

IN THE COURT OF APPEALS OF IOWA

No. 8-723 / 08-0131
Filed January 22, 2009

**IN RE THE MARRIAGE OF LAURA A. PEAKE
AND RICHARD PEAKE**

**Upon the Petition of
LAURA A. PEAKE a/k/a LAURA A. BRODIE,**
Petitioner-Appellee,

**And Concerning
RICHARD PEAKE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Michael Huppert,
Judge.

A father appeals from the district court's findings in a dissolution of
marriage proceeding regarding physical care of his child and property and debt
distribution. **AFFIRMED.**

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

Karen Taylor of Taylor Law Offices, Des Moines, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts and Proceedings**

Laura Brodie, a/k/a Laura Peake, and Rick Peake married on October 26, 1996. They have one child from the marriage who was born in March of 1999.¹ The parties' relationship was strained for years, and Laura filed a petition for dissolution of marriage on November 7, 2006. Laura currently lives with her mother in Des Moines, and Rick lives in Altoona in the marital residence.

Laura is a high school graduate and worked during the marriage full time in office jobs until December 2004 when she was diagnosed with lymphoma. Chemotherapy has successfully placed Laura's cancer in remission; however, as a result of the treatment, she suffers from neuropathy, a condition that affects her extremities. This condition causes her chronic pain and has limited her mobility, requiring her to use a cane at times, though the record establishes that she is physically able to care for her children. At the time of trial, she had been declared disabled and was receiving social security benefits. She was taking medication for depression and anxiety.

Rick received a bachelor of arts from Iowa State University in hotel and restaurant management. Throughout the marriage Rick worked in the food service industry. Though he changed jobs frequently, he almost always was employed. Particularly after Laura's disabling illness, Rick was the primary breadwinner in the family. At the time of trial, Rick worked as a manager of restaurants in the Des Moines airport. Rick's hours vary from day to day, but his

¹ Laura also had a child in February of 2007, but both parties agree that Rick is not the father of this child. The court disestablished Rick's paternity of the child.

schedule is regular between weeks. He tends to work from 4:00 a.m. to 1:00 p.m. two days per week, from noon to 9:00 p.m. two days per week, and 9:00 a.m. to 5:00 pm one day per week. In the past, Rick has not worked on weekends when he has the child or on Tuesdays when he is scheduled to spend time with the child.

Rick also dealt with health issues during the marriage. He was diagnosed with sleep apnea in 2000 and was prescribed the use of a CPAP machine to help him breathe while sleeping.² Rick testified that his need for this has decreased as a result of recent weight loss. He was also treated for depression from 2001 to 2003, with a brief hospitalization in 2002 due to suicidal thoughts. Rick testified that Laura's extramarital affairs caused his depression symptoms, which he now successfully manages without medication. In 2005, Rick was diagnosed with attention-deficit hyperactivity disorder (ADHD), for which he takes medication that helps to organize his thoughts and control his energy level.

During the course of the relationship, Laura participated in several extramarital affairs. In 2001, when Rick learned of an affair, Laura told him she would end that relationship. However, she later reinitiated it. Laura's most recent affair resulted in the birth of a child. At the time of trial, Laura was no longer involved with the father of that child.

Rick testified that Laura emotionally and physically abused him and contends the district court erred in failing to find a history of domestic abuse. Rick's testimony included examples of alleged altercations, both physical and

² In 2004 Rick fell asleep while driving and had his driver's license suspended for six months.

nonphysical, between him and Laura, at times involving the police. Multiple witnesses, including Laura, testified that she often loses her temper. Rick asserts that Laura would yell at him, using profanity in front of the child. Rick claims that Laura had a controlling personality.

While all parties agree that the child is close with both parents, he is considerably closer with his mother. Laura asserts their closeness results from the fact that she has been his primary caregiver for his entire life. Rick, however, says the child's bond with his mother is unhealthy and stems from Laura's desire for the child to be dependent on her and the child's intense need to please Laura. The record establishes that Laura was the child's primary caregiver, though Rick was also active in the child's life, particularly after he started school.

The district court ordered Rick and Laura to participate in a custody evaluation done by Dr. Kerri Kinnaird. Kinnaird's report found that Laura "shows no awareness of the effect that her lack of anger control has on [the child]." Kinnaird also questioned the effect that Rick's lack of organization and tracking of financial matters had on the child. Kinnaird reported that "given their respective risk factors and problem areas, I cannot recommend primary physical care with either one of them." Kinnaird ultimately found, however, that if a primary care provider must be designated, she would recommend Rick because his "difficulty financially supporting his son on a consistent basis" was less concerning than Laura's "judgment and self-control."

After the custody evaluation, Laura began seeing a therapist, Susan Gauger, regarding her anger management issues. At the time of the trial, Laura

had seen Gauger six times, and Gauger reported that Laura “appears to have made progress.”

Laura and Rick also struggled financially during their marriage. Throughout the marriage, Rick’s parents helped the couple meet their financial needs. Rick’s father, James, frequently put money into a joint account that he shared with Rick and also made several payments directly to the mortgage company.³ James testified that he provided Rick and Laura with roughly \$100,000, including \$3000 for the down payment on their house, before 2005, when Rick and Laura filed bankruptcy. When Rick and Laura filed for bankruptcy, they did not disclose any debt to Rick’s parents. Neither Rick nor James documented any of the money received with a promissory note or mortgage. Both testified that they viewed the loans as a family issue and understood that Rick was to pay James back as he became able. Since Rick and Laura filed bankruptcy in 2005, Rick’s parents have provided Rick and Laura with roughly \$17,800, of which Rick has repaid approximately \$3000, leaving a balance of roughly \$14,800.⁴

There is also a dispute regarding a 2005 Ford Taurus that Laura drove. She bought a new vehicle and turned the Taurus over to Rick. The Taurus was subsequently repossessed. Neither party wants to claim responsibility for the deficiency judgment on the Taurus.

The district court awarded physical care of the child to Laura. The district court also found that the money received from Rick’s parents was a gift to Rick

³ Laura claims that James and Rick purposefully did not inform her about financial issues.

⁴ In addition, Rick’s parents lent over \$20,000 to Rick during this time.

and Laura and ordered Rick to pay Laura \$16,700, which the court found to be half of the equity in the parties' marital residence. Finally, the district court assigned any deficiency that may result from the repossession of the Taurus equally between both parties.

Rick appeals, arguing the district court erred by: (1) granting physical care of the child to Laura; (2) finding that the money received from Rick's parents was a gift to both Rick and Laura; and (3) ordering Rick to pay half of the debt associated with the Taurus.

II. Standard of Review

We review this action in equity *de novo*. *In re Marriage of Kleist*, 538 N.W.2d 273, 276 (Iowa 1995). We give weight to the district court's findings of fact, especially when considering the credibility of witnesses, but we are not bound by them. *Id.* at 278. We do so because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Physical Care of the Child

The first and governing consideration is the best interests of the child. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). "The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interests of the children." *In re Marriage of Bowen*, 219 N.W.2d 683, 687-88 (Iowa 1974). Gender is irrelevant in custody considerations. *In re Marriage of Wessel*, 520 N.W.2d 308, 310 (Iowa Ct. App. 1994).

We have considered the relevant factors outlined by Iowa Code section 598.41(3) (Supp. 2005) and the Iowa Supreme Court in *Marriage of Winter*, 223 N.W.2d 165, 166–167 (Iowa 1974), and we find that the district court’s decision to grant primary physical care of the child to Laura is in the child’s best interests.

Stability and continuity of caregiving are important factors to consider when one spouse has successfully cared for children, but a parent’s prior role as primary caregiver during the marriage does not necessarily render that parent the primary caregiver after the marriage. *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa Ct. App. 1992). The record establishes that Laura was the child’s primary caregiver for his entire life. It is very clear that Laura loves her child and historically was the parent that made sure that his needs were met. Because of this, the child has developed an extremely close emotional bond with his mother. Rick has a legitimate concern that the child is too dependent on his mother. Even so, we believe stability can be best provided to the child if his mother remains his primary caregiver. We agree with the district court that if Rick were given physical custody, the child’s diminished relationship with his mother could be damaging.

While Laura’s anger has admittedly been a problem in the past, we find that her attempts to manage her outbursts through therapy are genuine. Laura’s therapist reported seeing improvement in Laura, and we acknowledge Laura’s effort to correct problem areas cited by Kinnaird in her custody evaluation. Even if Laura’s behavior amounted to a history of domestic abuse, we find that the child’s need for continuity and stability weigh against granting physical care to

Rick. We agree with the district court that her anger will be less of a problem once the dissolution disputes are resolved. Rick, on the other hand, showed no attempt to improve on problem areas noted by Kinnaird. Laura clearly wants to do what is best for her child and will do whatever is necessary to provide for his care.

Laura has also shown a commitment to fostering the child's relationship with his father. She has informed Rick about all of the child's appointments, though Rick declined to attend all of them. The record shows that Laura has made efforts to communicate with Rick regarding the child's schedule and medical issues. We believe that Laura respects the bond the child has with his father and that she does not seek to hinder their relationship.

IV. Property Distribution

Rick also argues that the district court erred in finding that money received from his parents was a gift to both him and Laura and therefore not excluded from the property distribution. Rick contends that the money from his parents was either: (1) a loan; or (2) a gift to him alone, and not to Laura. The court is not required to divide property equally, but should divide property so as to create a fair and equitable result. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). In determining what is equitable, we take into consideration the factors codified in Iowa Code section 598.21(5). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa Ct. App. 1983). Generally, gifts received by one party during the marriage belong to that party and are not subject to a property division. Iowa Code § 598.21(6).

We cannot find that the money from Rick's parents constituted an enforceable debt. There is no documentation of any terms of repayment between the parties. While Rick's father, James, kept a ledger of money paid to Rick, there is no evidence that Rick was under any obligation to repay the money; no terms of repayment or indebtedness exist. Additionally, when Rick and Laura declared bankruptcy in 2005, they did not list Rick's parents as creditors, despite receiving roughly \$100,000 from them before that time. The record does not support Rick's contention that the money received from his parents constituted a loan.

The record also fails to support Rick's contention that the money was a gift only to him, and not to Laura. James's ledger has a column for money given to Rick and a column for money given to Rick and Laura. All of the money in dispute is recorded in the column of money given to Rick and Laura. For this reason, we agree with the district court's finding that the money received from Rick's parents was a gift to both Rick and Laura.

We also find that the district court's distribution of any potential deficiency related to the repossession of the 2005 Taurus was equitable. The vehicle was purchased in the name of both parties. We find that both parties should be equally responsible for any deficiency obligation. The district court's property distribution was equitable.

AFFIRMED.

Vaitheswaran, J. and Potterfield, J. concur. Sackett, C.J. concurs in part and dissents in part.

SACKETT, C.J. (concurring in part and dissenting in part)

I concur in part and dissent in part.

I agree with the majority's resolution of the property issues and the debt distribution and agree with the majority's affirmance on these issues.

I cannot concur with their custody decision. I believe that the minor child has a better chance for a normal childhood if Richard is his primary physical custodian. Laura's emotionally and physically abusive tendencies and her inability to control her temper put the child at risk. I would modify the decree to award Richard primary physical care.