

IN THE COURT OF APPEALS OF IOWA

No. 2-978 / 12-0915
Filed January 9, 2013

**IN RE THE MARRIAGE OF RYAN PATRICK MCALISTER
AND HEATHER RAINE MCALISTER**

Upon the Petition of

RYAN PATRICK MCALISTER,
Petitioner-Appellee,

And Concerning

**HEATHER RAINE MCALISTER
n/k/a HEATHER RAINE SHELTON,**
Respondent-Appellant.

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

Heather Shelton appeals the custodial provisions of the district court's decree dissolving her marriage to Ryan McAlister. **AFFIRMED.**

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Julie G. Mayhall of Green, Siemann & Greteman, P.L.C., Carroll, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Heather Shelton appeals the district court's April 2012 decree dissolving her marriage to Ryan McAlister. Heather contends the district court erred in awarding physical care of the parties' three children to Ryan. Upon our de novo review, we agree with the district court's assessment of physical care in this case. We affirm.

I. Background Facts and Proceedings.

Heather and Ryan were married in December 2004, and have three children, H.M., M.M., and O.M., who were five, four, and two at the time the dissolution decree was entered. Heather was twenty-seven; Ryan was thirty-one. Both were in good health. The parties met in 2003, when Heather was nineteen and Ryan was twenty-three. Heather had a difficult home life and moved from her mother's home during her senior year of high school. Heather and her mother maintained a relationship, albeit strained at times. The parties dated for two years. When they married, they rented a home in Carroll before purchasing a new home in Arcadia in 2007.

Heather completed high school, but has no post-secondary education. She held a number of part-time jobs for short periods during the marriage, but was not consistently employed. At the time of the dissolution trial, Heather was unemployed. Heather testified she hopes to attend college for accounting, but did not have a plan for paying for college.

Heather admitted to smoking cigarettes. Ryan alleged Heather used marijuana with her friends, which Heather denied. Heather testified she drinks

alcohol, except during her pregnancies. Ryan alleged Heather does not drink socially, but rather, drinks to get drunk and then becomes violent.

Ryan graduated high school and attended the University of Northern Iowa from 2001-2002. He was expelled because of marijuana usage. Ryan earned an associate's degree from Des Moines Area Community College. Throughout the marriage, Ryan was the primary income earner. Ryan worked at Pella Corporation until he was terminated in December 2007. He drew unemployment until March 2008, when he began working at the Arcadia Coop. Ryan was terminated from the Coop in August 2011 due to a drug charge against him based on marijuana found in his vehicle. Ryan denied the drugs were his and that charge was later dismissed. At the time of the dissolution trial, Ryan remained unemployed and collected \$370.60 in unemployment benefits per week. He also received food stamps. Ryan testified he had some "good leads" on a job, but was waiting for the decree in this case to be entered before pursuing them.

Ryan was also a partner in the North Side Bar in April 2011. Ryan's involvement in the business was limited to the weeks he did not have the children or when he arranged for childcare after the children went to bed. Ryan testified he did not earn a salary from the business, but "occasionally" could get "gas money." In August 2011, Ryan was charged with selling/serving alcohol after hours and with interference with official acts. In December 2011, he entered *Alford* pleas to those charges.

Ryan admitted to occasionally smoking cigarettes. Heather alleged Ryan used marijuana daily beginning in 2003 and throughout the marriage and at times sold marijuana. Ryan testified he used marijuana no more than once or twice per month when Heather's brother, Jacob, a confirmed marijuana user, gave it to him; Ryan denied ever paying for marijuana. The Manning Family Recovery Center evaluated Ryan in August 2011 and based upon a negative drug test and information provided by Ryan, concluded Ryan did not fall "within the medically recognized criteria for chemical dependency." Another drug test in January 2012, which was arranged by Ryan, was also negative.

Ryan's extended family lives in the area. His parents live in Bayard. Ryan is the oldest of seven children. He maintains a close relationship with his parents and siblings. Heather and Ryan regularly went to Ryan's parents' home with the children. Ryan's mother also visited the parties and the children at their home in Arcadia. Heather had a good relationship with Ryan's mother during the parties' marriage. Ryan's mother assisted Heather with the children when there was an illness or when Heather needed to catch up on things. Heather's parents were far less involved.

Heather testified she was the primary caretaker of the children. Testimony suggests Ryan was also involved and was nurturing to the children. Heather alleged she was primarily responsible for the cooking, laundry, and cleaning. Heather indicated she kept the home clean, but there was testimony from Ryan and his mother that the home was dirty at times. Heather took the children to

doctor's appointments. Both parties did activities with the children and went to church as a family.

The allocation of child care and homemaking responsibilities was an issue between the parties. Heather believed Ryan should share equally in these tasks, whereas Ryan believed in sharing responsibilities in accordance with the parties' work schedules. Heather believed Ryan was on the computer too much and that he did not properly supervise the children. Ryan also believed Heather did not properly supervise the children,¹ and alleged she was not responsible and was overwhelmed easily. The parties were critical of the other for not doing what each perceived to be the other's fair share.

Heather considered Ryan to be controlling during the parties' marriage. The parties only had one vehicle, which Ryan took to work when he was employed. After dropping their home telephone, they only had a prepaid cellular phone, which Ryan also took to work. Heather alleged Ryan yelled at her and talked down to her in front of the children. Ryan handled the family finances, but testified he did so only because Heather demonstrated no interest in taking responsibility for paying bills.

In January 2011, Heather left the family home with the children. She left Ryan a note that she wanted a divorce. She initially stayed at her brother's two-bedroom apartment that he shared with his girlfriend and their child. Heather later stayed with her friend, Chantel. Initially, the children were with Heather

¹ In November 2011, M.M. was helping Heather make dinner, and splashed boiling water on O.M., causing substantial burns on O.M.'s chest. Heather took O.M. to the emergency room, and followed physician's orders to treat the burns. Heather did contact Ryan about the incident when it occurred.

during the week and with Ryan on the weekends.² Sometimes Ryan also picked the children up in the mornings and spent time with them before going to work in the afternoons. There was testimony the parties do not communicate well,³ and are not as supportive of each other as they could be.

Ryan filed a petition for dissolution in March 2011. The district court entered a temporary order in June 2011, ordering temporary joint physical care, with the parties alternating care of the children each week. Following the temporary custody order, Heather moved to Rockwell City, then to her mother's home near Jefferson City, and then to Lake City.

Heather gave birth to her fourth child, Z.S., in November 2011. Ryan is not the biological father of Z.S.; Zebulon (Zeb) Smith is the child's father.⁴ Heather knew Zeb before she and Ryan married. Zeb is employed as a crane operator and travels during the week for work. Zeb has prior drug possession and operating while intoxicated charges, but nothing within the past five years. Heather lives with Zeb and Z.S. in a rental home in Lake City. The home has adequate bedrooms for the children, but only one bathroom; it has a shower but no bath tub. Ryan alleged the children were not clean after staying at Heather's.

Following the parties' separation, Heather stopped taking the children to church because she understood Ryan would be taking them; Ryan continued

² Heather encountered some difficulties regarding childcare after the parties' separation. For example, in February 2011, she sent a text message to Ryan asking what he does when O.M. wakes up crying and will not stop crying, and in March 2011, she indicated she was dealing with a toothbrush shortage by having the children share her toothbrush.

³ Shortly after the parties' separation, Ryan broke Heather's cell phone and threw it at her.

⁴ Physical care of Z.S. is not at issue on appeal.

taking them to church. The oldest child, H.M., has had some issues with absenteeism from kindergarten while in Heather's care. However, the children appear to have consistent routines when they are in the care of each party.

Trial was held in January 2012. The main issue before the court was physical care of the parties' children. Although the parties had been sharing physical care of the children on an every-other-week basis following their separation, both parties requested physical care.

In April 2012, the district court entered a decree dissolving the parties' marriage. The district court found the evidence showed both parents were suitable custodians for the children and stated this was "a very close case." The court found the parties were able to meet the children's needs and did a "reasonably good job parenting" the children, but observed neither party was working, "they each smoke, they each have substance abuse issues, and both appear to enjoy their time free of household and child care responsibilities." The court also found it was "doubtful that either party will be particularly supportive of the other," and that each "will be stressed financially and the party awarded sole physical care will have the additional stress of meeting those custodial obligations." The court determined "the best interests of the children is going to require that the party awarded physical care has substantial family support." In this regard, the court found "the scales tip in favor" of Ryan. The court also noted Heather's lack of responsibility or "interest in financial matters, even household finances."

The court ordered physical care of the children with Ryan, and provided Heather with visitation. The court ordered Heather to pay thirty dollars per month in child support. The court ordered Ryan to contribute \$1000 to Heather's attorney fees. Heather now appeals the district court's decision on physical care.

II. Scope and Standard of Review.

We review dissolution cases de novo. *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009). While we decide the issues anew, we give weight to the district court's factual findings, particularly those pertaining to witness credibility. *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). Because we base our decision on the unique facts of each case, precedent has little value. *In re Marriage of White*, 537 N.W.2d 744, 746 (Iowa 1995).

III. Discussion.

The primary consideration in any physical care determination is the best interests of the child. Iowa R. App. P. 6.904(3)(o). "[T]he courts must examine each case based on the unique facts and circumstances presented to arrive at the best decision." *In re Marriage of Hansen*, 733 N.W.2d 683, 700 (Iowa 2007). To make this decision, we consider a number of factors including those listed in Iowa Code section 598.41(3) (2009),⁵ and those contained in *In re Marriage of*

⁵ Iowa Code section 598.41(3) provides:

In considering what custody arrangement . . . is in the best interest of the minor child, the court shall consider the following factors:

- a. Whether each parent would be a suitable custodian for the child.
- b. Whether the psychological and emotional needs and development of the child will suffer due to lack of active contact with and attention from both parents.
- c. Whether the parents can communicate with each other regarding the child's needs.

Winter, 223 N.W.2d 165, 166–67 (Iowa 1974).⁶ In considering all these factors, our one objective “is to place the children in the environment most likely to bring them to health, both physically and mentally, and to social maturity.” *Hansen*, 733 N.W.2d at 695. Gender of the parent is irrelevant to our consideration, and neither parent has a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37–38 (Iowa Ct. App. 1996).

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- d. Whether both parents have actively cared for the child before and since the separation.
 - e. Whether each parent can support the other parent’s relationship with the child.
 - f. Whether the custody arrangement is in accord with the child’s wishes or whether the child has strong opposition, taking into consideration the child’s age and maturity.
 - g. Whether one or both the parents agree or are opposed to joint custody.
 - h. The geographic proximity of the parents.
 - i. Whether the safety of the child, other children, or the other parent will be jeopardized by the awarding of joint custody or by unsupervised or unrestricted visitation.

⁶ The factors listed in *Winter*, 223 N.W.2d at 166–67, include:

1. The characteristics of each child, including age, maturity, mental and physical health.
2. The emotional, social, moral, material, and educational needs of the child.
3. The characteristics of each parent, including age, character, stability, mental and physical health.
4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
5. The interpersonal relationship between the child and each parent.
6. The interpersonal relationship between the child and its siblings.
7. The effect on the child of continuing or disrupting an existing custodial status.
8. The nature of each proposed environment, including its stability and wholesomeness.
9. The preference of the child, if the child is of sufficient age and maturity.
10. The report and recommendation of the attorney for the child or other independent investigator.
11. Available alternatives.
12. Any other relevant matter the evidence in a particular case may disclose.

Here, both Heather and Ryan requested physical care of the children. Heather claims the district court erred in ordering physical care of the children with Ryan where she “was the children’s historical primary caretaker, the children thrived in her care, and she would continue to provide for them in a similar manner in the future.” Heather contends Ryan’s failure to help her “provide for the children’s basic needs” establishes Ryan as “a person who will not act in the children’s long-term best interests.” Heather states that “[d]ue to Ryan’s lack of participation during the marriage, [she] had effectively been a single parent for years.” Heather further alleges that Ryan depended on his parents and extended family “to accomplish basic family functions like keeping a clean house and doing laundry.”

Ryan alleges Heather “abandoned the family home” and “moved five times” prior to the dissolution trial, while he stayed in the family home to allow the children “to grow up in familiar and reassuring surroundings.” Ryan states Heather “gave birth to a child before these proceedings could even conclude,” moved in with the child’s father, and alleges Heather “clearly makes major life choices without considering the impact it will have on her children.” Ryan states he worked full time during the marriage, while Heather’s employment history was “sketchy and inconsistent at best.” Ryan further points out that although Heather claimed to be the children’s primary caretaker during the marriage, the district court “specifically found that [Heather] downplayed Ryan’s assistance” in taking care of the children.

Upon our de novo review, we agree with the district court's assessment of physical care in this case. We observe that both parties sincerely love the children and are concerned with their well-being. However, like the district court, we conclude several factors tip the balance in favor of granting Ryan physical care of the children. As the district court noted, the support of Ryan's extended family is significant. At issue are three children, close in age, who require a great deal of time and attention. Ryan's family, especially his mother, has played a large role in the children's lives and continues to do so. We believe the children will greatly benefit from support and companionship of their nearby extended family. In addition, we find placing the children with Ryan will provide them more stability. With the exception of a few short periods of unemployment, Ryan has been employed and providing for the children. Relative to Heather, Ryan has also maintained a stable home environment.

We have carefully considered all arguments raised by the parties on the physical care issue. We conclude the children's best interests require that they be placed in the physical care of Ryan. Accordingly, we affirm the district court's decision.

AFFIRMED.