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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 6-743 / 96-1254

IN RE THE MARRIAGE OF BILLIE J. LANE AND WILLIAM JOSEPH LANE

Upon the Petition of
BILLIE J. LANE,
Appellee/Cross-Appellant,

000215

And Concerning,
WILLIAM JOSEPH LANE,
Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

Parties appeal and cross-appeal from entry of dissolution decree.

AFFIRMED AS MODIFIED; REVERSED IN PART.

Stephen C. Ebke of Porter, Tauke & Ebke, Council Bluffs, for appellant.

Patrick A. Sondag of Root, Tinley & Sondag, Council Bluffs, for appellee.

Considered en banc.

VOGEL, J.

I. Background facts. Billie Jo and William were married on October 27, 1989. They have two children, Rebecca Jo born May 13, 1990, and Brandi Jo born December 13, 1991. Billie Jo filed a petition for dissolution of marriage in July 1995, and the parties separated in September 1995.

The court entered a decree of dissolution on June 25, 1996. The court determined the parties should have joint legal custody of the minor children with physical care to Billie Jo. William was ordered to pay $887 per month in child support. Billie Jo's request for rehabilitative alimony of $125 per month for two years was denied. William appealed and Billie Jo cross-appealed.

II. Scope of review. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Primary physical care. William contends he should have been granted the physical care of the children. The court appointed a guardian ad litem to investigate the issue of custody and make a recommendation to the court. The guardian ad litem recommended William should be granted the physical care of the children. The trial court is not bound to adopt the guardian ad litem's

recommendation, but it should be given weight appropriate to the particular facts and circumstances of the case. *In re Marriage of Harris*, 499 N.W.2d 329, 331 (Iowa App. 1993). The record shows the trial court did consider the guardian ad litem's report and further stated why the recommendation was not in the children's best interests.

We defer to the trial court's assessment of the credibility of the witnesses. It appears that both parties to this action would be appropriate caregivers, but the trial court did find that Billie Joe is more able to effectively minister to the children's daily needs and determined it would be in the children's best interest to be in Billie Jo's daily care. The trial court viewed Billie Jo's testimony as "candid and sincere," and further determined that her schedule is more consistent and stable when compared with William's work schedule.

William is concerned about placing the children's health at risk due to Billie Jo's smoking around them. The trial court considered this issue, but found Billie Jo was careful to avoid smoking in the presence of the girls. Since long-term dangers from second-hand smoke have raised serious health concerns in the medical community, we underscore the importance of Billie Jo continuing to place the children's good health above her need to smoke in their presence. Although William's complaints about Billie Jo were genuine, the trial court was not convinced, nor are we, the he could minister overall more effectively to the children.

We affirm on the primary physical care of the children.

IV. Visitation. William's visitation was set to coordinate with his unique work schedule. William argues the visitation schedule does not ensure him maximum contact with his daughters. Liberal visitation rights are in the best interests of the children. Iowa Code § 598.41(1) (1995); *In re Marriage of Muell*, 408 N.W.2d 774, 777 (Iowa App. 1987). Both parents, as joint legal custodians, are charged with maintaining those interests. A close examination of the visitation order reveals a seventeen-day stretch during the five-week rotation wherein William does not see his children at all. This strains the concept of maximum physical and emotional contact as delineated in Iowa Code section 598.41(1) (1995). As such, we hereby modify the visitation order. On the long weekends (after the fifth week) following his night shift, William will have visitation from 3:00 p.m. Wednesday through 3:00 p.m. Saturday evening.

We decline to modify the amount of child support requested by William.

V. Rehabilitative alimony. We have reviewed both the property division and Billie Jo's request for rehabilitative alimony in the amount of $125 per month for two years. The property division and the alimony request should be evaluated together in determining their individual sufficiency. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995). Rehabilitative alimony is typically awarded to a spouse who may need further training or education to secure employment after the dissolution. *Id.* at 162. It provides support to the economically dependent spouse through a limited period of re-education or retraining following a divorce, which

creates the incentive and opportunity for the spouse to become self-supporting. *Id.* at 162. We determine that Billie Jo should be awarded rehabilitative alimony in the amount of $125 per month for two years so that she may further her education and ultimately become self-supporting.

VI. Appellate attorney fees. Billie Jo requests that this court award her attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Gilliam*, 525 N.W.2d 436, 439 (Iowa App. 1994). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. *In re Marriage of Roberts*, 545 N.W.2d 340, 345 (Iowa App. 1996). We determine each party must pay his or her own appellate fees.

Costs are assessed one-half to each party.

AFFIRMED AS MODIFIED; REVERSED IN PART.

All judges concur except Streit and Sackett, JJ., who dissent.

STREIT, J. (dissenting)

I dissent. I would affirm the trial court.

Sackett, J. joins in this dissent.