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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-549/ 94-0591

IN RE THE MARRIAGE OF JACK RICHARD HOOD AND LUANN HOOD

Upon the Petition of
JACK RICHARD HOOD,

Petitioner-Appellant,

And Concerning
LUANN HOOD,

Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Gene L. Needles, Judge.

Jack Richard Hood appeals from the provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth & Genest Law Office, Pleasant Hill, for appellant.

Robert H. Laden and Teresa A. Beyer of Hyland, Laden & Pearson, P.C., Des Moines, for appellee.

Considered by Donielson, C.J., and Habhab and Cady, JJ.

HABHAB, J.

Jack Richard Hood's (Richard) and Luann Hood's nine-year marriage was dissolved in November 1993. The parties have two minor children, Abby, born May 29, 1989, and Cara, born May 15, 1986. Richard works for the Des Moines Public Schools as a speech pathologist and Luann works as a paralegal.

The dissolution decree stated Richard's net monthly income was $2500 and Luann's was $1750. The decree based Richard's income on his schoolteacher salary and on his earning capacity during the summer months while he is not teaching.

The parties were awarded joint legal custody and Luann was awarded primary physical care of the children. Richard was awarded visitation, including alternate weekends and six weeks each summer. Richard was ordered to pay $740 per month in child support. Among other things, Luann was awarded the homestead and Richard was given a $17,000 lien against it. Richard was also ordered to pay the costs of a psychologist's custody evaluation report.

Both parties filed rule 179(b) motions which were in effect denied but the court retained jurisdiction to resolve several issues if the parties could not come to a mutual solution. Finally, the court issued a ruling on unresolved issues.

Richard appeals. He contends the district court should have specified the parties' rights and responsibilities

under the joint legal custody award. He also contends he should be awarded primary care of the parties' children. He further claims his visitation award is unduly restrictive and should at least provide some midweek visitation. Richard contends the district court improperly calculated his net monthly income for child support purposes. Finally, Richard asserts the district court improperly awarded Luann a greater portion of the marital assets and should have ordered her to pay the costs of the custody evaluation.

I. 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 witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. Rights and responsibilities under joint custody.

Richard contends the district court erred in failing to incorporate a description of the rights and responsibilities of the parties under joint legal custody. Those rights and responsibilities are sufficiently set out in Iowa Code section 598.41(5) (1993). We make reference to this section of the Code in Division III of this opinion. The district court did not err.

III. Primary physical care. Richard contends the district court erred in awarding Luann primary physical care of the children. Richard argues he is better able to provide for the children's long-range interests.

In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in both the Iowa Code and in Iowa case law. Iowa Code § 598.41(3) (1993); In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983); In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration"--the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

The district court, in reaching its decision on this issue, had available the report of Dr. Craig Rypma regarding primary physical care of the children. Dr. Rypma was appointed by the court and filed an opinion stating Richard should be given primary physical care. As the district court pointed out, Dr. Rypma found the parties to

both be very capable parents. The court also noted Dr. Rypma found this decision to be a very close call.

In his testimony, Dr. Rypma stated that while Richard may have some advantages as a parent, these advantages were very slight. Dr. Rypma stated in his report that:

> Both of these parents have comparable levels of knowledge, skills, and abilities to serve as parents for Cara and Abbey. Both parents demonstrated skills and knowledge that are above average. From this perspective, both would be in a position to raise happy and healthy children. Furthermore, it is clear from this evaluation that both parents possess strengths that may ultimately contribute positively in the development of the minor children.

While Dr. Rypma found the parties to be close in ability, he stated it was his job to differentiate the parties and make a recommendation to the court.

The district court specifically took Dr. Rypma's report and testimony into consideration. We agree with the district court's assessment that the thrust of the report was that the parties were very close in parenting ability. While the district court had this report to consider in making its determination, it also had the testimony at trial to consider.

Neither party is perfect. Among other things, Richard has alleged abusive behavior on Luann's part, and Luann has alleged lying and extra-marital affairs on Richard's part. Both parties claim to be caring and attentive parents, and we have no reason to believe this is generally not true. Much of this issue revolves around whose testimony is more

credible. We give weight to the fact findings of the trial court especially when evaluating such credibility issues. See Iowa R. App. P. 14(f)(7).

From our de novo review of the record, we conclude the district court properly placed primary physical care of the minor children with Luann. We also affirm the trial court's decision to award joint legal custody of the children to their parents (to the parents' credit they were able to agree to this arrangement).

In affirming the joint legal custody provision of the decree, we are mindful of the open hostility the parents have from time to time displayed toward each other in the presence of their children. The parents would do well to put their personal feelings aside and attempt to work together in those decisions affecting the children's legal status, medical care, education, extracurricular activities, and religious instructions.

Joint custody gives both parents not only rights to their children, but it also imposes given responsibilities. The parents are reminded of the provisions of Iowa Code § 598.41(5) (1993) which provides:

> Joint legal custody does not require joint physical care. When the court determines such action would be in the best interest of the child, physical care may be given to one joint custodial parent and not to the other. If one joint custodial parent is awarded physical care, the court shall hold that parent responsible for providing for the best interest of the child. However, physical care given to one parent does not affect the other parent's rights and responsibilities as a legal custodian of the

> child. Rights and responsibilities as legal custodian of the child include, but are not limited to, equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction.

IV. Visitation. Richard contends the district court erred in setting out Richard's visitation rights. Richard's primary assertion is the district court should have allowed the requested midweek visitation. The district court specifically found such visitation would be disruptive and denied the request. We suspect the trial court envisioned dissension between the parents concerning visitation and, as a consequence, it did in minute detail spell out the extent of visitation. We affirm the trial court on this issue.

V. Child support. Richard contends the district court erred in setting the child support amount. Richard's primary argument is the district court erred in calculating his earning capacity.

In determining Richard's net monthly income,[1] the district court added in an amount that reflects Richard's

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1. There is some mention in the briefs that relate to Richard's earnings under a Phase III Program. In this regard, the only testimony that has been directed to our attention in the appendix is that of Luann's where she, after testifying that Richard's base salary under his current teaching contract was $38,692, stated: "And I know also Richard always in the past has gotten Phase III money that's never reflected upon the contract. It's on his pay stub, and I don't know--he might not get that anymore, but it could possibly be more. Plus there's his summer income too." We don't believe the trial court allocated any earnings to Phase III, as suggested in the briefs, but merely rounded off the $38,692 annual salary to $38,700. We are unable to attribute any Phase III earnings to

summer earnings. The court concluded that Richard earns from $7.25 to $7.50 an hour as a carpenter during the summer.

The appellee points out in his brief that Richard's own testimony is that there are at least ten weeks during the summer when he can or does work as a carpenter. The appellee further argues that, even if $7.00 an hour is used, Richard has summer earnings of at least $2800.

From our de novo review of the record, we conclude there is not a great deal of difference in the amounts proposed by the appellant and appellee. The appellant states in his brief that Richard's history of summer earnings is between $700 and $1000 per month. Richard testified that, if work is available, he earns between $250 and $300 per week.

We conclude that Richard's summer earnings are at least equal to $2800. We recalculate Richard's net monthly income to determine his child support obligation. In doing so, we add to his income from the school district his summer earnings of $2800, giving Richard gross annual earnings of $41,500. After reducing his gross monthly income by the allowable deductions, we determine his net monthly income to be $2420. Multiplying this amount by the thirty percent figure required in the guidelines,

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Richard's earnings for the record is silent as to that or those amounts.

Richard's recalculated monthly child support payments shall be $726.

VI. Property distribution. The dispute in this issue centers around the valuation of the assets. Richard contends the district court should have awarded him a lien on the homestead of $30,830 instead of the $17,000 lien awarded by the district court. We find the value placed on the assets by the trial court to be well within the permissible range of evidence and will not disturb them on appeal. See In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984).

Richard further contends Luann should contribute one half of the cost of Dr. Rypma's fee. Luann clearly stated she did not want the report and asked at the time that she not be made responsible to pay for it. The judge who ordered the report ruled Richard would be responsible for paying for the report. We conclude Richard should pay for the report in full.

AFFIRMED AS MODIFIED.