

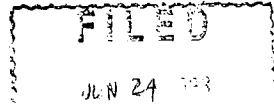
IN THE COURT OF APPEALS OF IOWA

No. 8-236 / 97-1854

**IN RE THE MARRIAGE OF JAMES BEYER
AND BRENDA BEYER**

Upon the Petition of
JAMES BEYER,
Appellee,

And Concerning
BRENDA BEYER,
Appellant.



Appeal from the Iowa District Court for Poweshiek County, Richard J. Vogel,
Judge.

Respondent appeals the child custody and economic provisions of the parties'
dissolution decree. **AFFIRMED AS MODIFIED.**

Barry S. Kaplan of Fairall, Fairall, Kaplan, Hoglan, Condon & Klaessy,
Marshalltown, for appellant.

Martha L. Mertz of Mick, Mertz & McAllister, Knoxville, and Michael P.
Brice, Oskaloosa, for appellee.

Heard by Cady, C.J., and Vogel and Mahan, JJ.

CADY, C.J.

Brenda Beyer appeals the child custody and economic provisions of the dissolution decree. She claims the district court erred by awarding primary physical care of the parties' children to her former husband. She also maintains the district court erred by awarding her an inequitable share of marital property. We affirm the district court as modified.

James and Brenda Beyer married on October 22, 1988. The parties had two children: Lucas, born November 13, 1989, and Alex, born January 29, 1992. The parties' marriage was filled with stress and confrontation. The district court found both parties had been assaultive towards each other.

Both parties worked outside the home during the marriage and shared the parenting responsibilities for the children. Brenda, however, took the children for medical appointments. During a period of time when Alex was in the hospital, she stayed with him. Although Brenda assumed responsibility for many of the children's day-to-day needs, James was also involved with their care.

Prior to trial, the parties allowed Dr. Carroll Roland to perform a child custody evaluation. Dr. Roland found both parties would be capable of parenting the children. Dr. Roland noted Lucas preferred to be with his father while Alex preferred to be with his mother. Ultimately, Dr. Roland recommended James as the primary physical care provider for the children.

Prior to the dissolution, the district court entered a temporary custody order granting Brenda primary physical care of the children. In the final decree, the district court awarded primary physical care of the children to James.

The district court awarded James assets valued at approximately \$54,500 and liabilities of \$29,500. He received a net award of \$25,000. Brenda received assets valued at \$1,000, no liabilities, and a cash payment from James to equalize the property division in the amount of \$12,000. The decree provided each party should receive their own retirement account. Brenda had a 401K valued at \$1,000, while James had a 401K valued at \$19,139.

On appeal Brenda maintains the district court erred by awarding primary physical care of the children to James. She also asserts the district court erred in its property division by failing to reach an equitable distribution of the pension funds.

I. Standard of Review

We review this equitable matter de novo. Iowa R. App. P. 4. This requires us to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997). At the same time, we recognize the value in listening to and observing the parties and witnesses. Iowa R. App. P. 14(f)(7). Consequently, we give weight to the findings of the trial court, although they are not binding. *Id.*

II. Primary Physical Care

In resolving child custody issues, the best interests of the children is the first and governing consideration. See *In re Marriage of Fynaardt*, 545 N.W.2d 890, 892 (Iowa App. 1996). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41 (1997). The critical issue in determining the best interests of the children is which parent will do better in raising the child. See *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa App. 1996). Gender is irrelevant in a custody determination and neither parent should have a greater burden in attempting to gain custody. See *Fynaardt*, 545 N.W.2d at 892-93. The objective should always be to place the children in the environment most likely to bring them healthy physical, mental, and social maturity. See *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). Although not controlling, we give weight in deciding the issue of primary care, to which parent served as the primary caretaker during the marriage. See *In re Marriage of Roberts*, 545 N.W.2d 340, 343 (Iowa App. 1996).

Brenda claims the district court erred by granting James primary physical care of the children and she is better suited to provide primary physical care. Specifically, she asserts she has been the primary caretaker of the children and an incident at Dr. Rolland's office adversely affected her evaluation. She maintains Lucas was better behaved for James at Dr. Rolland's office because he promised to take the children to a hockey game if they were good. Brenda also contends should she receive primary care of the children, she should also receive the family home.

Both parties are clearly capable of providing suitable primary physical care. The decision is close. In such cases, our tendency is to consider the advantageous perspective of the trial court and its ability to listen to and observe the parties. *See In re Marriage of Ford*, 563 N.W.2d 629, 633-34 (Iowa 1997). After reviewing the decision of the trial court, we can find no reason not to do so in this case.

While Brenda claims she has been the primary caretaker during the marriage, the record indicates James also actively participated in parenting the children. The children share a close bond with both parents. Therefore, the determination of which parent was more active in the care of the children does not have the significance in this case as it would in other cases. Additionally, we give weight to Dr. Roland's report. His opinions were based on factors other than Lucas' behavior during the evaluation.

While the decision is close, we find the evidence slightly favors James. He has been able to bond with and meet the emotional needs of Lucas, as well as Alex. We agree with the district court that the overall best interests of the children would be met by granting James primary physical care of the children. In light of our decision concerning primary physical care, we affirm the district court's award of the family home.

III. Property Distribution

The partners to a marriage are entitled to a just and equitable share of property accumulated through their joint efforts. *See In re Marriage of Gonzalez*, 561 N.W.2d 94, 98 (Iowa App. 1997); *see also In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). The Iowa courts do not require an equal division or a percentage division in determining a just and equitable share of property. *Gonzalez*, 561 N.W.2d at 98. Instead, each particular circumstance determines what is fair and equitable. *Id.* Further, the property distribution should be made pursuant to the criteria codified in Iowa Code section 598.21(1). *Id.* Finally, it is well established that pension benefits, although individually owned, are treated as marital property subject to division. *In re Marriage of Kurtt*, 561 N.W.2d 385, 388 (Iowa App. 1997).

Brenda claims the district court erred by failing to equitably divide the parties' pension funds. On our de novo review we agree an equitable distribution requires division of the parties' 401K plans. Accordingly, we modify the division of property to require James to pay Brenda an additional \$9,000, payable by July 1, 2000, with interest as provided in the decree.

In sum, we affirm the decision entered by the district court except we modify the property division as provided in this opinion. Costs of the appeal shall be divided equally.

AFFIRMED AS MODIFIED.