IN THE COURT OF APPEALS OF IOWA

No. 0-753 / 00-0570
Filed January 24, 2001

IN RE THE MARRIAGE OF JEFFREY T. HANKINS AND APRIL LEE BAKER

Upon the Petition of
JEFFREY T. HANKINS,
Petitioner-Appellee,

And Concerning
APRIL LEE BAKER,
Respondent-Appellant.

FILED
JAN 24 2001
CLERK SUPREME COURT

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

The respondent appeals the child custody and economic provisions of the parties' dissolution decree. Respondent contends the district court erred in: (1) awarding petitioner physical care of their minor children; (2) failing to award her both rehabilitative and reimbursement alimony; (3) concluding that a $4500 debt owed to petitioner's parents was a joint marital debt; and (4) ordering her to pay excessive child support. **AFFIRMED.**

Bruce D. Goddard of Tindal, Erdahl, Goddard & Nestor, Iowa City, for appellant.

Patricia C. Kamath of Kamath Law Office, Iowa City, for appellee.

Heard by Sackett, C.J., and Mahan, J., and Habhab, S.J.**

**Senior judge assigned by order pursuant to Iowa Code § 602.9206 (2001).

SACKETT, C.J.

Respondent-Appellant April Lee Baker appeals from the decree dissolving her October 1987 marriage to Petitioner-Appellee Jeffrey T. Hankins. April contends (1) she, not Jeffrey, should have been awarded primary physical care of their four children; (2) she should have received both rehabilitative alimony and spousal support; (3) the property division was not equitable; and (4) she was ordered to pay excessive child support. We affirm.

April, born in 1957, has completed two years of college work. She is in good health and has had a number of jobs outside the home during the marriage although she remained home to care for the children until about 1994. At the time of the dissolution she was driving a school bus for an area public school system and earning an annual salary of approximately $7000.

Jeff, born in 1959, has about 160 hours of college credit. He is in good health and at the time of the dissolution worked for the Coralville Transit System, a job he held during the marriage. His annual salary was about $25,000.

The parties have four children, Kael, born in 1988, Lelda, born in 1989, Erik, born in 1993, and Clarie, born in 1994. The children are all in good health. At the time of trial the family lived in Oxford, Iowa, in a home they purchased about four years earlier with the help of a government program providing a low interest loan based on the family income.

The primary issue at trial was the custodial care of the children. As did the district court, we find this to be a close issue. We agree with the child custody evaluator, "[t]hat both parents would likely be able to raise these children to be

happy and productive adults." The district court named Jeffrey the primary care parent. April contends she should be the primary care parent.

In considering a dissolution appeal our review is de novo. Iowa R. App. P. 4. We give weight to the fact-findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). However, we are not bound by these determinations. *Id.* We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Steenhoek*, 305 N.W.2d 448, 452 (Iowa 1981). We base our decision primarily on the particular circumstances of the parties before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

In addressing April's claim she should have primary physical care the interests of the children are the primary consideration. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), *Weidner*, 338 N.W.2d at 355-56; *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The issue is which parent will do better in raising the child; gender is irrelevant and neither parent has a greater burden than the other in attempting to gain custody in a dissolution proceeding. *In re Marriage of Ullerich*, 367 N.W.2d 297, 299 (Iowa App.1985).

The parties stipulated as to joint custody but both sought primary physical care. The district court in addressing the custody issue found April was the children's primary care taker until just before Claire was born in October of 1994. At that time she told Jeff she was dissatisfied with the marriage. The parties in considering their children's welfare decided to stay in the same household. The

district court found after that time Jeff became considerably more involved in his children's lives and their day-to-day care. In making the choice between the two parents the district court said:

> April is probably the more skilled of the two parents as shown by her ability to better verbalize parent skills to the evaluator and show more widespread and equal attention to each of the four children. A major question with regard to April is the level of commitment she has shown to her children over the last four years. Jeffrey must work harder to parent than April, but he appears to have been much more consistent in being available to the children and being aware of their needs since a more active parental role was thrust upon him. . . . there have been times when April was not home supervising the children when she should have been when she was spending time with her boyfriend, visiting other friends or sitting out in the garage reading. It is unfortunate and possibly understandable that April wished to remove herself from her relationship with her husband four years ago. Unfortunately this has resulted in her removing herself from her parental role. That explains why the two youngest children review their father more positively as a parental figure than their mother.

April premises her argument that she should have primary physical care on her claim that she has been the primary care parent, that the custody evaluation found she had better skills and would assure that the children had maximum contact with their father, and that she has been abused by Jeffrey.

It is agreed that until about four years before the dissolution April was the primary care taker. Jeff has since that time assumed substantial responsibility for the children and from that time the parents shared the duties of primary care. April contends, because the children are happy and well adjusted, they should be in her primary care. We give consideration to a parent's role in child raising prior to a separation in fixing physical care. *See In re Marriage of Love*, 511 N.W.2d 648, 650 (Iowa App.1993); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992). Our review of the record convinces us the children have a special

relationship with each parent. We hesitate to say one type of relationship is different or superior to the other. We give April credit in our determination for the years she devoted her efforts to child rearing. We recognize the decision she stay at home with the children was a joint decision. We give Jeffrey credit for working two jobs and providing the financial resources so the children, during those years, could have a full-time care parent. However, the level of support Jeffrey was able to provide was not great.

Both April and Jeffrey are good parents and interested in their children. While the children have had limited financial advantages, they have had love and care. They are good students and are succeeding in their endeavors.

Having said this we are inclined to believe, as the district court found, that April has not been as attentive to the children's need for supervision since she took outside employment and she has left the older children in the positions of caregivers, with more responsibility than they should be required to assume.

The decision of these parents to divorce and live separately will not provide occasion for either parent to care for the children without outside employment. Jeffrey has committed himself to maintaining a lifestyle that puts the children first. While he was considerably less directed towards the children in the early years of the marriage he has in the years since the birth of their last child been able to maintain a balance between his employment and his childcare responsibilities. April on the other hand is more easily diverted from the responsibilities of the children's care. We share the district court's concern that she may be too willing to put custodial responsibilities on her two older children.

April focuses a substantial portion of her brief on allegations that Jeffrey was abusive to her. Jeffrey does not seek to have us consider the incident where April injured him as a factor in the custody determination. The district court correctly recognized the fact that domestic abuse can be detrimental to children. The district court found there was yelling and screaming in the household. There was an instance where April's actions resulted in Jeffrey suffering an abrasion on his head. Additionally, there were incidents of pushing, shoving and tackling where there was question as to who had incited the confrontation. The district court determined that the incidents between the parties and the physical altercations were not of such frequency or seriousness as to be such a history of domestic abuse as would require the court to consider it in determining the better placement for the children. Giving the required deference to the fact-findings of the district court we reach the same conclusion.

Iowa Code section 598.41 and sections 598.41(1)(b), (d) and (2)(c), (d) pertain to the effect of a history of domestic abuse by a parent. The Iowa Supreme Court has considered these provisions. *See, In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997) (holding a history of domestic abuse is not necessarily established by a single documented incident); *see also In re Marriage of Forbes*, 570 N.W.2d 757, 759 (Iowa 1997). Nor does more than one minor incident automatically establish a "history of domestic abuse." It is for the court to weigh the evidence of domestic abuse, its nature, severity, repetition, and to whom directed, not just to be a counter of numbers. Furthermore, even if a court does find a history of domestic abuse the presumption created by section 598.41(1)(b) against awarding joint custody can be rebutted. *See id.*; *see also*

Ford, 563 N.W.2d at 632-33. The district court gave careful thought to the domestic abuse issue and found that it was not significant enough to be the sole factor in determining custody of the children. The parties and their witnesses gave different versions of the facts surrounding the times April claimed Jeffrey abused her. The district court gave more deference to Jeffrey's version of the events.

The child custody evaluator noted that April expressed concerns about Jeffrey's physical abuse of her. He interviewed the children but did not report that they had any complaints about their father abusing their mother. He found specifically that "[n]either parent showed signs of any kind of gross psychopathology that would interfere with their ability to parent. Likewise, neither parent showed tendencies to be physically abusive to their children."

After reviewing the record and giving weight to the factual findings made by the district court we fail to find that either April or Jeffrey has established a history of abuse by their spouse.

April next contends that the district court failed to give the proper weight to the report of the custody evaluator. A report by the evaluator filed in mid-December 1999 recommended that April be the primary physical custodian. We consider the report on our de novo review looking at the evaluator's education, experience, familiarity with the case, reasons given for the opinion and the evaluator's interest in the case, if any. *See Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa App. 1994).

The evaluator has a Ph.D. in clinical psychology and has been doing child custody evaluations since 1976. He met with all four children and the parents.

He did tests, talked to the participants and made observations of the interaction between each parent and the children. He also contacted individual witnesses for each party. The evaluator was appointed by the court. He was not hired as a witness for either side. Jeffrey advances that there is current thought and literature suggesting that while clinical psychologists can offer assistance to the court in making assessments of parents and children, they should no longer make recommendations as to which parent is the better parent or the one more likely to succeed in caring for the children.

The custody evaluator spent five hours interviewing April and four and a half hours interviewing Jeffrey. He spent a total of two and three quarters hours interviewing the four children and an hour in a diagnostic play interview with Jeffrey and the children and an hour with April and the children in the same type of interview. The custody evaluator besides interviewing and testing the parents and the children spent forty-five minutes reviewing unidentified materials presented him by the parties and talking to three witnesses for fifteen minutes each and one witness for half an hour. The district court heard the case from January 10 to 14 of 2000. The court had the opportunity of seeing the parties and their witnesses testify in court under oath.

The custody evaluator's report though recommending that April be the primary physical custodian is complimentary of Jeffrey and his relationship with the children in a number of instances. The evaluator found both parents to be well above average in their knowledge, skills and ability. He found the children had positive attitudes towards both parents and their attitudes towards which parent they would prefer as the primary physical custodian were mixed. The

district court gave proper weight to the custody evaluator's report. Giving the required deference to the district court we affirm the award of primary physical care.

April next contends that she should have rehabilitative alimony so that she can return to college. She advances that she spent some time out of the workforce to care for her children. She also challenges the allocation and consideration of a debt and makes certain challenges to the property division.

We consider alimony and property division together in assessing their individual sufficiency. *In re Marriage of McLaughlin*, 526 N.W.2d 342, 345 (Iowa App. 1994). They are neither made nor subject to evaluation in isolation from one another. *In re Marriage of Griffin*, 356 N.W.2d 606, 608 (Iowa App.1984). We consider pension benefits. *In re Marriage of Howell*, 434 N.W.2d 629, 632 (Iowa 1989). Spousal support is provided for under Iowa Code section 598.21(3). Whether spousal support is justified is dependent on the facts of each case. Entitlement to spousal support is not an absolute right. *In re Marriage of McFarland*, 239 N.W.2d 175, 179 (Iowa 1976). We must approach this issue from a gender-neutral position avoiding sexual stereotypes. *In re Marriage of Pratt*, 489 N.W.2d 56, 58 (Iowa App. 1992); *see also In re Marriage of Bethke*, 484 N.W.2d 604, 608 (Iowa App.1992).

The parties had agreed that their home would go to the parent who received primary physical care. The district court found there was $16,000 equity in the home and awarded it to Jeffrey. The court found Jeffrey had an Iowa Public Employees Retirement System account valued at $12,000. Additionally, Jeffrey was ordered to pay certain bills. The court divided other property and

obligations. The court found the resulting division was that Jeffrey received a property award of $18,500 and April received $1000. The court then ordered Jeffrey to pay April $9000 over a three-year period with interest at ten percent. The court found both parties financially strapped and that Jeffrey as the primary caretaker of the children would receive a small amount of child support from April. The court also considered the fact Jeffrey had substantial debts and few liquid assets. The court noted that while April was starting over she has only minimal debt. The court found Jeffrey did not have the ability to pay alimony and denied April's contention she should have been awarded it.

While we agree with April that an alimony award is justified when the distribution of the assets of the marriage does not equalize the inequities and economic disadvantages suffered in marriage by the party and the other spouse has to have the ability to pay. Jeffrey does not. Neither party has excelled in a career. Both have worked hard to handle the responsibilities of four children on a limited income. April cites *In re Marriage of Francis*, 442 N.W. 2d 59, 66 (Iowa 1989); and *In re Marriage of Janssen*, 348 N.W. 2d 252, 254 (Iowa 1984) in support of her position. In these cases, sacrifices were made while the other spouse furthered a career that resulted in a substantial increase in earning capacity. Such is not the case here. Both Jeffrey and April have been curtailed in their educational pursuits and career advancements by the responsibilities of their four children. They both have modest earnings. While April would benefit from further education, Jeffrey does not have the financial ability to help pursue it.

April also argues in allocating assets and debts the district court should not have considered money received from Jeffrey's parents as a loan. At the time of the dissolution Jeffrey contended that the parties owed his parents $4500 on a $7000 loan his parents made to the couple at the time the home in Oxford was purchased. April contended the money was given to both of them by Jeffrey's parents as a gift. The district court found it a debt not a gift. The court noted that both parties acknowledge they had paid Jeffrey's parents a part of the original amount. We agree with the district court's findings on this issue. We affirm the decision to deny alimony. We agree with the division of assets and debts.

April was ordered to pay child support of $176 a month. She contends she should have a monthly support obligation of $168.21. The amount awarded is within the permissible range of the evidence and we will not disturb it on appeal. We award no appellate attorney fees. The costs on appeal are taxed to April.

AFFIRMED.