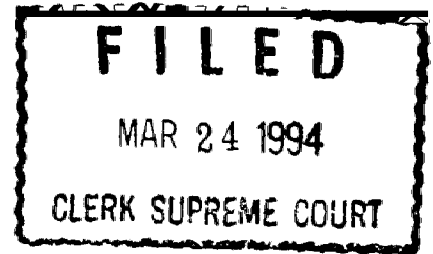


IN THE COURT OF APPEALS OF IOWA

No. 4-055 / 93-510



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IN RE THE MARRIAGE OF KELLY SCOTT HUTTON AND
MICHAEL J. HUTTON

Upon the Petition of
KELLY SCOTT HUTTON,

Appellee-Cross-Appellant,

And Concerning
MICHAEL J. HUTTON,

Appellant-Cross-Appellee.

Appeal from the Iowa District Court for O'Brien County,
Frank B. Nelson and Joseph J. Straub, Judges.

Michael Hutton appeals, and Kelly Hutton cross-appeals,
the provisions and modification of the parties' dissolution
decree. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth and Genest, Pleasant Hill, for
appellant.

Randall G. Sease of Sease Law Firm, Hartley, for
appellee.

Heard by Schlegel, P.J., and Habhab and Cady, JJ., but
decided by Habhab, P.J., Cady, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving by
order of the Iowa Supreme Court.

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SCHLEGEL, S.J.

Michael Hutton appeals, and Kelly Hutton cross-appeals, the provisions and modification of the parties dissolution decree. Michael contends the district court erred in: (1) calculating child support; (2) refusing to award abatement of child support during summer visitation; (3) awarding alimony; (4) determining visitation; and (5) awarding Kelly attorney fees. Kelly contends the district court erred in valuing Michael's stock and trust funds and in failing to award premarital funds belonging to her. Kelly also requests appellate attorney fees.

Kelly and Michael Hutton's three-year marriage was dissolved on March 2, 1993. They have one minor child, Alexander, born September 28, 1989. Both parties have two children each from previous marriages. Both parties are in their thirties and have one year of college. Kelly is attempting to finish her college degree. She worked at Hy-Vee for twelve years but is now unemployed. Michael has worked for Hy-Vee for eighteen years and is currently a store manager.

The dissolution decree awarded primary physical care of Alexander to Kelly. Michael was awarded liberal visitation including every other weekend and four weeks in the summer. The court determined Michael had "accomplished a spectacular increase in his income" since mid-1990 and currently earned an available net income of \$6703 per month. Kelly's earning capacity was calculated to be

between \$901 and \$1000 per month. The court then ordered Michael to pay \$800 per month in child support and \$250 per month in alimony for two years. Kelly was awarded \$9600 from the sale of the home, \$18,825 from Michael's Hy-Vee trust fund, and \$9268.86 from Mike's Hy-Vee stock fund. Finally, Michael was ordered to pay "\$2000 towards Kelly's attorney fees.

Kelly moved to Decatur, Illinois, during the pendency of this appeal, and Michael filed a motion with the supreme court for limited remand on the issue of visitation. The motion was granted and an order was filed on May 14, 1993, remanding the case to district court. The district court filed an order on June 10, 1993, awarding Michael visitation for one week every six weeks and for six weeks in the summer after Alexander begins kindergarten. Michael again appealed the district court's ruling. The supreme court ordered the appeals be consolidated.

On appeal, Michael argues the district court erred in the amount of the child support award because of a miscalculation of his net income. He also argues that child support payments should be abated by fifty percent during the summer visitation period. Michael further contends that, based on Kelly's age, work experience and ability, her property settlement and her cohabitation with a man who can contribute to her living expenses, the alimony payments are inequitable. He asserts alimony should stop upon remarriage or cohabitation by Kelly.

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Michael also requests more frequent visitation, including one week every four weeks and four consecutive weeks during the summer until Alexander begins school. He argues Kelly's award of the trust and stock fund shares should be reduced. Finally, Michael argues the award of attorney fees was erroneous.

On cross-appeal, Kelly contends the district court erred in valuing the Hy-Vee stock and trust funds resulting in less of an award from these funds than she is entitled to. She also claims the district court erred in failing to award premarital funds belonging to her. We affirm as modified.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Michael first contends the district court erred in determining his child support obligation. He argues the district court incorrectly calculated his net income when determining the child support award pursuant to the child support guidelines. Michael's income is derived from commissions based on the sales and profitability of the

Hy-Vee store he manages. He does not receive a set monthly wage.

Michael argues that his income fluctuates from month-to-month and year-to-year and, therefore, his net monthly income should be determined by averaging his income from the past two and one-half years. We disagree. The record reveals that Michael's income has steadily increased. The equitable practice of income averaging to determine support awards is more appropriately utilized when the obligor's income truly varies irregularly, including increases and decreases in income. See, e.g., In re Marriage of Cossel, 487 N.W.2d 679, 683 (Iowa App. 1992). To permit Michael to benefit from this equitable practice, which is designed to reflect both the peaks and valleys generally associated with certain occupations, such as farming, for example, would not be equitable.

Our review of the record reveals Michael's net monthly income easily exceeds \$3000. Michael does not contest the district court's finding that Kelly's net monthly earning capacity is between \$901 and \$1000. Under these circumstances, the appropriate amount of child support is deemed to be within the sound discretion of the court. We cannot say the district court erred in ordering Michael to pay child support in the amount of \$800 per month for Alexander.

Next, Michael argues the district court erred in requiring him to pay Kelly \$250 per month in alimony. When

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determining the appropriateness of alimony, the court must consider "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against relative needs of the other." In re Marriage of Estlund, 344 N.W.2d 276, 281 (Iowa App. 1983) (citation omitted). Alimony is an allowance to the former spouse in lieu of a legal obligation to support that person. See In re Marriage of Hitchcock, 309 N.W.2d 432, 437 (Iowa 1981).

Alimony is not an absolute right; an award depends upon the circumstances of each particular case. In re Marriage of Fleener, 247 N.W.2d 219, 220 (Iowa 1976). The discretionary award of alimony is made after considering those factors listed in Iowa Code section 598.21(3). See In re Marriage of Hayne, 334 N.W.2d 347 (Iowa App. 1983). Having carefully reviewed the circumstances of this case in light of these factors, we conclude Michael shall not be required to pay Kelly alimony. In addition to the other listed factors in section 598.21(3), several important facts support our decision to overturn the alimony award in this particular case: (1) the distribution of the parties' property; (2) the short length of the parties' marriage; and (3) the cohabitation of Kelly.

On cross-appeal, Kelly contends the district court erred in valuing Russell's Hy-Vee trust fund and stock plan. The crux of Kelly's argument is that the district court should have valued both the Hy-Vee trust fund and the Hy-Vee stocks at the time of trial, not the time of the

parties' separation. Michael argued, and the district court agreed, that the valuation date should be the date of the parties' separation. We agree. We faced a similar question in In re Marriage of Oakes, 462 N.W.2d 730 (Iowa App. 1990). In Oakes we concluded the wife was not entitled to a share of the increase in funds accrued in the husband's retirement account after the parties' separation, where the wife did not contribute to the growth of the assets after such time. Id. at 733.

A similar situation exists in this case. After the parties' separation, Michael continued to accrue assets in the Hy-Vee trust fund and the Hy-Vee stock plan. The value of both of these assets was increased solely as a result of Michael's efforts. Since Kelly did not contribute to the growth of the assets in Michael's Hy-Vee trust and stock funds from the time of the parties' separation, the postseparation increase should not be divided between the parties. The district court did not err in electing to value the stock and trust fund assets according to their value at the time of the parties' separation.

With regard to this same issue, Michael raises an interesting point in his response to Kelly's cross-appeal. Michael argues the district court erred in awarding Kelly \$18,825 of the value of the Hy-Vee trust fund. Michael argues the district court "apparently overlooked the fact that a portion of this trust fund had already been set aside for Mike's first ex-wife, Jane Hutton in that

divorce." The portion of the dissolution decree, resulting from Michael's first divorce, to which Michael refers reads:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the retirement plan of Petitioner [Michael] through Hy Vee Food Stores shall remain the property of the Petitioner subject, however, to Petitioner assigning 50% of his retirement plan, said amount not to exceed \$50,000.00, to be paid in the event he terminates his employment or is involuntarily terminated from Hy Vee Food Stores, said funds to be paid to a trust for the benefit of the minor children to be used for college education of the minor children of the parties and held until such time as the children's twenty-third birthday at which time any funds not required for their education shall be returned to the Petitioner. Respondent specifically waives any right or interest in Petitioner's retirement plan and hereby is directed to sign any and all documents required by the Petitioner to evidence the same.

Reading this portion of the dissolution decree reveals that, in fact, no portion of the Hy-Vee trust fund/retirement plan has been previously set aside for Michael's first ex-wife, Jane Hutton. More importantly, the district court's order in this regard merely constitutes a contingent liability against Michael's Hy-Vee trust fund. Accordingly, it would be inappropriate for us to declare at this time, as Michael requests, that Kelly is only entitled to \$9,413.13 of the Hy-Vee trust fund instead of the \$18,825 which she was awarded in the parties' dissolution decree. In accordance with the above discussion, we affirm the district court's property division, including its valuation and division of the Hy-Vee trust fund and stock plan.

We have considered the remainder of the issues raised in Michael's appeal and Kelly's cross-appeal, and we find them to be without merit. Except as modified in this opinion with regard to the alimony award, we affirm the district court's dissolution decree as subsequently modified by the district court in its ruling filed June 10, 1993, regarding the issues of visitation, transportation, and support during visitation.

The parties shall pay their own appellate attorney fees, and each party shall pay one-half the costs of this appeal.

AFFIRMED AS MODIFIED.