IN THE COURT OF APPEALS OF IOWA

No. 6-143 / 05-1703
Filed April 26, 2006

**IN RE THE MARRIAGE OF JEAN SOBEK
AND SCOTT SOBEK**

**Upon the Petition of
JEAN SOBEK,**
Petitioner-Appellant,

**And Concerning
SCOTT SOBEK,**
Respondent-Appellee.

Appeal from the Iowa District Court for Hancock County, John S. Mackey, Judge.

Petitioner appeals from provisions of a dissolution decree. **AFFIRMED AS MODIFIED AND REMANDED.**

Jane White of Parrish, Kruidenier, Moss, Dunn, Boles, Gribble & Cook, L.L.P., Des Moines, for appellant.

Robert W. Brinton of Brinton, Bordwell & Johnson, Clarion, for appellee.

Heard by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

Jean Sobek appeals from the child custody, child support, and property division provisions of the district court's decree dissolving her marriage to Scott Sobek. We affirm as modified.

I. Background Facts & Proceedings

Jean and Scott were married in 2001. Jean has a son, Briar, from a previous relationship. Jean has had sole custody of Briar since his birth in 1995 and receives little or no financial support from his father. Jean and Scott have one child, Brock, born in 2002.

Scott was thirty-two years old at the time of the dissolution trial. He has a high-school education and has been employed full-time with Winnebago Industries in Forest City, Iowa, for about thirteen years. He supervises about twenty employees and, with the exception of a written warning after a harassment incident in 2002, has been evaluated as an exceptional employee. Scott purchased a home in 1993 which became the parties' marital residence after the marriage but remained solely in Scott's name.

Jean was thirty years old at the time of trial. She had been employed full-time at Winnebago Industries for approximately one year prior to trial. Jean worked full-time outside the home prior to Brock's birth.

Shortly after Brock was born, Jean began providing daycare in the parties' home. In April 2004 the Department of Human Services (DHS) investigated allegations that Jean left several children unattended in her vehicle while she went into Briar's school to deliver a birthday cake. The DHS investigation resulted in a founded child abuse claim against Jean for denial of critical care to

her son Brock, age one and one-half at the time. Jean was placed on the child abuse registry.

In January 2005 Scott returned to the family home extremely intoxicated and took Brock. Scott and Brock lived with Scott's parents for about two weeks, during which time Scott restricted Jean's visitation with Brock and would not allow her unsupervised visits. As a consequence, Jean did not see Brock during the two-week period. Shortly after removing Brock from the home, Scott served Jean with eviction papers to evict Briar and Jean from the home.

Jean filed a petition for dissolution of marriage in February 2005. Trial was held, and the district court entered its findings of fact, conclusions of law, and decree. Following Jean's motion pursuant to Iowa Rule of Civil Procedure 1.904(2), the court entered a post-trial order in September 2005.

In relevant part, the decree awarded physical care of Brock to Scott with liberal visitation rights to Jean and ordered Jean to pay child support. The decree provided that each party would retain sole title to his or her respective pensions, noting that the amount to which Jean would have been entitled from Scott's pension was nearly equal to the amount of Jean's debt paid from the proceeds of a second mortgage taken out by the parties during the marriage.

Jean appeals, arguing the district court erred (1) in granting physical care of Brock to Scott, (2) in its application of the child support guidelines, and (3) in failing to make an equitable division of the parties' assets. Jean also argues the district court abused its discretion in failing to award her trial attorney fees.

We will discuss additional facts as they relate to the issues raised on appeal.

II. Standard of Review

Our scope of review in this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate anew the parties' rights on the issues properly presented. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50-51 (Iowa 1999). Because the district court has a firsthand opportunity to hear the evidence and view the witnesses, we give weight to its findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 6.14(6)(*g*); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Physical Care

The primary consideration in a physical care determination is the best interests of the child. Iowa R. App. P. 6.14(6)(*o*); *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We consider the factors set forth in Iowa Code section 598.41(3) (2005) and those identified in *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974), when considering which physical care arrangement is in the child's best interests. The critical issue 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 re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). In determining which parent serves the child's best interests, the objective is to place the child in the environment most likely to bring him to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683; *Courtade*, 560 N.W.2d at 38.

There is a presumption that siblings should not be separated. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). The presumption applies equally to half-siblings. *In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986). However, our primary concern remains the long-range best interests of the child. *In re Marriage of Brauer*, 511 N.W.2d 645, 647 (Iowa Ct. App. 1993).

Jean argues the district court failed to properly consider the evidence of Scott's lack of maturity, as demonstrated by his excessive use of alcohol, discipline issues at work, his eviction of Jean from the marital home, and his forcible separation of Brock from his mother and older brother. She contends the record demonstrates she has a "proven track record of her ability to parent," and the district court focused too much attention on allegations of Jean leaving children without supervision. Jean further argues the district court erred in failing to properly apply the strong presumption that it is in a child's best interests to keep siblings together.

In reviewing the dissolution decree, we conclude the district court provided us with very few findings of fact to guide us as to its reasons for granting physical care to Scott. Its conclusions of law related to custody are limited to the following:

> Scott appears to have modified his drinking behavior and there does not appear to be any jeopardy toward Brock by such alcohol consumption. By the same token, the court finds Brock may very well be jeopardized in the future by reason of Jean's pattern of prior conduct of leaving not only Brock but also other babies unattended for lengthy intervals on several occasions which, to this court, is inexcusable.

Perhaps more disturbing to this court is the district court's order denying Jean's motion pursuant to rule 1.904(2):

> With respect to the presumption that siblings should not be separated, the court finds good and compelling reasons exist for such departure by reason of petitioner's lack of credibility, her lack of concern of Briar's "neighborhood club" which involved the touching of private parts, and, unless the court failed to make it clear to petitioner, her leaving of babies in her care unattended on several occasions. Such evidence also heavily tilts the scales of justice in comparison to her role as Brock's primary caretaker. In view of such evidence, petitioner can hardly criticize respondent's actions on the night when Brock was removed from her with the aid of his father. Finally, not only would petitioner be unable to "cast the first stone" with respect to respondent's drinking but also common sense and experience in this neck of the woods show that having a few beers while camping or shingling go together like a Harley-Davidson and a '63 Chevy pickup.

We are troubled by the district court's choice of words in this order. More importantly, however, we conclude the court's findings of fact in this case, particularly as they concern credibility of the parties, are not supported by substantial evidence. *See In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). Moreover, its findings of fact are incomplete.

Based on our de novo review of the record before us, it is apparent the conduct of *both* parents has been less than exemplary. Scott has been convicted of operating while intoxicated (OWI) and has a history of drinking to excess. He recruited his parents to assist him in forcibly removing Brock from the marital home when he (Scott) was intoxicated. He apparently was intoxicated on two earlier occasions when he attempted to kick Jean out of the marital home. Jean was less than candid with DHS during the investigation of alleged denial of critical care, as evidenced from the DHS report of the incident. The DHS investigation resulted in a founded child abuse claim. Testimony at trial

indicated there may have been other incidents during which Jean left children in her care unattended. While we do not take these allegations lightly, we note that the alleged incidents were either not reported to, or not investigated by, DHS and remain unfounded. In addition, the testimony came from witnesses clearly biased in Scott's favor.

We must determine which parent will do the best job in raising Brock by viewing all the evidence and putting isolated events into perspective. *See In re Marriage of Ihle*, 577 N.W.2d 64, 69 (Iowa Ct. App. 1998). In doing so, and in considering the relevant statutory and judicially-recognized factors, we conclude Jean can better minister to Brock's long-term best interests. The record reveals that Jean has been Brock's primary caretaker throughout the marriage. In addition, she has been the primary caretaker for her other son, Briar, since his birth.[1] She got the children ready in the morning, put them to bed in the evening, took them to the doctor and to church, cooked, and cleaned. Scott's involvement in the children's day-to-day care during the marriage was limited. In fact, he admitted at trial his involvement with Brock had increased since the parties separated. We also find compelling the testimony from Brock's daycare provider, who testified Brock was reluctant to leave with Scott and was more comfortable when his mother came to get him.

The district court failed to give appropriate consideration to the presumption that siblings—even half-siblings—should not be separated. The record shows that Briar and Brock have a close sibling relationship. Scott has

[1] While we acknowledge testimony in the record as to questionable behavior by Briar, and Jean's response to such behavior, we find insufficient evidence in the record to support any particular findings in this regard.

demonstrated an unwillingness to support the sibling relationship since the separation, as evidenced by his forcible removal of Brock from the marital home and subsequent eviction of Briar and Jean, and his removal of Briar's bed from the children's bedroom almost immediately after Briar and Jean moved from the marital home. Scott has not allowed Briar and Brock to spend time together when Brock is in Scott's care. Prior to the separation, Brock had never lived in a home without Briar. We conclude separating these two children would serve only to add to the trauma of the divorce.

After reviewing the evidence de novo and appropriately weighing the relevant factors, we conclude it is in Brock's long-term best interests to grant Jean his primary physical care. We remand the matter for consideration of the issues of child support and visitation.

IV. Property Award

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Dean*, 642 N.W.2d 321, 325 (Iowa Ct. App. 2002). Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). The determining factor is what is fair and equitable in each particular circumstance. *In re Marriage of Miller*, 552 N.W.2d 460, 463 (Iowa Ct. App. 1996). The distribution should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (2005). *See id.* We accord the district court considerable latitude in resolving economic provisions of a dissolution decree and will disturb a ruling only when there has been a failure to do equity. *In re Marriage of Smith*, 573 N.W.2d 924, 926 (Iowa 1998).

Jean argues the district court improperly offset the portion of Scott's 401(k) account to which she is entitled based on the fact she had approximately the same amount of debt paid off during the marriage. We have carefully reviewed the record and conclude that the district court's property distribution was equitable under the circumstances. We will not disturb it on appeal.

V. Attorney Fees

An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997).

Jean argues the district court abused its discretion in failing to award her attorney fees. She requested the district court order Scott to pay $2000 for her attorney fees because she was forced from the marital home, required to pursue a temporary custody order to get visitation with Brock after Scott forcibly removed him from the home, and she has less earning capacity than Scott. Upon review of the record in this case, we award Jean trial attorney fees of $750.

Costs are taxed one-half to each party.

AFFIRMED AS MODIFIED AND REMANDED.