

**IN THE COURT OF APPEALS OF IOWA**

No. 8-980 / 08-0287  
Filed February 19, 2009

**IN RE THE MARRIAGE OF JESSICA JANE CLOYED AND JAMES BRYAN  
CLOYED**

**Upon the Petition of**

**JESSICA JANE CLOYED,**  
Petitioner-Appellee,

**And Concerning**

**JAMES BRYAN CLOYED,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Warren County, Martha L. Mertz,  
Judge.

James Bryan Cloyed appeals challenging the custody award and property  
division in the decree dissolving his marriage to Jessica Jane Cloyed.

**AFFIRMED.**

William A. Eddy of Eddy Law Firm, Indianola, for appellant.

Jami J. Hagemeier, Des Moines, for appellee.

Considered by Sackett, C.J., and Mahan and Potterfield, JJ.

**SACKETT, C.J.**

James Bryan Cloyed appeals challenging the custody award and property division in the decree dissolving his marriage to Jessica Jane Cloyed. We affirm.

**I. SCOPE OF REVIEW.**

Dissolution actions, as equitable proceedings, are reviewed de novo. Iowa R. App. P. 6.4; *In re Marriage of Benson*, 545 N.W.2d 252, 253 (Iowa 1996). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but these findings do not bind us. *In re Marriage of Duggan*, 659 N.W.2d 556, 559 (Iowa 2003). Prior cases have little precedential value with respect to custodial issues, and this court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

**II. BACKGROUND.**

James and Jessica were married in 2004. They have two sons born in 2002 and 2005 whose interests are affected by the dissolution. At the time of the dissolution hearing on January 16, 2008, James was twenty-six years old. He has been incarcerated since July of 2007 and is serving a seven-year prison term for domestic abuse. He expected to be paroled within eight to ten months after he has completed certain treatment programs. An admitted alcoholic, he completed a drug treatment program at Powell CDC prior to his incarceration. He testified he has continued to be involved in an AA program and had a strong sponsor. He also testified that he has started working toward a bachelor degree in divinity in October of 2007 and hopes to be a pastor or a chaplain at some

future time. He further testified he was sober for three months prior to his incarceration. He is on an anti-depressant and an anti-anxiety medication. He expects to continue the medication on his release from prison.

Jessica, who was twenty-seven years old at the time of trial, is a court reporter employed by the State of Iowa. She holds an associate's degree from American Institute of Business.

Though the parties had a prenuptial agreement they each brought few assets to the marriage. The prenuptial agreement was aimed primarily at segregating for Jessica money anticipated to be recovered as a result of injuries she allegedly suffered in an automobile accident. Jessica spent most of the money received from the settlement to pay debts but did buy a Mitsubishi Outlander with part of the proceeds. Jessica made IPERS contributions since 2003 and at the time of the dissolution her refund value of the account was shown to be \$8,247.17.<sup>1</sup> The parties had a home with \$3000 in equity, two vehicles including the Mitsubishi, wedding rings, and minimal home furnishings. Both parties had debts including student loans to Sallie Mae.

The court gave Jessica sole custody of the two children. The court established no visitation schedule but determined when James is released he could file an application for visitation. The court also valued the assets and liabilities, set the Mitsubishi aside to Jessica, and distributed the balance of the

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<sup>1</sup> The payout does not necessarily represent the true value of Jessica's IPERS account which in essence is a defined benefit retirement account. Should Jessica continue in similar employment with similar contributions, it is anticipated that her annual retirement benefits would be between \$6,723.69 and \$12,187.50 depending on the age she elected to retire once she reached fifty-five years of age. However, both parties appear content to use the payout figure as the value of the account so we also use it.

assets and debts resulting in a distribution based on the district court's values leaving Jessica with a negative net worth of \$18,778 and James with a negative net worth of \$4400.

### **III. CHILD CUSTODY.**

The controlling consideration in determining custody is the best interest of the child. Iowa R. App. P. 6.14(6)(o). In deciding this question, we review the record de novo. Iowa R. App. P. 6.4. We give weight to the findings of the trial court, but are not bound by them. See *In re Marriage of Novak*, 220 N.W.2d 592, 597 (Iowa 1974). There is no presumption favoring one party as opposed to the other in deciding which one should have custody. See *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). We determine each case on its own facts to decide which parent can minister more effectively to the long-range interest of the child. *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974).

James contends that Jessica should not have been awarded sole custody of the two children. He argues that the court should have awarded joint custody. He argues that his past abuses of Jessica were the result of his alcoholism and that he obtained treatment, has maintained sobriety, and is involved in the AA program. He argues these facts rebut the presumption against awarding joint custody in situations where a history of domestic abuse exists. He also contends he has a strong bond with his children and will write letters to them during his incarceration.

“The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most

compelling circumstances.” *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). If either parent requests joint custody the court must order joint custody unless it cites clear and convincing evidence, pursuant to the factors in Iowa Code section 598.41(3) (2007), that joint custody is unreasonable and not in the best interests of the children to the extent that the legal custodial relationship between the children and a parent should be severed. Iowa Code § 598.41(2)(b). Included in the factors set forth in section 598.41(3) for the court to consider in determining the best custody arrangement, are whether the parents can communicate with each other regarding the children’s needs, and whether a history of domestic abuse exists. Iowa Code §§ 598.41(3)(c), (j).

Notwithstanding our preference for joint legal custody, “if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists.” *Id.* § 598.41(1)(b). An un rebutted finding of a history of domestic abuse outweighs consideration of any other section 598.41(3) factor. *Id.* § 598.41(2)(c). In determining whether a history of domestic abuse exists, we may consider, among other things, the issuance of a protective order, the response of a police officer to the scene of an alleged domestic abuse incident, the arrest of an individual in response to a report of alleged domestic abuse, or a conviction for domestic abuse assault. Iowa Code § 598.41(3)(j).

We commend James for the efforts he has made and is making to conquer his substance abuse problems. However, we agree with the district court that he has failed to rebut the presumption against awarding joint custody.

Clearly the abuse did occur and he is incarcerated. Jessica continues to have concerns about his behavior. We affirm on this issue.

#### **IV. PROPERTY DIVISION.**

James contends the property division is not equitable. Before making an equitable distribution of assets in a dissolution, the court must determine all assets held in the name of either or both parties as well as the debts owed by either or both. See *In re Marriage of Brainard*, 523 N.W.2d 611, 616 (Iowa Ct. App. 1994). The assets should then be given their value as of the date of trial. *Locke v. Locke*, 246 N.W.2d 246, 252 (Iowa 1976); *In re Marriage of McLaughlin*, 526 N.W.2d 342, 344 (Iowa Ct. App. 1994). The assets and liabilities should then be equitably, not necessarily equally, divided after considering the criteria delineated in Iowa Code section 598.21(5). *In re Marriage of Hoak*, 364 N.W.2d 185, 194 (Iowa 1985). In general, the division of property is based upon each marriage partner's right to a just and equitable share of the property accumulated as a result of their joint efforts. *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002). With these principles in mind we address the parties' challenges.

James contends that the district court should have awarded him the parties' wedding rings, \$1500 representing half of the equity in the parties' home, and \$3,081.50 representing half of seventy-five percent<sup>2</sup> of Jessica's retirement account. He does not challenge the other allocation of assets and debts made

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<sup>2</sup> The district court determined that seventy-five percent of the account was acquired during marriage and James does not disagree with this determination.

by the district court. There is no inequity in the division that left Jessica with a larger negative net worth than that received by James. We affirm on this issue.

Both parties request appellate attorney fees.<sup>3</sup> “An award of appellate attorney fees is not a matter of right but rests within our discretion.” *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We award James no attorney fees. James shall pay \$150 towards Jessica’s attorney fees. Costs on appeal are taxed to James.

**AFFIRMED.**

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<sup>3</sup> Jessica also challenges the district court’s order directing her to pay James’s guardian ad litem’s fees. Jessica did not file a cross appeal. Consequently this issue is not before us.