

IN THE COURT OF APPEALS OF IOWA

No. 0-446 / 10-0349
Filed October 6, 2010

**IN RE THE MARRIAGE OF JASON SCOTT BRUCE AND ATISHA JENE
BRUCE**

**Upon the Petition of
JASON SCOTT BRUCE,**
Petitioner-Appellee/Cross-Appellant,

**And Concerning
ATISHA JENE BRUCE,**
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Union County, David L.
Christensen, Judge.

Atisha Jene Bruce appeals from the decree dissolving her marriage to
Jason Bruce. **AFFIRMED AS MODIFIED.**

Patrick O'Bryan, Des Moines, for appellant.

Ann M. Nielsen, Creston, and Catherine K. Levine, Des Moines, for
appellee.

Heard by Sackett, C.J., Potterfield and Tabor, JJ.

SACKETT, C.J.

Atisha Jene Bruce appeals from the December 18, 2009, decree dissolving her marriage to Jason Bruce. Atisha contends she should have been granted primary physical care of the parties' daughter born in 2007, that the property division was not equitable and the district court should not have ordered her to pay child support based on her earning capacity. Jason cross-appeals asking that the visitation schedule set for Atisha be modified. We affirm as modified.

SCOPE OF REVIEW. We review dissolution cases de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Although we decide the issues raised on appeal anew, we give weight to the trial court's factual findings, especially with respect to the credibility of the witnesses. *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003). "Precedent is of little value as our determination must depend on the facts of the particular case." *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995). We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

BACKGROUND AND PROCEEDINGS. Jason, born in 1978, and Atisha, born in 1985, were married in 2006. The parties both are high school graduates and Atisha took some classes at the area community college. They both have held a number of jobs and lived in several different places. In November of 2007, after their daughter's birth, they bought a house in Creston, Iowa, where they

both had grown up and where they each had family members living. They continued to be employed. They separated in October of 2008 when Atisha left the family home in Creston.

In January of 2009 Jason filed the petition for dissolution of marriage that led to this appeal. On February 13, 2009, a temporary order issued providing that the parties should temporarily have joint legal and physical custody of their daughter and they should alternate care of her every other weekend from the conclusion of their work on Friday until Sunday at 6:30 p.m. Jason was to have the child every week from after his work on Tuesday until after his work on Thursday and Atisha was to have the child every week from 6:30 p.m. on Sunday until after her work on Tuesday, and from after her work on Thursday until after her work on Friday. The parties were also ordered to continue to reside in Creston community school district and use a designated day care provider which could be changed if the parties agreed. Jason was ordered to pay Atisha child support of \$171 a month, and the child's expenses including out-of-pocket medical expenses and day care should be paid one half by each party. Jason was responsible for continuing health insurance on the family during the pendency of the action. On Atisha's application the order was modified to strike the provision for residence in the Creston school district and for child care with the designated child care provider. The matter came on for hearing on November 4, 2009. On December 18, 2009, the district court filed its findings of fact and decree of dissolution of marriage.

The district court found the parties' child in good health, making normal developmental progress, and noted that since the separation the parties have shared her custody but they both agree the arrangement is not working and both requested primary physical care. The court found that Jason could most effectively administer to the child's long-range best interest holding:

Jason is the person most able to provide [the child] with structure, consistency, and routine. He remains in the family home . . . in Creston, Iowa. He has a day-care provider [the child] likes. Jason's hours of employment are steady. His family, including parents and siblings and their families, reside in Creston, Iowa, and provide Jason with family support. Jason supports [the child's] relationship with Atisha. [The child's] medical care will be able to be provided by the providers used by Jason [for the child] in the past and currently. Jason has plans to enroll [the child] in pre-school in the fall of 2010 and has already put her name on the waiting list. Jason continues to provide a stable home.

Atisha was given visitation from Thursday at 5:30 p.m. until Sunday at 5:30 p.m. every week until the last weekend before the child starts kindergarten at which time Atisha should have visitation on alternate weekends from Friday at 5:30 p.m. until Sunday at 5:30 p.m. Holidays were basically alternated and uninterrupted summer visitation was provided. The parties were ordered to share transportation, and if they could not agree, to meet approximately halfway between each parent's home.

Atisha was given credit for extraordinary visitation and ordered to pay child support to Jason of \$258.75 a month. Jason was to maintain medical insurance on the child and provisions were made for her uncovered medical expenses. The court divided the parties' assets and debts.

PRIMARY PHYSICAL CARE. Atisha contends she, not Jason, should have been granted primary physical care of their daughter. She contends that since the child's birth she has been the primary care provider and her bond with her daughter is strong. She argues she has supported Jason's relationship with their daughter and she has provided an adequate place for her to live. Relying on *In re Marriage of Hansen*, 733 N.W.2d 683, 696-97 (Iowa 2007), she contends that the fact she was the primary custodian prior to the parties' separation should be given substantial weight.

Jason responds that after the child was born the parties took turns getting up at night to feed and change her and that he attended many of her doctor's appointments and he frequently got her ready to go to daycare in the morning and picked her up at night. He also points out that since the parties' separation they have shared care and that he is and has been involved in the child's care. He also argues that he is the more stable parent. He points out Atisha moved four times since the parties separated and voluntarily left two jobs, and at the time of trial she was a part-time bartender who worked for tips.

The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (2009), in *Weidner*, 338 N.W.2d at 355-56, and in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The issue is which parent will do better in raising the child; gender is irrelevant and neither parent has a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Rodgers*, 470 N.W.2d 43, 44 (Iowa Ct. App. 1991); *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa Ct. App.

1985). We give consideration to each parent's role in child raising prior to a separation in fixing primary physical care. See *In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa Ct. App. 1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). Though we do not award custody based on hours of service for past care, we attempt to determine which parent will in the future provide an environment where the child is most likely to thrive. *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993). We approach this issue from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa Ct. App. 1992); see also *In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa Ct. App. 1992).

On reviewing the record we agree with the district court that Jason is able to provide his daughter with more structure, consistency, and routine than is Atisha. Jason has parents and two siblings and their families in Creston. He has prior experience in child care, having assumed some child care responsibilities for his nieces and nephews. He has taken infant CPR classes and reads on child development. He has stable full-time employment.

The parties have both brought new partners into their lives. Where a parent seeks to establish a relationship or a home with another adult, that adult's background and his or her relationship with the child becomes a significant factor in a custody dispute. See *In re Marriage of Decker*, 666 N.W.2d 175, 179 (Iowa Ct. App. 2003). That adult will have a place in the child's life. The type of person and relationship the parent has sought is an indication of where that parent's priority for his or her children is in his or her life. *Id.*

Both parties here have established new relationships and the parties to those relationships testified. Sadie Hockett has taken up residence with Jason. Never having been married, she has custody of her daughter who was three-and-a-half at the time of trial. Sadie has a bachelor's degree in criminal justice and sociology and is working through the University of Iowa towards a master's degree in human services. She is a social worker who works with families identified as needing assistance and does child-abuse assessment. She has held the job for two and a half years. She testified she is financially responsible and shares the expense of the home with Jason. There was testimony the couple is considering marriage.

Atisha is pregnant with a child. She testified the child is not Jason's but that Joshua Austin is the child's father. Joshua works as a house mover and a farmer. He had an OWI conviction several years ago and apparently drove without a license for a period. He has no other criminal record. He has not provided any support to Atisha although he did accompany her to a recent doctor's appointment.

Our de novo review of the evidence causes us to agree with the district court's assessment of the custody award and we affirm it.

PROPERTY DIVISION. Atisha contends the property division was not equitable. Jason contends it was. The court is to consider the enumerated factors of Iowa Code section 598.21(5) in making an equitable division of property. *In re Marriage of Fennelly*, 737 N.W.2d 97, 102 (Iowa 2007); *In re Marriage of Schriener*, 695 N.W.2d 493, 496 (Iowa 2005). We defer to the trial

court when valuations are accompanied with supporting credibility findings or corroborating evidence. *In re Marriage of Vieth*, 591 N.W.2d 639, 640 (Iowa Ct. App. 1999); *see also In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994). Considering the factors of section 598.21(5), we find the property division made by the district court is equitable and we affirm on appeal.

CHILD SUPPORT. Atisha contends the district court erred in basing her child support obligation on her earning capacity rather than her actual earnings. The court imputed her income at \$9.54 per hour based on a former job and ordered her to pay \$258.75 in child support per month. Jason contends it was proper to use earning capacity. Atisha contends the district court failed to follow Iowa Court Rule 9.11(4) effective July 1, 2009, which provides:

The court shall not use earning capacity rather than actual earnings unless a written determination is made that, if actual earnings were used, substantial injustice would occur or adjustments would be necessary to provide for the needs of the child or to do justice between the parties.

The required findings were not made. However, because our review is de novo, we may make our own findings and conclusions on issues properly raised. *See Lessenger v. Lessenger*, 261 Iowa 1076, 1078, 156 N.W.2d 845, 846 (1968) (noting our review of an equity case is de novo where we may issue fact findings and legal conclusions on our own review as we deem proper). Atisha quit several jobs. To use her actual earnings would be a substantial injustice to her child. We affirm on this issue.

VISITATION SCHEDULE. Jason contends that the district court should not have ordered visitation every weekend until the child starts school and asks that it be every other weekend.

Since Jason has primary physical custody of his daughter, he is entitled to enjoy weekend time with her. See *Weidner*, 338 N.W.2d at 359; *In re Marriage of Ertmann*, 376 N.W.2d 918, 921 (Iowa Ct. App. 1985). We therefore modify the decree to award Atisha visitation with her daughter every other weekend from 5:00 p.m. on Friday to 5:00 p.m. on Sunday. See *In re Marriage of Lacaeyse*, 461 N.W.2d 475, 477 (Iowa Ct. App. 1990).

APPELLATE ATTORNEY FEES. We award no appellate attorney fees. Costs on appeal are taxed to Atisha.

AFFIRMED AS MODIFIED.