

IN THE COURT OF APPEALS OF IOWA

No. 4-260 / 93-1380

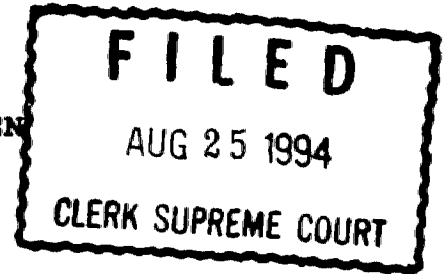
IN RE THE MARRIAGE OF BRADLEY J. DEWEERD AND
BRENDA J. DEWEERD n/k/a BRENDA J. VANENGELLENHOVEN

Upon the Petition of
BRADLEY J. DEWEERD,

Appellee,

And Concerning
BRENDA J. DEWEERD n/k/a BRENDA J. VANENGELLENHOVEN,

Appellant.



Appeal from the Iowa District Court for Sioux County,
Gary E. Wenell, Judge.

Brenda appeals from various provisions of the parties' dissolution decree. She contests the placement of the child with Brad, the property division, and the attorney fees. **AFFIRMED AS MODIFIED.**

Judith A. Garnos of Murphy & Associates, Le Mars, for
appellant.

Bradley K. DeJong, Orange City, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.
Huitink, J., takes no part.

CADY, J.

Respondent (Brenda) appeals from the dissolution decree dissolving her marriage with Petitioner (Brad). She contests placement of their child, with Brad, the property division, and the attorney fees. She also asserts error in the court's factual findings. Custody was the primary issue at trial and is the focus of the appeal. The trial court ordered joint custody of Cory and placed primary care with Brad. We affirm with modification.

Brad and Brenda lived together for several months prior to their marriage on June 7, 1987. Brenda had sole custody of her three sons from a previous marriage, Jason, Barry and Travis. Brad, Brenda, and the three boys resided in Brad's three-bedroom trailer located on Brad's parents' farm property. On August 10, 1988, Brad and Brenda had a son, Cory John DeWeerd. Brenda stayed home with the children until Cory was six months old at which time she began working part-time.

In May 1992 Brenda left her four children in the care of her best friend and then checked herself into Charter hospital. She received treatment for anxiety and depression for two weeks. While Brenda was in the hospital, her former husband, Terry VanVoorst, picked up his sons. Brad also took Cory home with him. Upon her release, Brenda returned home but the parties separated shortly thereafter. Brenda moved with her three sons to a rented house in a neighboring community. (Terry VanVoorst

had attempted to gain custody of the boys but his application to modify the dissolution decree was unsuccessful.)

Brad filed a petition for dissolution and obtained an ex parte order awarding him temporary custody of Cory. However, by agreement Brad and Brenda shared custody of Cory during the separation. Cory spent alternating weeks with each parent. When Cory is with Brad, Brad's mother provides child care while Brad is working. When Cory is with Brenda, a baby-sitter provides child care.

Brenda currently works forty to forty-five hours per week at Link Manufacturing. Her net monthly income is approximately \$800. Terry VanVoorst is approximately \$7000 in arrears on his child support obligation. Brad works for Farmer's Co-op Society fifty to fifty-five hours per week. During planting and harvesting season, however, Brad works sixty to seventy-five hours per week. His net monthly income is approximately \$1300.

Following a hearing, the district court ordered primary care of Cory placed with Brad. The court found Brad able to provide a more stable environment. Brenda was ordered to pay \$100 per month in child support.

Brad was awarded the trailer, his 401K plan with an approximate value of \$7000, a 1979 pickup and a 1970 Chevelle. Brenda was awarded several items of personal property in addition to items she had already retrieved from the home, her 401K plan, a 1985 Cutlass Cierra and a

\$2000 cash property settlement. Brad was to be responsible for the indebtedness on the trailer (\$14,700), the pickup (\$200), the Cutlass Cierra (\$450), Brenda's counseling bill (\$280) and a dentist bill for Cory (\$70). Brenda was to be responsible for a medical bill (\$1000), a doctor bill (\$211) and her attorney fees related to Terry's application for modification (\$810). Brad was to furnish medical insurance for Cory and received the state and federal income tax exemptions for him. Brad was ordered to pay \$250 towards Brenda's attorney fees.

Brenda appeals. She asserts the district court entered several findings of fact unsupported by the evidence. She also contends the court erred in placing Cory in Brad's primary care, separating him from his half-brothers. Further, she argues the court failed to award her pre-marital and gifted property, should have awarded \$366 for an insurance payment Brad converted to his own use, and awarded her insufficient attorney fees.

Finally, Brenda seeks an award of appellate attorney fees.

I. Scope of Review

Our review is de novo. Iowa R. App. P. 4. We are required to examine the record made at trial and determine the issues presented on appeal unimpeded by the findings of the trial court. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). The findings of the trial court, however, are recognized and given weight, especially when

considering credibility of witnesses. Iowa R. App. P. 14(f)(7). The trial court hears the evidence and observes the witnesses. In re Marriage of Will, 489 N.W.2d 394, 397 (Iowa 1992). This important perspective can greatly enhance the decision-making process, and is not forgotten on appeal. See In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974).

II. District Court's Findings of Fact

Brenda argues the district court entered findings of fact unsupported by evidence at trial, casting doubt on its conclusions. After examining the record, we find any errors the court made were insignificant and did not impact its ultimate decision.

III. Custody

The best interest of the child is the preeminent consideration in child custody cases. Numerous factors set forth in Iowa Code section 598.41(3) (1993) supplement the best interest standard. See also In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983); In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests of the child is which parent will do better in raising the child. In re Marriage of Golay, 495 N.W.2d 123, 125 (Iowa App. 1992). Gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. Id.

The district court found both parties were fit parents. However, it determined it was in Cory's best interest for Brad to be awarded primary physical custody. It discussed Brad's consistent employment and ability to provide a stable environment with nearby family and friends to help care for Cory. Other relevant factors in the court's decision were Brenda's display of immaturity by leaving the family home for a weekend without informing Brad of her whereabouts, her inimical relationship with her first husband, and her reluctance to allow him access to their three boys.

On appeal, Brenda particularly emphasized the fact that placing Cory in Brad's primary physical care would separate him from his half-siblings. Although separation of siblings is discouraged, circumstances may arise under which separation may better promote the long term best interests of the child. In re Marriage of Hunt, 476 N.W.2d 99, 102 (Iowa App. 1991). We believe those circumstances are present in this case. The children of Brenda's first marriage, Jason, Barry, and Travis, are ages sixteen, twelve, and ten respectively. Cory is only five. The testimony regarding Cory's relationship with his older brothers was that they baby-sat him and Cory was somewhat closer to Travis than to the two older boys. Furthermore, there was no testimony that separating the boys would have a detrimental effect on Cory.

After reviewing the record de novo, we conclude it is in Cory's best interest for Brad to be the primary caretaker. We realize the decision is a close one. In such cases, our preference is to follow the trial court. See In re Marriage of Forest, 201 N.W.2d 728, 729 (Iowa 1972). It has the parties before it throughout the trial and is in a better position to observe their demeanor and evaluate them as custodians. Id.

IV. Property Distribution

The partners in a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. In re Marriage of Hoffman, 493 N.W.2d 84, 87 (Iowa App. 1992). Iowa courts do not require an equal division or percentage distribution. Id. The determining factor is what is fair and equitable in each particular circumstance. Id. The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1993). In re Marriage of Estlund, 344 N.W.2d 276, 280 (Iowa App. 1983).

The court should divide all property, except inherited property or gifts received by one party, equitably between the parties. Iowa Code § 598.21(1). However, when a gift given specifically to one spouse is subsequently placed in joint ownership it may become a marital asset. See Hoffman, 493 N.W.2d at 89 (citing In re Marriage of Havran, 406 N.W.2d 450, 451 (Iowa App. 1987)).

Brenda contends the district court erred in its division of the parties' property. Specifically, she claims the court should have awarded her all the items in Respondent's exhibit "N". Items in this exhibit include: personal belongings of Brenda and her three boys, gifts from her family, and items she owned prior to the marriage. At trial, Brad testified Brenda could have all the items on page one of exhibit "N" except the ceiling fan. Brad expressed reservations about allowing Brenda to have all the items on page two of exhibit "N".

The district court relied on the parties' stipulation of assets and liabilities when it distributed the parties' personal property. However, the parties' list was incomplete and failed to designate the ownership of many items. Thus, all the items listed on exhibit "N" were left undistributed except a ceiling fan, a few cassette tapes, and some tupperware which were awarded to Brad.

We conclude the items listed on exhibit "N" should be awarded to Brenda except the ceiling fan and the tupperware. We affirm the remainder of the division of property made by the district court.

V. Insurance Payment

Brenda also argues the district court should have awarded her \$336 for an insurance payment Brad converted to his own use. At trial Brad admitted he received insurance check payments for the purpose of paying Brenda's counseling bill at Bethesda Christian Counseling Center,

but instead used them to pay other medical bills. Brenda's counseling bill remains outstanding.

The district court determined the balance of the bill was \$280 and made Brad responsible for its payment. After reviewing the record, we find the balance of the bill is \$336 and order Brad to pay this amount to Bethesda Christian Counseling Center.

VI. Attorney Fees

Finally, Brenda asserts the district court awarded her insufficient attorney fees. We do not agree.

An award of attorney fees is not a matter of right. In re Marriage of Elbert, 492 N.W.2d 733, 736 (Iowa App. 1992). It rests within the discretion of the court and is essentially based on the parties' financial positions. Id. To overturn an award the complaining party must demonstrate the trial court abused its discretion. In re Marriage of Giles, 338 N.W.2d 544, 546 (Iowa App. 1983).

We find no abuse of discretion by the trial court. The award of \$250 to Brenda for attorney fees is affirmed. Additionally, we award Brenda \$750 in appellate attorney fees. Costs of the appeal shall be paid by Brenda.

AFFIRMED AS MODIFIED.