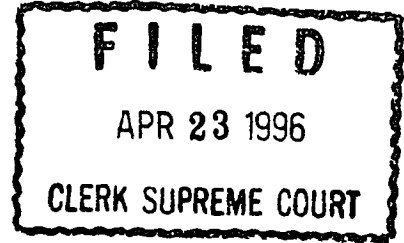


IN THE COURT OF APPEALS OF IOWA

No. 6-043 / 95-1399



000285

**IN RE THE MARRIAGE OF BRENT ALLAN SCOTT  
AND LISA JANE SCOTT**

Upon the Petition of  
**BRENT ALLAN SCOTT,**

Appellant,

And Concerning  
**LISA JANE SCOTT,**

Appellee.

---

Appeal from the Iowa District Court for Story County, William C. Ostlund,  
Judge.

Appeal from the child custody provisions of dissolution decree. **AFFIRMED.**

Thomas J. McCann, Des Moines, for appellant.

John W. Curran of the Legal Aid Society, Nevada, for appellee.

Heard by Habhab, P.J., Huitink, J., and Peterson, S.J.\*

\*Senior Judge from the Second Judicial District serving on this court by order of the  
Iowa Supreme Court.

**PETERSON, S.J.**

Brent and Lisa Scott were married on October 1, 1993. Their son Troy was born May 2, 1994. The parties separated in December 1994, and Brent commenced dissolution proceedings in January 1995. Brent was awarded the temporary physical care of Troy.

Subsequent to the parties' separation, Lisa became pregnant and claimed Brent was the father of the unborn child. Brent did not dispute he and Lisa had sexual relations following their separation, but he would not admit or deny he was the father until the baby was born and paternity could be established. The baby was due in January 1996.

The dissolution trial was held in July. The August, 11, 1995, ruling of the trial court awarded Lisa the permanent physical care of Troy. Brent appeals, and the only issue now before this court is which parent should have the physical care of the child.

In this equity action our review is de novo. *In re Marriage of Brauer*, 511 N.W.2d 645, 646 (Iowa App. 1993). We have a duty to examine the entire record and adjudicate anew the issues properly presented. *Id.* We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

In child custody cases the best interests of the child are the first and governing consideration. *Brauer*, 511 N.W.2d at 647. The factors a court is to consider in awarding custody are enumerated in section 598.41 of the Iowa Code and in our case law. All the factors bear on what will be in the long-term best interests of the child. *Id.*

At the time of trial, Brent was twenty-six years old and Lisa was twenty-three. Brent was a college student and Lisa worked at a day care center. Brent expected to graduate with a teaching degree in December 1995. Lisa testified she planned to register for courses at a community college so she could enroll in a nursing program.

For the first three months of Troy's life, Lisa was his primary caretaker. After the parties moved to Ames, and prior to their separation, both of them provided for Troy's care. Lisa was able to take Troy to the same day care center where she worked, and although the center's policies required he be cared for by other staff, she could see Troy during the course of her workday.

After the parties had separated Brent moved into his parents' home. Since Brent had been awarded the temporary care of Troy, his mother cared for Troy while Brent attended college. Brent's mother also provided child care for seven other children.

During her young life Lisa has had emotional and substance abuse problems. She has had several incidents of drug overdoses. These episodes do not appear to

have been suicidal in nature, but were instead desperate efforts by Lisa to reach out for help. During the fall of 1994 Lisa engaged in substantial alcohol abuse. At a crisis point in early January 1995, she voluntarily hospitalized herself and sought treatment.

Lisa's seven-day hospitalization resulted in a diagnosis of a dysthymic (depressive) disorder and alcohol abuse. Following her release from the hospital Lisa involved herself in numerous recovery programs including counseling, Alcoholics Anonymous meetings, and a chemical dependency recovery care program. By all accounts Lisa has demonstrated a remarkable commitment to recovery and has followed through on all recommendations made by her treating professionals.

The trial court heard the testimony of Tonya Larson, a licensed social worker, Jane Larson, a certified addictions counselor, and Jennifer Sillman, the director of the day care center where Lisa worked. The testimony of Tonya Larson and Jane Larson established that Lisa has developed coping skills to handle her problems and no longer abuses alcohol. Lisa's mood swings and other emotional problems have dissipated. The director of the day care center testified Lisa was a quality day care provider who establishes strong relationships with the children in her care. Her testimony indicated Lisa never compromised the quality of day care she provided because she had addressed her emotional and substance abuse problems by taking time off work and seeking treatment.

Courts are directed to order a custody award which will assure a child the opportunity for maximum continuing physical and emotional contact with both parents. Iowa Code § 598.41(1) (1995). From our review of the record, we are concerned as to whether Brent would be committed to fostering Troy's relationship with his mother. Under the temporary custody order Brent was awarded the physical care of Troy, but Lisa was allowed to care for him for three consecutive days each week. Despite language in the temporary order which indicated both parents were to have "substantial access" to the child, Brent did not allow Lisa to care for Troy when he left the state for three weeks during the early summer in 1995. Instead, he left Troy in the care of his family members.

When questioned about why he had not left Troy in Lisa's care, Brent testified he would rather view Lisa's relationship to Troy as that of a "babysitter" and he would not want a babysitter to raise his child or care for him for more than a couple of days at a time. Brent also testified that while he thought Troy should see and know his mother, he would not encourage a relationship between them. Brent's conduct and statements do not demonstrate a commitment to fostering Troy's relationship with his mother or to seeing that they have maximum physical contact. Given the record before us, we find Lisa is more likely than Brent to foster Troy's relationship with his noncustodial parent.

In reviewing a custody decision we are aware of the presumption siblings should not be separated. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). It is statutorily presumed Brent is the parent of Lisa's unborn child. *See* Iowa Code § 144.13(2) (1995). However, even if he is not the father, the presumption against separating siblings also extends to cases involving the physical care of half siblings. *See In re Marriage of Orte*, 389 N.W.2d 373, 374 (Iowa 1986).

Brent appears to argue a mother gains an unfair advantage in a custody dispute if any consideration is given to the fact she is pregnant with another child. A similar argument has been previously made and rejected in the context of half-siblings. *See id.* Our primary concern is the welfare of the child, and we have a strong interest in keeping children of broken homes together. *Id.*

Troy and his sibling will be relatively close in age. Lisa appears more committed to fostering Troy's relationship with his sibling. This factor favors an award of custody with Lisa.

We give much deference to the trial court's findings regarding Lisa's improvement and present ability to parent Troy. Custody decisions of this kind are not easy, and we are keenly aware of the superior vantage point of the trial court due to its ability to consider firsthand the demeanor and appearance of the parties. *See In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984). The trial court's

assessment of the parties is particularly important in a close case such as this. The deference we accord the trial court's findings is grounded in wise public policy.

These determinations are more apt to be just when the objective facts are squared with the judge's subjective impressions, gained from close personal observations. One who personally observes holds a clear advantage over us who learn the case from a cold record. The first-hand observer can translate that advantage into a more just disposition.

*In re Marriage of Wegner*, 434 N.W.2d 397, 400 (Iowa 1988) (Harris, J., dissenting).

The trial court had the opportunity to observe and assess the credibility of the witnesses. Several witnesses were professionals who had treated Lisa and could objectively evaluate her progress. Of considerable weight is the fact Lisa's supervisor considered her well-qualified to care for children at the day care center, and entrusted one of her own children to Lisa's care.

We have carefully reviewed the record and find both parents love Troy and are able to provide for his needs. Lisa no longer uses alcohol and has her emotional problems under control. We find placement of Troy in Lisa's care is in his best long-term interests. Unlike Brent who characterized his view of Lisa's relationship to Troy as that of a "babysitter," Lisa appears more likely to foster Troy's relationship with his noncustodial parent. Furthermore, placement of Troy in Lisa's care will allow two siblings to remain together and encourage the development of a strong relationship between them. We affirm the trial court's award of physical care to Lisa.

**AFFIRMED.**