

IN THE COURT OF APPEALS OF IOWA

No. 0-672 / 09-1902
Filed November 24, 2010

IN RE THE MARRIAGE OF JODI LYNN HAGAR AND MICHAEL JAMES HAGAR

Upon the Petition of

JODI LYNN HAGAR,
Petitioner-Appellee/Cross-Appellant,

And Concerning

MICHAEL JAMES HAGAR,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Dubuque County, Monica Ackley,
Judge.

Husband appeals and wife cross-appeals the provisions of the decree
dissolving their marriage. **AFFIRMED AS MODIFIED.**

Werner Hellmer and Sheila A. O'Laughlin of Day & Hellmer, P.C.,
Dubuque, for appellant/cross-appellee.

Constance Peschang Stannard of Johnston, Stannard, Klesner, Burbidge
& Fitzgerald, Iowa City, for appellee/cross-appellant.

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

EISENHAUER, J.

Michael Hagar appeals from the property division and spousal support provisions of the decree dissolving the parties' marriage. In her cross-appeal, Jodi Hagar appeals from the physical care and property division provisions of the decree. We modify the property division and alimony award and affirm joint physical care.

I. Background Facts and Proceedings.

Resolution of the property issues in the marital estate requires a discussion of the dry cleaning and rental real estate businesses established by Ralph and Mary Kaye Hagar, Michael's parents. Originally, both businesses operated together as Goliath, Inc. Starting in 1982, certified public accountant Ron Helle did accounting for Goliath, Inc. Helle explained that on January 1, 1996, Hagar Enterprises, Inc. (Hagar, Inc.) was formed "to own all the real estate" and to distribute income to Ralph and Mary Kay. Goliath, Inc. remained the dry cleaning operating entity/equipment owner. Goliath, Inc. leases the buildings/land for its dry cleaning business from Hagar, Inc. In 1996, Michael moved back to Iowa to operate the dry cleaning business. He also purchased a home in Galena, Illinois.

Hagar, Inc. assumed "a substantial portion of the debt on the real estate and in return was given a note receivable from [Goliath, Inc.] in the amount of \$150,000." Helle explained: "At the time we split [Hagar, Inc.] off from [Goliath, Inc.], we intentionally tried to keep the value of [Goliath, Inc.] low with the idea of making the transfer of ownership of [Goliath, Inc.] economically feasible."

Jodi and Michael, both college graduates, married in July 1999 when Jodi was thirty and Michael was thirty-four. Several months later, in December 1999, Jodi ended her \$50,000/year job as a publishing sales representative and joined Michael at Goliath, Inc. At that time Michael was running four dry cleaning stores for Goliath, Inc. and he trained Jodi to manage one of the stores.

Near the end of Jodi's first year of full-time employment with Goliath, Inc., on December 7, 2000, accountant Helle wrote to Ralph and Mary Kaye stating Goliath, Inc. had an estimated value of \$502,903, but its value was reduced to "approximately \$250,000" by three factors: (1) a \$150,000 note payable to Hagar, Inc.; (2) the \$10,486 present value of excess interest paid by Goliath, Inc. on the note; and (3) the \$95,586 present value of excess rent paid by Goliath, Inc. to Hagar, Inc. The letter further stated Michael had an option to purchase Goliath, Inc. for \$310,000.

Approximately one year later, on January 1, 2002, Michael entered into a purchase agreement and note to purchase all the stock of Goliath, Inc. (seventy-five total shares) for \$300,000 from his parent's trust, Ralph/Mary Kaye Trust A (Trust A). At this time Goliath, Inc. was operating three stores. Michael pledged his shares to secure his performance of the purchase agreement and note. Also on January 1, 2002, Michael assigned thirty-seven of his seventy-five shares to Jodi. In a separate consent agreement, Jodi agreed to be bound by the pledge agreement securing performance on the note. After Michael and Jodi's initial payment of \$25,000, the note required payments of \$3000 per month.

In a May 31, 2002 letter to Michael and Jodi, Helle suggested they could reduce their social security tax “by reducing your salary [Michael reduce from \$1250 to \$600/week and Jodi reduce from \$429 to \$200/week] and taking a quarterly distribution of earnings in the amount of your salary reduction.” Helle suggested Goliath, Inc. make quarterly distributions of \$18,750 or \$250 per share: (1) to replace the reduced wages [\$9958/quarter]; and (2) to pay the \$3000 monthly note payment [\$9000/quarter] to Hagar, Inc.

In 2002, Goliath, Inc. established quarterly distributions. Michael’s social security statement shows yearly wages for 1998 to 2001 that range from \$61,080 to \$63,289. From 2002 to 2006, Michael’s social security wages were: \$46,800; 31,800; 30,600; 31,200 and 31,200.

In January 2002, Lauren was born. Mary Kaye took care of Lauren while Jodi returned to work in the dry cleaning business. In May 2004, Lilly was born. After Lilly’s birth, Jodi experienced medical problems requiring hospitalization and recuperation. Lilly also experienced medical issues, eventually requiring surgery. During this upheaval, the parties left their home in Galena and moved in with Mary Kaye. When Jodi recovered, the parties decided to sell their Galena home and build a new home near Mary Kaye while continuing to reside with her. Jodi reduced her hours at Goliath, Inc.

The parties moved into their new home during July 2005. The new home was more costly than anticipated and resulted in litigation with the contractor. After losing the litigation, the parties borrowed \$40,000 from Mary Kaye to pay

the contractor and their attorney. They repaid \$15,000 of this debt before trial leaving \$25,000 owed to Mary Kaye at the time of trial.

In January 2005, Michael and the trust agreed to reduce the note's monthly payment to \$2000. Mary Kaye¹ testified she cut the note's payments because Jodi and Michael couldn't afford the \$3000 per month payments. The Goliath, Inc. purchase note's amortization schedule shows its December 2004 principal balance was \$219,011. Therefore, over the course of three years, Michael and Jodi reduced the purchase note obligation by \$80,989. By June 2005, another location was closed and Goliath, Inc. was operating two stores.

In December 2005, in order to secure a tax savings for the Hagar family in the upcoming conversion of Hagar, Inc., Jodi was issued fifty percent of the Hagar, Inc. shares under a purchase agreement requiring her to pay \$410,602 to Trust A and \$333,722 to Ralph/Mary Kaye Trust B. Mary Kaye purchased the other fifty percent for the same amounts and terms. The next month, on January 6, 2006, Hagar, Inc. was liquidated and Mary Kaye and Jodi's shares were transferred directly to Hagar Enterprises, L.L.C. (Hagar, LLC). Under the January 6, 2006 pledge addendum: (1) if Jodi and Michael divorced, Jodi was required to transfer her Hagar, LLC shares to Michael; or (2) if Michael died, Jodi was required to transfer her Hagar, LLC shares to Mary Kaye. Hagar, LLC continued buying and leasing real estate and the Hagar, LLC purchase agreement payments for both Mary Kaye and Jodi were made from the operations of Hagar, LLC. Jodi contributed no funds to Hagar, LLC at the time of

¹ Ralph Hagar passed away at some point during the events discussed herein but the record does not indicate his date of death.

purchase and likewise made no payments on the purchase agreement debt from her funds.

Also in January 2006, Jodi stopped working at the Goliath, Inc. locations and started doing bookwork for the business out of the parties' home. In 2006, the parties' relationship deteriorated and in March 2006, Jodi withdrew \$10,000 of joint funds and put it in a separate account in her name. Michael agreed to Jodi having this account after it was established.

The payment on the note to Trust A had been accomplished primarily through the Goliath, Inc. quarterly distributions. At the end of 2007, the purchase note's principal balance was \$178,487. Therefore, over the course of six years, Michael and Jodi reduced the purchase note obligation by \$121,513.

Goliath, Inc. paid Michael and Jodi's family health insurance by sending payments directly to the insurance company. Additionally, from 2002 to 2007, Goliath, Inc. paid between \$40,000 to \$60,000 in total yearly distributions to Michael and Jodi. Goliath Inc.'s recent yearly distributions compared to total revenues (TR) are: \$52,000 distributed from \$484,000 TR in 2005;² \$58,182 distributed from \$427,850 TR in 2007; \$3280 distributed from \$406,660 TR in 2008. After Jodi filed for dissolution of the marriage in February 2008, Michael, as majority shareholder, unilaterally stopped the quarterly distributions.

Michael also set his own salary. Helle testified that from 2006 to November 1, 2008, Michael set his salary at \$1200 every two weeks. From November 1, 2008 to March 15, 2009, Michael's salary was \$3000 every two

² Accountant Helle confirmed \$446,425 TR in 2006, but could not specify 2006 distributions because Goliath, Inc. used another accounting firm during that time period.

weeks. After March 15, 2009, Michael returned his salary to \$1200 every two weeks. Michael testified his 2008 salary totaled \$67,223.

When the parties separated in February 2008, Michael entered a substance abuse treatment program followed by support through Alcoholics Anonymous meetings. The trial court found Michael's "commitment to remain sober appears genuine." Michael moved into Mary Kaye's nearby home and continues to reside there.

Jodi last worked for Goliath, Inc. in February 2008, but Michael paid her salary from Goliath, Inc. through September 2008. Jodi testified she received \$29,600 in gross income in 2008, with \$15,600 coming from freelance consulting in the publishing business.

During the pendency of the dissolution, a dispute arose during a visitation transfer. On June 9, 2008, Michael consented to an order requiring no contact with Jodi. He further consented to staying out of the family home.

In July 2008, Jodi filed for temporary support, stating "until the time of filing of her Petition, both [Jodi and Michael] were receiving quarterly distributions of approximately \$6500 from Goliath, Inc." and Michael is now refusing to pay Jodi her quarterly distribution.

On September 12, 2008, Michael's net worth statement indicated the value of Goliath, Inc. was unknown and it had approximately \$177,000 in debt. On September 12, 2008, the court found the parties were \$11,000 in arrears on the promissory note to purchase the dry cleaning business. The court recognized Jodi's current employment of freelance publishing projects paying

twenty dollars an hour during the school year. The court ordered Michael to pay \$739 in temporary monthly child support, stating:

The financial picture of the parties depends heavily on the maintenance of the business [Goliath, Inc.] and the sale of the residence. Until such time as the dissolution is resolved, however, the children will need to have a place to reside and [Michael] will need to financially assist [Jodi] until she is able to secure full-time employment. The evidence indicates she is capable of doing so and will need to commence searching for employment in the immediate future. It would also be recommended to place the home on the market as soon as possible to alleviate this large debt.

....

IT IS FURTHER ORDERED that during the pendency of the proceedings, [Michael] shall pay the mortgage on the residence. The mortgage payment shall be made each and every month and shall not be late so as to avoid any penalties and further interest accumulation. [Jodi] shall be responsible for the utility bills for the residence providing she continues to maintain her residence there with the children. Each of the parties will be responsible for the payment of their proportionate share of the note outstanding and owed for the purchase of the stock in [Goliath, Inc.] to "Trust A" retained by [Michael's] mother.

In October 2008, Michael requested a hearing to determine custody and visitation and Jodi requested an increase in temporary support. After hearing, on November 21, 2008, the court declined to increase temporary support and ruled the visitation schedule established by Jodi was reasonable: Michael has overnight visitation every Wednesday and has visitation every other weekend. Trial was set for January 13, 2009.

On December 22, 2008, Mary Kaye, as trustee of Trust A, sent a notice of default and right to cure letter to Michael with copy to Jodi. Mary Kay stated Michael was in default on the Goliath, Inc. purchase note's \$2000 monthly payments and gave him fifteen days to pay \$17,000 plus interest or forfeit Michael's thirty-eight shares and Jodi's thirty-seven shares.

On December 30, 2008, Jodi filed an application to show cause seeking to hold Michael in contempt for failing to pay his proportionate share of the Goliath, Inc. purchase note as required by the September 12, 2008 court order. Jodi also filed a petition for temporary injunctive relief stating: (1) since Jodi filed her petition, Michael has withheld payment of the quarterly distributions used in the past to satisfy the note's monthly payments; (2) Jodi paid \$3000 to Trust A "for one-half of the payments on the promissory note for the past three months"; (3) Michael has not made any payments since the temporary support order; (4) the fifteen days allowed to cure the promissory note default will expire before the January 13 dissolution trial; and (5) "Jodi will liquidate her own 401(k) and attempt to borrow from her family to avoid a forfeiture"

Additionally, Jodi sought an order to compel discovery due to Michael's failure to respond to her request for any documents modifying Goliath, Inc.'s business transactions and correspondence from accountants/advisors concerning Goliath, Inc.

On January 2, 2009, the court ruled the contempt issues urged by Jodi would be presented to the court at the January 13 trial. Regarding injunctive relief, the court stated the note's default deadline is January 6, 2009. The court recognized: "[I]t is clear that if the requisite payments are not made toward the [purchase note], the stock interests will be forfeited to [Michael's] mother" and "[t]his would result in financial detriment to [Jodi] in that the asset that was sought to be purchased [Goliath, Inc.] . . . will be forfeited." The court ruled:

Since the Court is without jurisdiction to require a conversion of the shareholder standings in the corporation, the motion for

injunction pertaining to a conversion is denied. The parties' conduct in not paying the scheduled payments toward the stock purchase agreement indicates a dissipation of assets that can be taken into consideration by this Court in its final determination of the distribution of assets and debts to be resolved subsequent to the trial on the merits

. . . Again, noncompliance with the Court's [September 12] order can be considered as an intentional dissipation of marital assets and can be considered . . . in the final determination of the merits

In early January 2009, Jodi borrowed \$17,000 from her mother, Sandra Bertsch, and paid Trust A to prevent the loss of Goliath, Inc. At the end of 2008, the purchase note's principal balance was \$163,500. Therefore, over the course of seven years, the purchase note obligation was reduced by \$136,500.

Also on January 2, the court entered an order stating Michael admitted he had failed to provide the requested discovery and the parties agreed Michael would respond by January 5, 2009. Due to Michael's subsequent failure to comply with Jodi's discovery requests, the court continued trial to April 2009.

On January 30, 2009, Michael filed an application to hold Jodi in contempt for failing to follow the September 12, 2008 court order by not paying: (1) her payments on behalf of Goliath, Inc. to Trust A; and (2) the utility payments.

The court set both parties' contempt applications for a February 3 hearing. On February 12, 2009, the court found Michael in contempt of the court's September 12, 2008 order "requiring him to pay his proportionate share of the stock option purchase for" Goliath, Inc. The court ruled:

[Michael] has paid the child support obligation as required. He has also paid the mortgage as required. What he has not done, admittedly, is make the payment toward the stock purchase. [Jodi] borrowed money from her mother in order to pay the balance owed

pursuant to the default notice [from Michael's mother] to avoid losing the asset before the parties' dissolution can be resolved. . . .

The parties have been before this Court for temporary matters on numerous occasions. [Michael] continues to show disregard for court proceedings and for an open and honest approach to reviewing financial matters in this matter. His actions with regard to Goliath, Inc. evidence a desire to ruin the parties' financial picture, thereby creating a circumstance where he could be considered without the financial wherewithal to pay any future support obligations. He testified that if the business was forfeited to his mother as a result of the default on the payments, he would still be retained as a manager since he is the only one who knows how to run the dry cleaning machines. In paying the obligations that he has been required to under the Court's order, he has shown due diligence. But, however, he made a poor choice when he paid a note payable for the business instead of paying for the stock option. His choice was intentional with regard to placing priority on the obligations. His choice also forced [Jodi's] hand into incurring more debt when she was unable to obtain any cooperation through other channels relating to the business.

On March 11, 2009, the court responded to Michael's request for clarification of its contempt order, ruling:

The Court agrees that clarification needs to be had with regard to whether or not [Jodi] was in contempt of Court and as to the amount of money required to be paid by [Michael] in order to purge . . . the finding of contempt. As to contempt, [Jodi] first of all has been without income to make the requisite payments to cure the default to Trust A. Secondly, she tried everything she possibly could to avoid a default on the purchase of Goliath, Inc. All of her efforts show a sincere desire not to willfully violate the Court's order requiring that the parties pay their proportionate share of the obligation to cure the default to Trust A. Therefore, the Court does not find that [Jodi] is in contempt of Court for her inability to make monthly payments on the obligation to purchase [Goliath, Inc.].

The court ruled Michael's assertion Jodi was in contempt for failing to pay utility bills would be resolved at trial. Further, Michael "shall pay the sum of \$7379.99 in order to purge himself of the Court's finding of contempt" and \$500 in attorney fees. Michael paid \$2000 toward his \$7879.99 contempt obligation.

On April 2, 2009, Michael paid the \$3000 March 1, 2009 mortgage payment. At trial in May/June 2009, Michael admitted he was delinquent on the April 1, May 1, and June 1, 2009 mortgage payments under the court's temporary order.³ Helle testified Goliath, Inc.'s accounts payable were paid up as of April 30, 2009.

At trial, Jodi requested physical care and Michael requested joint physical care. The parties disputed the amount of time Jodi spent working in the dry cleaning business and the valuation of numerous assets. Both parties sought ownership of Goliath, Inc. Helle testified Jodi's inability to repair the equipment would decrease Goliath, Inc.'s profits. The court also heard testimony regarding Michael's utility bill contempt application.

In October 2009, the court ordered joint physical care with Michael paying \$375.40 monthly child support.⁴ Michael was further ordered to pay \$2000/month rehabilitative alimony for five years and \$5000 of Jodi's attorney fees. The court awarded the house to Jodi and Goliath, Inc. to Michael. The court awarded Jodi's interest in Hagar, LLC to Michael as required under the January 6, 2006 pledge addendum. Because Jodi did not contribute any assets toward purchasing her interest, the court did not include Hagar, LLC in its valuation of the marital estate.

³ Our opinion does not eliminate or modify Michael's continuing obligation to pay the mortgage payments required by the court's September 12, 2008 temporary support order.

⁴ The court's scrivener's error in the original decree was corrected by its February 10, 2010 order confirming child support of \$375.40.

In allocating the debts of the marital estate, the court specifically did not include: (1) Michael's \$5879.99 remaining debt under the February 12 contempt order; and (2) \$15,645 of Jodi's credit card debt due to Jodi's living beyond her means after the separation. The court was critical of Jodi's treatment of her \$16,662 401(k) during the dissolution, which Jodi admitted was accumulated during the marriage and was a marital asset. After penalties for early withdrawal, Jodi received a distribution of \$12,523. The court stated:

[Jodi] testified to a need to liquidate the asset to pay the loan payment to the Trust and did not do so. Instead, she borrowed the money from her mom and did a variety of other things with the 401K balance. She made a waste of a marital asset, and created a tax liability for the parties.

After valuing/assigning assets and debt, the court ruled:

In order to equalize the property distribution herein, Michael should be required to pay the sum of \$7987 to Jodi. In light of the dissipation of the 401K marital asset, Jodi shall be entitled to \$1978 representing a \$6000 reduction of the equalization payment. She shall be responsible for all tax consequences associated with the conversion of the asset. Jodi is hereby awarded judgment in her favor and against Michael for \$1978.

The court found Jodi in contempt of its February 12 order requiring her to pay the utility bills. Under the equity doctrine of unclean hands, the court did not impose any penalty on Jodi due to Michael's prior contempt "for his non-compliance with the Court's order to pay his proportionate share of the loan obligation to the Trust concerning the purchase of the stock interest in [Goliath, Inc.]."

In November 2009, the court ruled on the parties' post-trial motions. The court authorized an alternative method of payment by Michael to satisfy the

court-ordered \$1978 equalization payment and \$5000 attorney fee award. This appeal followed.⁵ In January 2010, Michael filed a \$33,000 supersedeas bond and the clerk of court stayed proceedings to collect or enforce the alimony judgment.

II. Scope and Standards of Review.

We review the trial court's decision de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). We examine the entire record and decide anew the legal and factual issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). We accordingly need not separately consider assignments of error in the trial court's findings of fact and conclusions of law, but make such findings and conclusions from our de novo review as we deem appropriate. *Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968). We give weight to the trial court's fact findings, especially regarding witness credibility, but they are not binding. *McKenzie*, 709 N.W.2d at 531.

III. Physical Care.

Jodi appeals the court's award of joint physical care seeking physical care with visitation for Michael. Jodi stresses she provided primary care during the course of the marriage and there is a high degree of conflict with Michael.

The trial court ruled:

⁵ We find no merit to Jodi's claim the trial court abused its discretion in finding her in contempt and adopt the court's finding: Jodi "was spending money and incurring additional credit card debt for a variety of things, including frivolous non-essentials." Therefore, "the Court hereby finds that she made choices as to where the money would be spent, regardless of what the court order required."

The parties are both fit persons to care for the minor children. Jodi has been the more traditional care provider for the children in that she has remained home while Michael has worked outside the home more. He has however, been able to provide more for the children due to his flexible schedule. He has shared in a great number of child rearing issues including discipline, education, extra-curricular activities and day-to-day matters which shows the Court he can do what is necessary to be a shared care parent. Both parents love the girls and should be given every opportunity to share in their lives. To maximize both parties' involvement with the children, the Court hereby finds it is in the best interest of the children that the parties be awarded a shared physical care arrangement.

“When considering the issue of physical care, the child’s best interest is the overriding consideration.” *In re Marriage of Fennelly*, 737 N.W.2d 97, 101 (Iowa 2007). The court is guided by the factors set forth in Iowa Code section 598.41(3) (2007) and listed in *In re Marriage of Hansen*, 733 N.W.2d 683, 697-99 (Iowa 2007). Among the factors to consider are the “historic patterns of caregiving” and the relationship of the parties. *Hansen*, 733 N.W.2d at 697. The ultimate objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *See id.* at 695.

Jodi is correct in asserting we give consideration to placing children with the historical primary caregiver. *See In re Marriage of Decker*, 666 N.W.2d 175, 178-80 (Iowa Ct. App. 2003). However, “no one criterion is determinative” and our courts apply a multi-factored test. *Hansen*, 733 N.W.2d at 697. While Jodi was the primary caregiver before the separation, the “fact a parent was the primary caretaker prior to separation does not assure [she] will be the custodial parent.” *Decker*, 666 N.W.2d at 178.

As the district court recognized, Jodi and Michael are both competent and loving parents who are sincere in their desire to care for their daughters. While the parties have had disagreements during the dissolution process, the record does not preclude shared physical care. See *In re Marriage of Gensley*, 777 N.W.2d 705, 715 (Iowa Ct. App. 2009) (stating the parties' communication problems must exceed "the usual acrimony that accompanies a divorce").

Where the children would flourish in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. In close cases, we give careful consideration to the district court's findings. *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995). We defer to the district court's impressions of the parties gleaned from observing their testimony because it "had the parties before it and was able to observe and evaluate the parties as custodians." *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa Ct. App. 1996). The district court observed Jodi and Michael during numerous pretrial proceedings as well as during a four-day trial. While the court found both parties in contempt regarding financial matters, it concluded joint physical care would be in their daughters' best interests. The district court's findings are supported by the evidence and we adopt them.

IV. Property Division.

Iowa is an equitable distribution state, which means each marital partner is entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). Iowa courts do not require an equal division or percentage distribution. *In re*

Marriage of Russell, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). The determining factor is what is fair and equitable in each particular circumstance. *Id.* When distributing property we take into consideration the criteria codified in Iowa Code section 598.21(1). See *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983).

A. Home Equity.

The district court awarded Jodi the home valued at \$500,000 and recognized and awarded Jodi home-related debt of \$411,245 mortgage, \$7605 Premier Bank home equity note, and \$1200 in homeowner association fees.⁶

The court ruled:

Neither party alone can afford to maintain the house, given their current financial circumstances. It should be placed on the market so that the parties can attempt to cover the mortgage and the children can be relocated to a more affordable place of residency.

...
Jodi is awarded the marital residence She shall take the necessary steps to either refinance the house . . . or, if she is unable to do so, she shall place the house on the market. She has one year from the date of this order [10/07/2009] to accomplish the task assigned. Michael shall have the right of first refusal to purchase the house

Jodi shall immediately assume the responsibility for all house payments, taxes, insurance and other fees associated with the residence. Jodi shall assume all responsibility for the home equity note. If the home has to be sold, and Michael is not the purchaser, all [sale] proceeds . . . shall be first applied to the mortgage, then the home equity note, then fees associated with the sale of the home, then all credit card debt awarded to Jodi herein. Once all the marital liabilities listed herein are paid, the equity remains Jodi's without claim by Michael.

⁶ We find no merit to Michael's argument the court erred in allocating \$1200 in homeowner association fees as a marital debt.

Jodi argues the court's home equity value is speculative and it is unrealistic to award the home and its mortgage debt (from the date of the decree) to Jodi. Michael argues Jodi, who remained in the home during the pendency of the divorce, was the only one who could prepare the house for sale, and she failed to put the home on the market during the proceedings.

After our de novo review, we adopt the court's valuation of \$500,000, a reduction of the \$535,000 cost of the home/lot that recognizes the current housing market. We agree Jodi should be responsible for the mortgage debt from the date of the decree. Accordingly, we affirm the court's resolution of this issue.

B. Business Valuation.

Michael argues the court's valuation of Goliath, Inc. is too high. Specifically, Michael claims the district court misstated the record by concluding the upper range provided by Helle is \$120,000. Helle testified to making four quick "thumb-nail" calculations of Goliath, Inc.'s operational value under the assumption the operator "will be compensated at an annual salary of \$60,000." Michael asserts Helle's computations resulted in a range from \$71,329 as the top value to a low of *negative* \$120,000. Helle testified: "This is not a valuation. This was a computation, utilizing rule of thumbs that are documented as industry standards but not using the judgment, simply using calculations following each of the four suggested formulas."

Jodi argues the court undervalued Goliath, Inc. In December 2000, Goliath, Inc.'s undisputed valuation was \$500,000. Further, Jodi points out the

parties had paid almost half of the family-reduced \$300,000 purchase price during the marriage. The trial court ruled:

Given the current market, Mr. Helle estimated the business worth to be between \$71,000 and \$120,000, but further stated it was more valuable as a place of employment for Michael than as a running business. Revenues are down from a former \$700,000 to \$400,000.

.....

Based on the range of financial information provided to the Court and factors considered such as the role Mary Kaye still has in the business and lending of funds to help support it, as well as the tax consequences that may now have to be realized as a result of the reversion of stock, the Court hereby finds the value of the business is somewhere between the figures proffered by Mr. Helle, to wit: \$95,500.

After reviewing the record, we agree Helle's \$120,000 valuation was expressed as a negative number and \$71,329 was the highest number in Helle's four calculations. However, we do not utilize Helle's calculations because he admittedly did not "use judgment" and therefore, did not recognize the family relationship between Goliath, Inc. and Hagar, LLC, its landlord. We recognize Hagar, LLC is controlled by Michael's mother and over the years, Hagar, LLC and Goliath, Inc. were operated with family considerations being paramount. The prime example is Michael unilaterally discontinuing distributions after Jodi filed for dissolution of marriage, followed by Mary Kaye's attempt to default the parties' interest and remove Goliath, Inc. from the marital estate. Also, Goliath, Inc.'s valuation was reduced in December 2000 from its actual value of \$500,000 by the requirement Goliath, Inc. pay excess rent and excess interest to Hagar, LLC. In 2005, Goliath, Inc.'s monthly note payments to Hagar, LLC were reduced and the term of the note extended when Jodi and Michael built an

elaborate home. Additionally, one unprofitable Goliath, Inc. location was not closed as early as it could have been because the rent Goliath, Inc. paid to Hagar, LLC benefitted Michael's parent(s).

Jodi did not provide a valuation from an expert, but testified she had offered to pay Michael \$50,000 to buy out his half interest in Goliath, Inc. when he asserted the business had zero value. We find Michael's assertion the business has a zero valuation not credible. Jodi points out the parties purchased Goliath, Inc. in 2002 for \$300,000 and during the marriage reduced the note obligation to \$160,000, creating \$140,000 in equity.

After reviewing the record and recognizing Goliath, Inc.'s current decrease in sales is offset by the Hagar family business decisions to decrease Goliath, Inc.'s valuation, we modify the court's valuation to \$140,000 and affirm the court's award of Goliath, Inc. to Michael.

C. Credit Card Debt.

Michael argues the court erred in failing to exclude *all* of Jodi's credit card debt from the marital debt. Jodi argues the court erred in excluding *some* of her credit card debt from marital debt. The court found:

During the course of the marriage, the parties . . . were very involved with social gatherings and trade conventions. Once the parties separated, Jodi continued to travel with her sister and live as though money was not an object. She apparently used her credit cards to do this as she was not receiving any substantial income from the cleaners. Michael argues that she was also making cash advances on the credit cards to fund payment of attorney's fees, tanning expense and her numerous trips. The credit card statements bear some of this out, but not completely. Some of the credit card charges were used for family necessities and household obligations.

The court ordered Jodi to pay \$15,645 of her credit card debt (Chase) separately and did not include it in the parties' marital debt "due to the nature of the total expenditures made after the parties' separation and on all the credit cards in her name." The court ordered Jodi to pay \$28,856 in credit card debt/marital debt (Sam's Club, Sears, Target, Capital One). The court therefore examined the total credit card debt and judged \$15,645 to be the amount Jodi dissipated the marital estate in debt. After reviewing the record, we find no inequity in the court's treatment of this debt. See *In re Marriage of Fennelly*, 737 N.W.2d 97, 106 (Iowa 2007).

D. Loans from Jodi's Mother.

Michael argues the court erred in including two loans totaling \$2800 from Sandra Bertsch, Jodi's mother, in marital debt. We note the court included \$28,067 in loans from Mary Kaye, Michael's mother, in marital debt.

We find no merit in Michael's assertion the additional \$2800 in loans is excluded from marital debt by the court's ruling: "The debt to Jodi's mother shall also not be included in the total balance of the marital debt as the Court has previously decided the nature of the obligation as set forth in the Court's order of February 12, 2009." We conclude only the court-ordered \$7879.99 for contempt-purging/attorney fees is excluded from marital debt by this language and find no inequity in including the two separate loans from Sandra Bertsch.

D. Conclusion.

We modify the decree to value Goliath, Inc. at \$140,000. Accordingly, Jodi's net assets are unchanged at \$54,829 and Michael's net assets are

modified to \$115,286. Due to the difference of \$60,457, Michael's equalization payment to Jodi is modified to \$30,228. We affirm the court's \$6000 reduction of Michael's equalization payment due to Jodi's dissipation of her 401(k) marital asset: \$30,228 minus \$6000 is \$24,228. We modify the judgment for Jodi and against Michael to \$24,228.

V. Alimony.

In calculating child support, the court allocated \$30,000 in yearly income to Jodi and \$64,000 in yearly income to Michael. Michael argues the court's alimony award is excessive and the court erred in concluding his income is \$64,000. Further, Michael claims even when using the court-determined incomes, the court's award gives Jodi an annual income well in excess of his income: Michael's \$64,000 income with deductions of \$24,000 in alimony and \$4505 in child support equals income of \$35,495; Jodi's \$30,000 income with the addition of \$28,505 in alimony/child support equals \$58,505 in income.

When Jodi stopped working for a publishing company in 1999, her yearly income was \$50,000. While Jodi originally worked full time for Goliath, Inc., after Lilly's birth in 2004, she decreased her hours. The salary and distributions Jodi earned at Goliath, Inc. are not necessarily representative of her income. Goliath, Inc.'s attorney testified there was an Iowa income tax advantage to the parties "in splitting any income they might have from Goliath, Inc. as an "S" [corporation] that passes out its income."

The trial court awarded Jodi \$2000 a month rehabilitative alimony for five years, stating:

Jodi has been . . . the more traditional stay-at-home mom. She has taken herself out of the work force to raise the children and provided stability for them She has a degree which should enable a quicker entry back into the work force, but the employment climate at the present is not as promising as it once was. She has been performing free-lance services and the Court does not doubt that given her level of education, her experience and her drive and personality, she will be able to make an impression on an employer with bright prospects for long-term employment. . . . She cannot do this, however, without the financial assistance of Michael. . . . [A]n award of alimony for rehabilitative purposes is deemed appropriate.

Spousal support is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). The discretionary award of spousal support is made after considering factors such as the length of the marriage, each party's age, educational level, health, earning capacity, the ability of the spouse seeking support to be self-sufficient, length of absence from the job market, and the relative need for support. See Iowa Code § 598.21A(1) (2007).

Further, property division and spousal support should be considered together in evaluating their individual sufficiency. *In re Marriage of Trickey*, 589 N.W.2d 753, 756 (Iowa Ct. App. 1998). We have significantly modified the court's property division by giving a higher valuation to Goliath, Inc. Because Jodi will receive \$24,228 from Michael under the division of marital assets, a reduction in spousal support is equitable.

We adopt the \$64,000/\$30,000 incomes the court utilized. We consider the property award and the statutory factors, including: "The feasibility of the party seeking maintenance becoming self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage." Iowa Code §

598.21A(1)(f). After considering Jodi's home mortgage payment obligation and the currently-depressed home resale market, we conclude equity requires Michael to pay spousal support for five years: \$2000/month for the first two years and \$1000/month for three additional years.

VI. Medical Support.

Jodi seeks clarification of the parties' responsibility for the first \$250 of unreimbursed medical expenses. We confirm Michael's agreement that he will pay the first \$250 of unreimbursed medical expenses and so order.

VII. Attorney Fees.

Both parties request appellate attorney fees. Although both parties partially prevailed, we decline to order either party to pay any portion of the other's fees. See *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). Costs are assessed one-half to each party.

AFFIRMED AS MODIFIED.