

IN THE COURT OF APPEALS OF IOWA

No. 1-822 / 11-0298
Filed December 21, 2011

**IN RE THE MARRIAGE OF BRANDY BARTON
AND BRAD L. BARTON**

Upon the Petition of

BRANDY L. BARTON,
Petitioner-Appellant,

And Concerning

BRAD L. BARTON,
Respondent-Appellee.

Appeal from the Iowa District Court for Woodbury County, Jeffrey A. Neary, Judge.

Brandy L. Barton appeals the decree dissolving her marriage to Brad L. Barton contending the district court erred in awarding the parties joint legal custody and awarding physical care to Brad. **AFFIRMED.**

Paul W. Deck of Deck & Deck, L.L.P., Sioux City, for appellant.

Brandy L. Barton, South Sioux City, Nebraska, pro se appellant.

Brien Patrick O'Brien, Sioux City, for appellee.

Considered by Sackett, C.J., and Vogel and Eisenhauer, JJ.

SACKETT, C.J.

Brandy L. Barton appeals from the February 1, 2011 decree dissolving her marriage to Brad L. Barton contending the district court erred in awarding the parties joint legal custody and awarding physical care to Brad. For the reasons stated below, we affirm.

I. BACKGROUND AND PROCEEDINGS. The parties were married in June of 2008, when Brandy was twenty-seven and Brad was thirty. They had a son together before the marriage whose date of birth is March 23, 2006. Brandy has a thirteen-year-old daughter and an eight-year-old son by two other men.

Brandy is employed caring for three handicapped children and earns approximately \$700 per month. She testified she suffers from arthritis in her neck due to a car accident in 2008, and believes she cannot return to the job market due to her condition. At the time of the hearing she had applied for disability benefits.¹ Brad was self-employed at the time of the hearing as an auto salvage handler. He estimated he earned approximately \$300 per week.

Brandy filed the petition for dissolution in April of 2010, she obtained a protection order against Brad and had him forcibly removed from the home they were purchasing. The protection order was still in place at the time of the hearing, and was set to expire October 21, 2011. During the hearing the court took judicial notice of the protection order. The court found the allegations

¹ The district court noted in its decree that Brandy offered no medical evidence of her disability and appeared to have no difficulty in her mobility while in court. The court stated it appeared Brandy to be able to work regularly with no disability apparent.

pertained in most part to the minor children in the home, but were not very detailed. The protection order was entered by consent of the parties.

The dissolution case was tried on January 27, 2011. The district court in a February 1, 2011 order found the parties did not get along. Brandy initially testified Brad should receive no visitation with their son, but when pressed by her attorney said that, if necessary, he could be provided visitation for a couple of hours, one day a week. The district court stated it was clear Brandy did not support Brad's relationship with their son.

The court noted there was uncontested testimony Brad was the subject of a child abuse report where it was found he hit both the child here in question, and Brandy's eight-year-old son. Brandy alleged Brad slapped her eight-year-old son in the mouth and split his lip open. No documentation of the child abuse report was offered at trial, and no juvenile court action was initiated. The court noted that despite this child abuse report, Brad was permitted visitation without supervision at the time of the temporary hearing. This visitation was initially exercised, but tapered off and was ultimately stopped by Brandy. Because Brandy refused to permit visitation ordered at the temporary hearing, by the time of the trial Brad had not seen his son in almost four months. The court found Brandy readily admitted to preventing the visits, and that her rationale for stopping them was not supportable. The court concluded that the incidents of abuse were isolated and were not indicative of an ongoing pattern of behavior.

Several witnesses testified in support of Brad, including the father of Brandy's eight-year-old son. The court found these witnesses credible as they

were not members of Brad's family and had ample opportunity to observe Brad interact with his son and with Brandy's other children. The court found Brad to be a capable father, who was more able and willing to support the child's relationship with Brandy than Brandy was to support the child's relationship with Brad. The court viewed Brad as the more civil and level-headed of the two parties and capable of caring appropriately for the child.

The court noted Brad offered compelling testimony of how Brandy parents her eight-year-old son. The court found the evidence showed Brandy was resistant to authority as it related to the child's attendance at school, and his behavior while there. She attempted to cut off communication with the school's staff when they voiced multiple concerns over the child's behavior, and the child's inordinate number of absences from school. She suggested the school personnel were lying when they would inform her about the child's disruptive behavior. The court was concerned Brandy would act in a similar fashion when the child at issue here entered school. The court called Brandy's behavior troubling and stated it presented a dim view of the future for the child in question.

The court ultimately awarded the parties joint legal custody, and awarded physical care to Brad. It awarded Brandy visitation as follows: every Tuesday evening from 6:00 p.m. until 8:00 a.m. Wednesday morning or until school starts; every other weekend from 6:00 p.m. Friday until 6:00 p.m. Sunday; every Mother's day; two weeks each for the months of June, July, and August; and alternate holidays. Brad was awarded Father's Day. The court ordered Brandy

to pay sixty dollars per month in child support, and ordered each party to pay their own attorney fees.

Brandy appeals the court's order contending she should have been awarded sole legal custody and awarded physical care of her son. She also requests that we order Brad to pay her child support. Brad filed no appellate brief in this matter.

II. SCOPE OF REVIEW. We review de novo the court's decision on custody and physical care as the case was heard in equity. Iowa R. App. P. 6.907. However, while we are not bound by the district court's factual findings, we give them weight especially when considering the credibility of witnesses as the district court had the opportunity to hear the evidence and observe the witnesses. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009).

III. JOINT LEGAL CUSTODY AND PHYSICAL CARE. Brandy alleges the district court erred in awarding Brad physical care and giving the parties joint legal custody. She asserts the court separated the child from his half-siblings without providing compelling reasons, and also disregarded the undisputed evidence of Brad's history of domestic abuse of both the child in question and Brandy's other children. Because of this history of domestic abuse, Brandy asserts the court should have applied the presumption against joint legal custody and physical care contained in Iowa Code section 598.41(b) (2009).² Brandy also contends she should not be penalized for being reluctant to grant Brad visitation in light of the physical abuse, as well as her concerns over the

² Iowa Code section 598.41(b) provides in part, "if the court finds that a history of domestic abuse exists, a rebuttable presumption against awarding joint custody exists."

condition of the child when he would return home after visiting with Brad. Brandy complained the child was dirty, sleep deprived, and allowed to play with dangerous items such as a piece of electrical cord that had battery acid on it.

While we agree there exists a rebuttable presumption against granting joint legal custody or physical care to a person who has a history of domestic abuse, we disagree with Brandy that this presumption is applicable in this case. “A ‘history’ is not necessarily established by a single documented incident.” *In re Marriage of Forbes*, 570 N.W.2d 757, 760 (Iowa 1997). The district court heard the testimony offered in this case regarding the alleged abuse from both Brandy and her mother. The district court then concluded that this incident was isolated and not indicative of an ongoing pattern of behavior. From our de novo review of the evidence in this case, we agree with the district court.

Brad had a number of character witnesses who testified to his ability and willingness to care for his son, and many of the witnesses trusted Brad to interact with and watch their children as well. In addition, Chuck De Rochie, the father of Brandy’s eight-year-old son, testified that two weeks after the alleged abuse by Brad, his son ran up to Brad and was happy to see him, which contradicted in Chuck’s mind that the abuse ever occurred. Chuck asked his son about the abuse and his son told him Brad swatted his butt or slapped his hand, but never anything that would break the skin. In addition, Chuck testified that Brandy made multiple false accusations against him when he was divorcing Brandy, including reporting that he was abusive toward his son. This report was investigated, but never substantiated. Chuck indicated he believed Brandy had a pattern of

making claims of abuse when going through a divorce in order to attempt to grab custody of her children.

Because we find no history of domestic abuse in this case, we find Brandy is not entitled to the rebuttable presumption contained in Iowa Code section 598.41. The abuse here, while uncontested, did not amount to a history of domestic abuse.

Brandy also claims the court erred by separating the child in question from his half-siblings. We recognize there is a strong interest in keeping siblings together and this includes half-siblings. *Yarolem v. Ledford*, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994). However, circumstances can arise which demonstrate that separation is in the long-term bests interest of the children. *Id.* In this case, we find, as did the district court, that the long-term interests of the child in question in this case are best served by being in the custody of Brad, rather than Brandy.

Brad is more willing and able to support the child's relationship with Brandy. Brandy on the other hand cut off Brad's visitation for what the district court determined were unsupportable reasons, and testified she wanted Brad to be awarded no future visitation. The court described Brad as more civil and level-headed, and found Brandy's behavior troubling with respect to her eight-year-old son. The court found Brandy to be resistive to authority, and concluded her pattern of behavior with her other children presented a dim view of the future of the child in question if he were left in Brandy's care.

Because we find Brad more capable of providing for the child's long-term best interests, we affirm the custody and physical care provisions of the district court's decree. We, therefore, deny Brandy's request for child support.

AFFIRMED.