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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 7-735 / 96-1747

IN RE THE MARRIAGE OF KAREN IRENE BODE AND STEVEN MICHAEL BODE

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Upon the Petition of
KAREN IRENE BODE,
Petitioner-Appellant/Cross-Appellee,

And Concerning
STEVEN MICHAEL BODE,
Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Kossuth County, Patrick M. Carr, Judge.

Petitioner appeals, and respondent cross-appeals, the child custody and economic provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Jeanie Kunkle Vaudt, Patricia A. Shoff, and Jo Ellen Whitney of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellant.

Stacey N. Warren and Steven H. Shindler of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler, P.C., Des Moines, for appellee.

Heard by Cady, C.J., and Sackett and Vogel, JJ.

VOGEL, J.

The petitioner, Karen Bode, appeals, and respondent, Steven Bode, cross-appeals, the child custody and economic provisions of the parties' dissolution decree entered May 28, 1996. A hearing on limited remand was held with supplemental findings, conclusions, and decree entered on January 24, 1997. Appeal of the original decree was taken by Karen and appeal of the supplemental decree was taken by Steven. The appeals were consolidated.

Karen argues the district court erred in: (1) awarding primary physical care of their minor children to Steven; (2) calculating the amount she should pay in child support under the child support guidelines; (3) calculating her property settlement; and (4) failing to award her a greater period of rehabilitative alimony. She requests an award of appellate attorney fees. On cross-appeal, Steven maintains the district court order on limited remand setting visitation for Karen should be modified to provide that visitation would be supervised.

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 fact findings of the trial court, especially when considering the credibility of the witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

Background facts. Steven and Karen Bode were married on August 18, 1984. Steven was thirty-seven years of age at the time of trial and Karen was thirty-six. They have two children, Ryan, born May 10, 1990, and Ashley, born December 10, 1992. The parties' marriage was dissolved on May 28, 1996.

Karen and Steven lived in Texas and were both employed as landscape architects. When their first child was born in 1990, the couple agreed Karen would quit work and assume the role of a stay-at-home mom. A few months later, Karen's father died which was very hard on Karen and she suffered from mild depression. Within months, Steven's father, who ran a large farm operation in the Algona area, suffered a heart attack. To assist his father, Steven agreed to move to Iowa to the family homestead where he became involved in the operation of approximately 872 acres. Karen acquiesced in the move, but she was still struggling with the loss of her father and adjusting to the care of a baby. The parties' marriage began to erode approximately one year following their move to Iowa. Karen found farm life lonely, and with the birth of Ashley in December 1992, she began complaining of nervousness. In September 1993, Karen began seeking assistance from a marriage counselor. Steven characterized this as Karen "sneaking away" to see the counselor. Karen claimed Steven made most of the family decisions without consulting her.

In January 1994, an argument escalated into Steven pushing and shaking Karen, leaving a large bruise on her arm. Her doctor advised her to take steps to avoid further violence to herself and the children.

In May 1994, Karen informed Steven she was taking the children for a visit with her family in Tulsa, Oklahoma. While in Tulsa, Karen instituted separate maintenance proceedings, alleging she was a good faith resident of Tulsa. Meanwhile, Steven filed a petition for dissolution of marriage in Iowa and secured a temporary order for custody of the children. The legal wrangling had commenced. The children were affected in that Steven did not see the children while Karen was in Oklahoma -- an approximate three-month period. Eventually both the Oklahoma and Iowa petitions were dismissed and Karen returned to Iowa. The parties resumed living under one roof, with separate bedrooms. The following months were characterized by bitterness and some physical abuse.

In November 1994, while Steven was away on a fishing trip, Karen instituted dissolution proceedings and moved to town with the children.

I. Primary physical custody. Karen appeals the trial court's granting Steven primary physical care of the parties' children. She argues the court placed too little weight on some of Steven's troubling behavior and placed too much weight on the possibility that Karen would move to Oklahoma should she be granted primary care

of the children. We examine these claims and all issues on appeal and cross-appeal in the context of our de novo review.

The controlling consideration regarding placement of the children is their best interests. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The court determines placement according to which parent can minister more effectively to the children's long-range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *Kunkel*, 555 N.W.2d at 253.

Following trial, the district court noted that "each party has sought advantage where it could be found" and the true character of the parties was not correctly demonstrated by their recent behavior. The court found that both Karen and Steven were fit parents. The court then concluded the children would be better served in Steven's primary physical care, in large part because of the availability of Steven's extended family. This was coupled with the court's conclusion that placement of primary physical care with Karen would almost certainly result in Karen moving the children from Iowa to Oklahoma.

In assessing the ability of each parent to provide for the children's needs, the court found that Steven had conducted himself in an exemplary fashion since the

temporary divided custody order of February 1995. However, the court failed to adequately address Karen's significant role as the primary caretaker of the children during the marriage.

We are troubled, as was the trial court, by some of the behavior of both parties. Following the entry of the decree, Karen exercised her right of visitation with the children during the summer of 1996. She took the children but failed to inform Steven of her and the children's whereabouts. This gives us cause to consider whether she put her own needs ahead of the children's. When reviewing this behavior, we note the difference in the situations of the parties during this post-trial time period. A long custody battle was over, leaving Karen devastated by the loss of primary physical care of the children. Steven was living on the family "century" farm with his parents and a host of other relatives and long time friends in the surrounding community. Karen's entire family was out of state, leaving her little in the way of a support network. By going to Oklahoma for the visitation period, surrounded by her mother, brother and friends, she put herself on an emotional footing equal to that which Steven enjoyed in Algona. This does not, however, excuse her failure to notify Steven as to where she could be reached.

As the original decree had not incorporated a visitation schedule which contemplated Karen remaining in the area, the parameters were simply "reasonable, broad and liberal." Steven proposed Karen have visitation every third weekend, with

some accommodations and restrictions. This was unacceptable to Karen. She made numerous requests for visitation both through her attorney and directly with Steven. One request included taking the children to see their ailing great-grandmother in Minneapolis. Another request was for Ashley to be in a wedding of one of Karen's friends. All requests were refused. Following the summer visitation, Karen was allowed to see the children twice -- on August 31 and the weekend of September 13. Her next visit was December 14. During the months of August through November, Karen made thirty-one attempts to phone the children. She was successful in reaching them seven times. Visitation problems continued, prompted by miscommunications and mistrust by both parties. In reviewing the conduct of both parties, we find neither demonstrated a desire to put their bitterness aside for the sake of the children's relationship with the other parent.

Another area of concern to us is Steven's abuse of alcohol. The trial court found Steven's drinking was more evidence of stress than a chronic problem with alcohol. Steven has admitted to drinking four to six beers each night to help him sleep. In a psychosocial history conducted in September 1995, part of the diagnosis/assessment was "alcohol abuse," with the recommendation to abstain from abuse of alcohol. However, in January 1996, Steven was convicted of Operating While Intoxicated. His blood-alcohol level was .156 and he was driving with a thermos containing alcohol-laced punch.

We are further concerned with Steven's abusive behavior. The trial court did not find Steven presented a history of domestic abuse. However, on January 4, 1994, Steven grabbed Karen's arm and shook her during a dispute. In a hearing on temporary matters, the court found Steven to have physically abused Karen. This occurred prior to the parties' November 1994 separation. Following the incident, Karen's physician recommended she get in touch with a domestic abuse hotline and that Karen should not ignore the warning signs of abuse. The doctor alerted Karen that she and the children could be "at risk."

There was another incident on December 4, 1994, where Karen and Steven had a "wrestling match in the mud." Although the police report contained this statement, "both agreed that no one was struck in any way and neither had any marks." Karen sought treatment in the emergency room that evening. The physician's notes refer to a new bruise on her right elbow and a small bruise on the left biceps and a bruised area just below the right knee. The color photo exhibits graphically demonstrate these injuries.

The trial court found Karen had used the physical and sexual abuse report (discussed below) "to involve the children in the custody battle and to gain tactical advantage in this proceeding." Even it that were true, it is totally irrelevant to the finding that the physical abuse did occur, and at the hand of Steven. In a ruling on

temporary matters, filed February 16, 1995, the court specifically found that Karen had been physically abused by Steven on at least one occasion.

Also of significant importance to us is the Department of Human Services (DHS) founded incident of child abuse in September 1994 when Steven struck Ashley on her bare thigh. She was two-and-a-half years old at the time. The photograph, taken several days after the strike, reveals a large red handprint-shaped bruise covering Ashley's thigh. The trial court found Steven struck Ashley with too much force and should have exercised self-restraint. We agree with the trial court's assessment of Steven's behavior. A parent's propensity toward violence adversely impacts on the fitness of that parent to be the primary caretaker for the parties' children. *See In re Marriage of Brainard*, 523 N.W.2d 611, 614-15 (Iowa App. 1994).

Equally troubling to us is the fact the trial court seemed to believe it was Karen who possessed the impetus to file a sexual abuse report, again to purportedly gain a tactical advantage in the custody battle. This was not the case. Karen began taking Ryan and Ashley to Sharon Michel, a clinical social worker, in May 1995 to provide the children with support during the interim period of divided joint custody. Michel had a total of eleven sessions with the children. Ashley stated to Michel that she did not like her dad because of a "bad touch." Michel, as a mandatory child abuse reporter, turned that information over to DHS. Michel testified that Karen expressed

caution about "running away with any sexual abuse allegations." No investigation or action was taken by DHS at that time. In September 1996, when Karen was staying at a shelter for battered women, one of the staff members, after talking with Karen, reported similar allegations to DHS. Child abuse investigator William Pischke, who had previously received the information from Michel, stated he wanted to get to the bottom of the sexual abuse allegations and insisted *both* children have sexual abuse examinations. Karen testified she resisted this proposal by Pischke and "told him that I felt it was unwarranted and unnecessary and I think he understood I was upset about it and there were never any allegations regarding Ryan. . . ." Pischke nevertheless forged ahead with his plan to have both children examined. Therefore, the testimony supports that it was not Karen but the mandatory child abuse reporters who pursued the ultimately unfounded suspicions of sexual abuse in compliance with their job responsibilities.

Finally, the trial court, in granting primary physical care to Steven, relied on its assumption that Karen was moving to Tulsa after the divorce by finding "the children should not be removed from their present environment, and that this will almost certainly follow an award of primary physical care to Karen." Our current law provides that if a parent were to relocate the residence of a minor child to a location one hundred fifty miles or more from the residence of the minor child at the time custody was granted, the court may consider the relocation a substantial change in

circumstances. *See* Iowa Code § 598.21(8A), enacted in the 1997 amendment to section 598.21. Karen did not move to Tulsa and she has a disincentive under the current law to do so.

Based on the foregoing discussion and analysis, we find the best interests of the children would be served by placing primary physical care of both Ashley and Ryan with Karen. We accordingly modify the trial court's custody provision and hereby accord Karen primary physical custody.

II. Alimony. Alimony is a stipend to a spouse in lieu of the other spouse's legal obligation for support. *In re Marriage of Miller*, 532 N.W.2d 160, 162 (Iowa App. 1995); *In re Marriage of Francis*, 442 N.W.2d 59, 62 (Iowa 1989). Alimony is not an absolute right; an award depends on the circumstances of each particular case. *In re Marriage of Welchel*, 476 N.W.2d 104, 110 (Iowa App. 1991). We consider property division and alimony together in evaluating their individual sufficiency. *In re Marriage of Dahl*, 418 N.W.2d 358, 359 (Iowa App. 1987). The discretionary award of alimony is made after considering the factors listed in Iowa Code section 598.21(3) (1995).

In determining the appropriateness of alimony, the court must consider (1) the earning capacity of each party, and (2) the present standards of living and ability to pay, balanced against the relative need of the other. *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App. 1983). Self-sufficiency is the goal of rehabilitative

alimony. *In re Marriage of Erickson*, 553 N.W.2d 905, 907 (Iowa App. 1996) (citing *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989)). In awarding rehabilitative alimony, an economically dependent spouse is supported during a limited period of re-education and retraining after a divorce, creating an incentive and opportunity for that spouse to become self-supporting. *Erickson*, 553 N.W.2d at 907; *Francis*, 442 N.W.2d at 63.

The court found that Steven's income was $33,527 per year and Karen's earning potential was $29,000 per year based on the likelihood of her securing employment in Tulsa. Steven was ordered to pay Karen $750 per month alimony for three months. In setting such a short period of rehabilitative alimony, the court noted that Karen would soon be moving to Tulsa. When Karen did not receive primary care of the children, she did not move to Tulsa as contemplated by trial court. Karen is amenable to receiving the $750 per month alimony for three months as set by the trial court. However, she additionally requests the payments continue at a reduced amount of $400 per month until September 1998. This would give her time to acquire her certification as a landscape architect. We find this request reasonable in light of all the other factors, and accordingly so modify the alimony award.

III. Property award. The parties to a marriage are entitled to a just and equitable share of the property accumulated during the marriage. *In re Marriage of Starcevic*, 522 N.W.2d 855, 857 (Iowa App. 1994). The determining factor is what

is fair and equitable to both parties under each circumstance. *Id.*; Iowa Code § 598.21 (1995). Equitable distribution does not necessarily mean an equal division of property, nor does it mean a percentage division of the property. *In re Marriage of Hoak*, 364 N.W.2d 185, 194 (Iowa 1985). The equitable distribution of property should be made in consideration of the criteria codified under Iowa Code section 598.21. *Starcevic*, 522 N.W.2d at 857; *Estlund*, 344 N.W.2d at 280.

The court must first determine what assets are available to be allocated between the spouses. *In re Marriage of Driscoll*, 563 N.W.2d 640, 641-42 (Iowa App. 1997). To do this, the court must identify and value the assets of the parties, both jointly and separately. *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa App. 1994). The value of the assets should then be determined as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa App. 1994). Next, a determination must be made as to the allocation of those assets.

After a 179(b) ruling, the court awarded Steven a net property award of $64,031 and Karen's net award was $50,950. (Of this, $30,500 was in the form of a cash settlement.) Karen argues the district court erred in calculating her property settlement. She claims the parties had a net worth of $127,000 and that she is entitled to one-half that amount. We find the trial court's valuations to be within the permissible range of the evidence. *See In re Marriage of Huisman*, 532 N.W.2d 157,

160 (Iowa App. 1995). However, we modify the award to make it more equitable by giving Karen an additional $6500. In keeping with the principal and accruing interest payment schedule under the trial court's ruling, this payment shall be due and payable on December 1, 1999.

IV. Child support. There is insufficient information in the record for us to adequately set child support, in part because Karen did not move to Tulsa as assumed by the trial court, and in part by the fluctuations in farm income. We therefore remand to the trial court to calculate the amount of child support Steven shall pay for the support of Ryan and Ashley.

V. Trial 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).

The court ordered Steven to pay Karen $6000 toward trial attorney fees. We affirm.

VI. Appellate attorney fees. Karen lastly requests an award of appellate attorney fees. Steven urges no appellate attorney fees be awarded. We determine

Karen is entitled to $1000 appellate attorney fees. Costs on appeal are assessed to Steven.

We do not reach the issue on cross-appeal regarding supervised visitation. Having thoroughly considered all issues on appeal, we hereby modify to grant primary physical custody of the minor children to Karen, modify the duration of the alimony award, modify the property award, affirm trial attorney fees, grant appellate attorney fees, and remand for a calculation of the child support amount.

AFFIRMED AS MODIFIED AND REMANDED.

Cady, C.J., and Vogel, J., concur; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would affirm the trial court.