implications to Peter. He argues because in order to pay the equalization payment to Rujuta he would be required to sell appreciated property and he will have income tax consequences as a result of the sales. All the real estate went to Peter and Rujuta was given a cash payment. Rujuta contends that Peter failed to introduce evidence of the tax consequences of the sale of real estate. Tax consequences are among the litany of things a court shall consider when dividing marital property. *See* Iowa Code § 598.21(5); *see also In re Marriage of Hogeland*, 448 N.W.2d 678, 680-81 (Iowa Ct. App. 1989). Peter has failed in the district court and in this court to give us much specificity as to the tax consequences or the provisions of the tax code that would apply. *See In Marriage of Keener*, 728 N.W.2d 188, 198 (Iowa 2007) (finding argument as to tax consequences was not preserved where not raised in the district or this court with enough specificity).

There is evidence to support Peter's contention that some of the real estate has increased in value and it is obvious that there would be income tax consequences on the sale. However, the lack of additional evidence or authority limits the consideration we give the tax consequences.

e. Modification of property division. The property to be divided should be decreased by $20,700 representing the phantom bank account. The debt that Peter is required to pay that was not considered in dividing the property should be increased to $81,224. Peter should have his $10,000 in gifted property free and clear of Rujuta's claim. We consider tax consequences on the sale of appreciated property. We therefore modify the $380,000 equalization payment Peter is to pay and reduce it to $300,000.

XIII. ATTORNEY FEES.

Peter contends he should not have been required to pay Rujuta trial attorney fees of $10,000 noting that he also paid temporary fees of $10,000. We find no abuse of discretion.

XIV. CONCLUSION.

We affirm the decree with the following modifications: (1) striking the provision that Peter can only travel with the child for five days; (2) striking the provision that the parties shall implement changes in visitation recommended by the counselor; (3) reducing Peter's equalization payment from $380,000 to $300,000. We also set aside the determinations of child support and uncovered medical expenses and remand for their recalculation in accordance with parts IX and X of this opinion.

We award no appellate attorney fees. Costs on appeal are taxed one-half to each party.

AFFIRMED AS MODIFIED AND REMANDED.