IN THE COURT OF APPEALS OF IOWA

No. 0-749 / 10-0562
Filed November 10, 2010

IN RE THE MARRIAGE OF DORIS EVELYN NUSBAUM AND BRIAN GERALD NUSBAUM SR.

Upon the Petition of

DORIS NUSBAUM,
Petitioner-Appellee,

And Concerning

BRIAN GERALD NUSBAUM SR.,
Respondent-Appellant.

Appeal from the Iowa District Court for Poweshiek County, Joel D. Yates, Judge.

Appeal from the child-custody, visitation, and property division provisions of a decree of dissolution of marriage. **AFFIRMED.**

Michael W. Mahaffey of Mahaffey Law Office, Montezuma, for appellant.

Reyne L. See of Johnson, Sudenga, Latham, Peglow & O'Hare, P.L.C., Marshalltown, for appellee.

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

SACKETT, C.J.

Brian Nusbaum appeals from the decree dissolving his marriage to Doris Nusbaum, challenging the award of primary physical care of his two young sons to Doris and contending if the custody decision is affirmed that he should be awarded additional visitation. He also contends the property division is not equitable. We affirm.

SCOPE OF REVIEW. Dissolution actions, as equitable proceedings, are reviewed de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Benson*, 545 N.W.2d 252, 253 (Iowa 1996). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but these findings do not bind us. *In re Marriage of Duggan*, 659 N.W.2d 556, 559 (Iowa 2003). Prior cases have little precedential value with respect to custodial issues, and this court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

BACKGROUND. Brian was born in 1961; Doris in 1963. They were married in January of 2006. Both parties had been married previously.[1] At the time of the marriage Brian was the father of two sons born in 2004 and 2005 to his fourth wife, Jan, that are the subject of this appeal. In Brian's divorce from Jan he received primary physical care of the two boys, who apparently were living with Brian and Doris at the time of the dissolution of Brian's marriage. Jan received primary physical care of the parties' daughter, then about ten years old.

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[1] This was Brian's fifth marriage and Doris's second marriage.

In November of 2006 Jan agreed to termination of her parental rights[2] to the two boys, allowing Doris to adopt them.

Brian and Doris separated in late 2008. Doris filed a petition for dissolution of the marriage on February 10, 2009, and received an ex parte order granting her temporary custody of the boys. Notice of the order apparently was not served on Brian and he retained custody of the children[3] until February 26, 2009, when a subsequent order was entered granting Brian temporary primary physical care of the boys and granting Doris visitation every other weekend and every Wednesday for three hours. Doris was able to exercise the visitation. However, she arrived for the first visit without car seats in her car, and Brian refused to share his car seats with her, so her visitation time with the children at that scheduled visit was limited.

The matter came on for trial on February 24, 2010, nearly a year after the temporary order granting Brian physical care was entered. At the time of trial Brian and the boys were residing with Brian's fourth wife, Jan, and the children's fourteen-year-old half-sister.[4] Brian had enjoyed temporary custody of the boys for a year.

Evidence showed Brian suffers from cystic fibrosis and is under the care of several doctors, including Douglas B. Hornick, a pulmonary physician and a critical care specialist in the Department of Internal Medicine at the University of Iowa. One of the doctor's main duties was to serve as the head of the Adult

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[2] The record provides no reason for Jan's decision.
[3] There is a question of whether he sought to avoid service.
[4] Brian and Jan are the biological parents of this child who biologically is the boys' sister but legally their half-sister.

Cystic Fibrosis Center at University Hospitals. Dr. Hornick sees Brian every three months.

Brian has been hospitalized in the past. Dr. Hornick testified Brian's health is declining, he is on medication, future hospitalizations are likely, and there is a possibility that Brian may be a candidate for a lung transplant. Dr. Hornick believed Brian was capable and had the ability to care for his young sons on a day-to-day basis. Asked the basis for his opinion Dr. Hornick testified:

> [T]he intensity of Brian's treatment is not to the extreme of somebody with end-stage lung disease where I think it would become very difficult. So 65[5] percent is associated with fairly normal ability to do most activities of daily living so because of that association, I would say he would be capable. Now his treatments take time, and it's difficult to hold down a job, raise children, and take care of his CF at the same time. And many patients are able to do it, and it does take a degree of planning and sticking to schedules and things like that. From my experience of working with Brian he has been able to keep up with most things, and I would not see any reason at this point in his disease that would be a problem.

Brian, at the time of trial, was receiving social security disability, as were the boys. He was a stay-at-home father, a position he had also taken before the parties' separation, caring for the children while Doris worked at Wal-Mart a little less than forty hours a week.

Brian is a felon, apparently having pled guilty to identity theft as a result of a scheme he engineered while he was working at McDonald's in Williamsburg, Iowa. It was directed at undocumented employees working there. Brian initially left the state after he was fired from McDonald's but was returned when charges

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[5] Refers to lung capacity. The doctor had placed Brian's lung capacity at sixty percent.

were filed. His probationary period as a result of the plea was concluded prior to trial, but he pays fifty dollars a month on a $40,000 restitution judgment.

Doris was given custody of her three children from her prior marriage at the time of the dissolution of that marriage but she subsequently lost custody. She testified it was the result of drug use by a man who was living with her.[6] These children are now adults and Doris has contact with them.

PRIMARY CARE. The district court determined that the best interest of Brian Jr. and Daryl would be served by placing primary physical care with Doris, concluding Doris's home environment compared to Brian's home environment would give the boys the best possible chance to succeed. In making the determination the court considered Brian's health and what the district court determined to be Brian's lack of candor and his failure to cooperate with Doris's visitation.

Brian contends that he, not Doris, should have been awarded primary physical care. Doris contends the district court should be affirmed.

We review numerous factors in determining which parent should have physical care of a child. *See* Iowa Code § 598.41(3) (2009); *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). Our primary consideration, however, is the best interests of the child.[7] *In re Marriage of Decker*, 666 N.W.2d 175, 177

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[6] The record is not clear as to whether the loss of custody was the result of a modification of the dissolution decree or a parental termination action.

[7] While a best-interest standard is laudable, realistically the best interest of this child would be served by living with both of his parents in a loving family home. The parents have sought to dissolve their marriage, so this option is not available to us. Rather, we need to decide whether the child's interests are better served by being in the primary care of his mother or in the joint physical care of both of his parents.

(Iowa Ct. App. 2003). Specifically, we look to which parent can minister most effectively to the child's long-term interests. *In re Marriage of Williams*, 589 N.W.2d 759, 761 (Iowa Ct. App. 1998). We also consider the emotional and environmental stability each parent offers. *Id.* at 762. There is no inference favoring one parent over the other. *Decker*, 666 N.W.2d at 177. The critical issue is determining which parent will do a better job raising the child; gender is irrelevant, and neither parent should have a greater burden than the other in attempting to gain physical care in an original dissolution proceeding. *Id.* While not the singular factor in determining which placement would best serve the children's best interests, we give significant consideration to placing them with the primary caregiver. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). We also examine who can and will best support the other parent's relationship with the children. *See In re Marriage of Bartlett*, 427 N.W.2d 876, 878 (Iowa Ct. App. 1988) (stating a parent's attempt to isolate and alienate children from the other parent is a factor to be given weight in a custody determination).

Brian argues that he is a stay-at-home parent, he lives with the children's biological sister and their biological mother, and there is no evidence he has had any problems in caring for the boys. Doris admitted at trial Brian is a good father, his home is a decent place for the boys to grow up in, and she has no problems communicating with Brian. Brian points out that the older child is in school and points out the report from his teacher indicated the child is doing fine work. A copy of the child's report card for the first two quarters of the 2009 to 2010 school

year, the child's kindergarten year, showed the child was rated satisfactory in all areas except in the second quarter it was noted he needs improvement in knowing vocabulary words. The teacher's comments were the child was a nice boy to have in class, was off to a good start, was doing well recognizing letters, sounds and numbers but needed to practice color words. Doris disagrees with the teacher's report and focuses on a report of DIBELS[8] scores on three tests taken by the child during his kindergarten year. There were three categories for both sound fluency and letter-naming fluency: "at risk," "some risk," and "low risk." The child was in the middle category, "some risk," in both fluencies on the fall and winter tests, but "at risk" in the spring testing.

Brian admits he is a convicted felon but notes his probation period was to end on March 3, 2010, and there had been no other problems. Brian also acknowledges that he suffers from cystic fibrosis, a genetic disease, but points to his doctor's opinion that he is capable of caring for the children on a day-to-day basis. He believes the district court was unfair in finding he was not credible and was in error in finding that both parties had been primary custodians of the children and that he showed no remorse for his felony conviction.

Brian further contends that the district court's concern about visitation problems focused on a single, isolated incident after he did not give the child to Doris as she did not have car seats in her car.

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[8] DIBELS is represented to be a research-based assessment given to students individually three times during the school year and there are researched benchmarks or levels of performance to determine if the child is progressing in reading at the expected rate.

Doris contends that the evidence supports the district court's decision. She criticizes Brian's decision to leave the state after the McDonald's incident. She argues that Brian's health is not good. She is concerned that he listed Jan as the older child's mother on school documents and did not list her. She contends that she offers the children the best chance.

This is a close case. Brian correctly argues he has been the stay-at-home father, the children have done well, and granting him primary physical care will place the boys in the same home as their sister. There is merit to these arguments. The district court relied heavily on Brian's health issue in making the custodial award and the fact Doris is currently in good health. We give substantial weight to the testimony of Brian's doctor that he is able to parent the children and evidence that Brian checks with his doctors on a frequent basis and discount Brian's health as a factor weighing against his claim for custody. We also consider that Doris needs child care while Brian can be with the children more hours of the day. We are bothered by the fact Brian neglected to provide Doris's name to the older child's school and the fact he removed the child from a preschool program without consulting with Doris. We are concerned that there is no evidence why Jan agreed to termination of her parental rights, for if Brian is to have custody, at least as long as the two live together Jan will have substantial contact with the children. There was disputed testimony that she may have had an alcohol problem.

We are concerned that Doris lost custody of her children but recognize the district court's opinion that she showed remorse concerning the loss. The lack of

a more-detailed record of what happened and how it happened make it difficult to determine what weight this factor should be given. Doris, other than during visitation times, has never cared for the children without Brian's assistance.

Each party presented testimony of others that they were good parents.

We agree with the district court that Brian's credibility is questionable, considering his felony conviction, the fact his testimony about gun ownership is contradicted by the record, and he is vague as to his testimony on financial details. We find there are also credibility issues with Doris's testimony, including her initial answer under oath that she did not sign a deed, which she later recanted, and her claim that Brian owed income tax, which the district court found was not supported by the evidence.

Giving the required deference to the district court we affirm the award to Doris of physical care.

VISITATION. Brian contends that the district court should have granted him additional visitation. He was given visitation at a minimum of every other weekend from 4:00 p.m. on Friday until 6:00 p.m. on Sunday as well as a three-hour visit from 4:00 p.m. to 7:00 p.m. mid-week. Those visits were to be on Wednesday after he has had the children for the weekend and on Monday when he has not had them for the weekend. He is also given two weeks of visitation in each of the months of June, July, and August. Holidays are alternated between the parties. The visitation is reasonable and we will not modify it. *See* Iowa Code § 598.41(1)(a).

PROPERTY DIVISION. Brian contends the property division was not equitable. The district court awarded a BMW car valued at about $4610 titled in the name of an older son of Brian to Doris and provided if Brian could not get the car transferred to Doris then he should pay her the sum of $4610. Doris contends the property award was equitable.

Iowa is an equitable-division state. *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995). An equitable division does not necessarily mean an equal division of each asset. *Id.* Rather, the issue is what is equitable under the circumstances. *In re Marriage of Webb*, 426 N.W.2d 402, 405 (Iowa 1988). The partners in the marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). Iowa courts do not require an equal division or percentage distribution. *Id.* The determining factor is what is fair and equitable in each circumstance. *In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa Ct. App. 1993). The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(5). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). While an equal division of assets accumulated during the marriage is frequently considered fair, it is not demanded. *In re Marriage of Keener*, 728 N.W.2d 188, 193 (Iowa 2007).

Basically, we learn from the decree the parties were each awarded their undefined debts and undefined personal property in their possession. Specifically, Doris was awarded a Mule UTV, a 1998 Neon, and the BMW or $4610 in cash. She was also give her 401K account with Wal-Mart of less than

$1501 and her stock with the same company valued at just over $1000, based on the short duration of the marriage. Specifically Brian was awarded two 1000 cc four-wheelers, a boat, and a riding mower.

It is not entirely clear from the record what the parties' financial pictures actually are. Neither party has attempted to set forth in their brief information that would assist us in valuing the assets and liabilities divided. However, there is little in the record to suggest the parties have much to divide. Debts appear to exceed assets. Brian's only income comes from his disability payments. Doris's sole source of income is her wages from Wal-Mart. Brian filed an application for disability benefits but some time expired before he was granted the benefits. As a result he received a lump-sum payment of approximately $70,000.[9]

Doris testified that the money for the purchase of vehicles came from the above lump-sum settlement, as the settlement went into a joint account she had with Brian. She further testified that $3000 from the settlement went to the three children from her prior marriage. Brian agrees with Doris that the money for the BMW came from the settlement but notes the car was titled in Brian's son's name.

Brian argues that because the BMW was paid for with the proceeds of his settlement, which was the result of his disability, it was wrong for the district court to give it or the value of it to Doris. The parties cite a series of cases dealing with treatment of retirement and disability awards, arguing one or more cases

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[9] Brian was not clear as to when he first applied for benefits or when they were received but ultimately he testified he applied in 2004 and first received benefits and the settlement in 2008.

supports his or her position.[10] Brian asks us to hold that property purchased with the proceeds of a lump-sum social security disability payment should be the sole property of the disabled spouse. Doris asks us to hold otherwise. Brian has failed to show that the division of property was inequitable, and we consequently affirm the district court.

AFFIRMED.

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[10] *In re Marriage of Crosby*, 699 N.W.2d 255, 259, (Iowa 2005); *In re Marriage of Schriner*, 695 N.W.2d 493, 498-99 (Iowa 2005); *In re Marriage of Howell*, 434 N.W.2d 629, 633 (Iowa 1989); *In re Marriage of McNerney*, 417 N.W.2d 205, 206 (Iowa 1987); *In re Marriage of Miller*, 524 N.W.2d 442, 444 (Iowa Ct. App. 1994).