IN THE COURT OF APPEALS OF IOWA

No. 6-578 / 05-2103
Filed September 7, 2006

IN RE THE MARRIAGE OF HOLLY A. HYNICK AND BRADLEY L. HYNICK

Upon the Petition of

HOLLY A. HYNICK,
Petitioner-Appellee,

And Concerning

BRADLEY L. HYNICK,
Respondent-Appellant.

Appeal from the Iowa District Court for Mahaska County, Daniel P. Wilson, Judge.

Bradley Hynick appeals from the child custody provisions of the decree dissolving his marriage to Holly Hynick. **AFFIRMED AS MODIFIED.**

Eric Borseth of Borseth Law Office, Altoona, for appellant.

Joel D. Yates of Clements, Pothoven, Stravers & Yates, Oskaloosa, for appellee.

Considered by Sackett, C.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Bradley Hynick appeals from the child custody provisions of the decree dissolving his marriage to Holly Hynick. He contends the court should have granted his request for joint physical care of their son, Garisin. We affirm as modified and remand for further proceedings consistent with this opinion.

Background Facts and Proceedings.

Bradley and Holly were married in June of 2001 and have one son, Garisin, who was born in May of 2003. During the marriage, Holly worked outside the home but was Garisin's primary caretaker. Bradley, who was the family's primary income producer, also was actively involved as a provider of Garisin's care. Both parents love Garisin, are bonded with him, and are suitable parents and caretakers.

Bradley and Holly separated in February of 2005. They agreed to share Garisin's physical care during the separation by alternating their occupancy of the family home. However, an argument subsequently occurred when Holly visited Garisin at the family home. Holly's version of the incident is that she attempted to leave the house to avoid the argument, and that Bradley slammed a door into her knee, causing a bruise. Bradley denies that he caused the door to strike Holly's knee, and claims Holly fabricated the bruise to gain an advantage in the custody dispute. Within a few days after the alleged incident, Holly sought and obtained a no-contact order against Bradley. Less than a month later, however, Holly caused that order to be withdrawn.

On March 7, 2005, Holly filed a petition seeking to dissolve the marriage. On both March 26 and June 5, Holly called police to report that Bradley had

harassed her. She filed a petition for relief from domestic abuse pursuant to Iowa Code chapter 236 (2005) on June 7, and the court issued a temporary protective order.

After a trial on the merits, the district court filed a decree dissolving the parties' marriage. The decree provided the parties shall have joint legal custody, and allocated physical care to Holly. Bradley appeals from this order, claiming the district court erred in denying his request for joint physical care.

Scope of Review.

We review equitable proceedings, such as dissolutions of marriage, de novo. Iowa R. App. P. 6.4; *In re Marriage of Anliker*, 694 N.W.2d 535, 539 (Iowa 2005). We give weight to the district court's findings of fact, especially when considering the credibility of the witnesses, but are not bound by those findings. Iowa R. App. P. 6.14(6)(*g*).

Garisin's Physical Care.

The best interest of the child controls our determination of child custody disputes. *In re Marriage of Murphy,* 592 N.W.2d 681, 683 (1999). Our objective is to place Garisin in the environment most likely to bring him to healthy physical, mental, and social maturity. *Id.* In considering what custody arrangement is in his best interest, we consider statutory factors. Iowa Code § 598.41(3). All these factors bear upon the "first and governing consideration" as to what will be in the best long-term interest of the child. *In re Marriage of Vrban,* 359 N.W.2d 420, 424 (Iowa 1984).

That joint legal custody should be ordered in this case was not contested by the parties.[1] There is evidence in this case tending to prove, and the district court found, that Bradley committed acts of domestic abuse against Holly after the parties separated and during the pendency of this dissolution action. We look to the factors listed in Iowa Code section 598.41(3)(j) when determining whether a "history of domestic abuse" has been established. The district court found and the record establishes by a preponderance of the evidence that Holly (1) commenced an action against Bradley seeking protection from domestic abuse, (2) obtained a protective order, (3) claimed Bradley violated the protective order[2], and (4) summoned law enforcement officers who responded to assist her when Bradley persisted in his attempts to have unwanted in-person and telephonic contact with her.[3] Holly also presented the trial testimony of a

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[1] Notwithstanding the absence of a controversy as to the propriety of joint legal custody in this case, the district court concluded it was required to make a finding on the question of whether a history of domestic abuse was proved in this case. Chapter 598 does not expressly state whether the Code provisions establishing a rebuttable presumption against *joint legal custody* in cases presenting a history of domestic violence are controlling in this case, which presents a dispute only as to the appropriate physical care arrangement. *See* Iowa Code § 598.41(2)(b) (providing that where a request for joint legal custody is opposed by a party, the district court "shall cite clear and convincing evidence [bearing upon the factors listed in section 598.41(3)] that joint custody is unreasonable and not in the best interest of the child . . . ."); Iowa Code § 598.41(1)(b) (establishing a rebuttable presumption against joint legal custody in cases presenting a history of domestic abuse). We assume without deciding in this case that if the evidence raises a presumption against joint legal custody, that presumption is also raised against joint physical care in the same case.

[2] The district court also properly noted Bradley's pending domestic abuse assault and no-contact order violation charges which were based on the incident in which Holly's leg was allegedly bruised after Bradley slammed a door against her. See Iowa Code section 598.41(3)(j).

[3] In making its determination that a history of domestic abuse had been established in this case, the district court also considered Bradley's criminal record, including various driving, alcohol, and drug offenses. In 1998, Bradley was convicted of possession of methamphetamine and drug paraphernalia. His record also includes several traffic

domestic abuse advocate who classified Holly in the "extreme danger" category for domestic abuse. These factors and evidence of Bradley's criminal record[4] prompted the district court to order joint legal custody and allocate physical care to Holly.

Although we adopt as our own the district court's finding that Bradley's conduct constitutes a history of domestic abuse, we are not persuaded that it should preclude a joint physical care arrangement under the circumstances presented here. Bradley obviously had great difficulty coming to terms with Holly's decision to terminate the marriage. This difficulty manifested itself in desperate and persistent attempts to learn of Holly's reasons for seeking the dissolution and to persuade her to change her mind. Desperation fueled in part by a belief that Holly had been unfaithful during the marriage prompted Bradley to make several improvident attempts to speak to Holly on the telephone, at the home of one of her male friends, and at other locations. The depth of Bradley's desperation is evidenced by his suggestion, uttered after the separation, that Holly "should just shoot him." Although domestic abuse is always deplorable, we do not believe Bradley's conduct in this case disqualifies him from serving as a

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violations, multiple convictions for possessing alcohol as a minor, and an OWI conviction. Bradley contends his past criminal record, which did not include prior acts of violence in general or domestic abuse in particular, is irrelevant to the determination of whether a history of domestic abuse has been established in this case. Bradley denied using illegal substances since 1998. We find no contrary evidence in the record tending to prove that he has a drug dependency problem, and we credit Bradley's testimony and other evidence tending to prove that he has matured and turned his life around.

[4] Bradley's record includes several traffic violations, multiple convictions for possessing alcohol as a minor, an OWI conviction, and conviction of possession of methamphetamine and drug paraphernalia.

provider of joint physical care. The marriage has now ended, and we have no reason to believe Bradley has not accepted this fact.

The evidence is clear that Bradley is a capable and loving parent. Garisin is closely bonded to both parents. Although we are convinced that Holly has been Garisin's primary caretaker, Bradley has been an active and appropriate caretaker as well. Although the parties had difficulty communicating with each other when the marriage was failing and at times during their separation, such difficulties are not unusual in the midst of such trying times. Although there is some evidence that Holly has on occasion not promoted a relationship between Garisin and members of her own family, that evidence does not deter us from the view that a joint physical care arrangement is appropriate in this case. Both Bradley and Holly live in Oskaloosa, a community in which Garisin's extended family reside. And, although Holly expressed her opposition to a joint physical care arrangement, we are not persuaded that her opposition is meritorious or consistent with Garisin's best interest.

Accordingly, we modify the decree to provide that Bradley and Holly shall have joint physical care of Garisin. We remand this matter to the district court for a determination of the particular terms of the joint physical care arrangement[5] consistent with our opinion.

AFFIRMED AS MODIFIED.

Vaitheswaran, J., concurs; Sackett, C.J., dissents.

[5] On remand, the district court shall delineate the procedure by which Bradley may act as a provider of joint physical care consistent with the no-contact order that expires on October 20, 2006.

SACKETT, C.J. (dissenting)

I would affirm.