IN THE COURT OF APPEALS OF IOWA

No. 8-437 / 98-0347

IN RE THE MARRIAGE OF EILEEN M. HEIMAN AND DANIEL J. HEIMAN

Upon the Petition of
EILEEN M. HEIMAN,

Petitioner-Appellee,

And Concerning
DANIEL J. HEIMAN,

Respondent-Appellant.

FILED
AUG 28 1998
CLERK SUPREME COURT

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

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

James R. Van Dyke of Van Dyke & Werden, P.C., Carroll, for appellant.

Julie A. Greteman of Green & Siemann, Carroll, for appellee.

Considered by Sackett, P.J., and Huitink and Streit, JJ.

SACKETT, P.J.

Respondent-appellant Daniel J. Heiman challenges the custodial and economic provisions of the decree dissolving his marriage to petitioner-appellee Eileen M. Heiman. We affirm.

Daniel and Eileen were married in November of 1984. They have four children, Bryan born in 1986, Megan born in 1988, Eric born in 1990, and Justin born in 1992. At the time of trial, Daniel was forty-three and Eileen thirty-nine.

Daniel first contends a temporary order removing him from the parties' home jeopardized his custody position. Eileen contends no order issued. We need not address this issue because on our de novo review we do not consider the temporary custody arrangement. *See In re Marriage of Riddle*, 500 N.W.2d 718, 719 (Iowa App. 1993); *In re Marriage of Wilhelm*, 491 N.W.2d 171, 172 (Iowa App. 1992); *In re Marriage of Fennell*, 485 N.W.2d 863, 865 (Iowa App. 1992).

We next address Daniel's claim he should have been granted primary care. We review de novo. *In re Marriage of Craig*, 462 N.W.2d 692, 693 (Iowa App. 1990). While not bound by the trial court's factual findings, we give them weight in considering the credibility of witnesses. *In re Marriage of Farrell*, 481 N.W.2d 528, 530 (Iowa App. 1991).

Dan is an auto technician and a farmer. Eileen maintains a day care center at her home and also works part-time for a dry cleaning business. Both parties have

worked hard in the marriage and are dedicated to their children and their emotional and financial needs.

Dan advances he brings more stability, security, and order to the children's lives. He advances he is more level-headed in emergencies and Eileen relies on him when there is a crisis situation. He also complains her cigarette smoking is a health hazard for the children and the trial court did not give adequate consideration to the effect her smoking has on the children.

Eileen contends she has always been the primary care parent and the one more attentive to the children's needs. She advances Dan's primary focus has been his jobs. She also contends she is the more loving, caring parent. She advances she attempts to smoke away from the children.

The trial court made certain credibility findings and determined Eileen to be the parent substantially more involved with the children's care and the one who has met their day-to-day needs. The trial court found the children show proper upbringing, giving Eileen credit for her major part in this. It determined Eileen should have primary physical care.

The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1997), *In re Marriage of Weidner*, 338 N.W.2d 351, 355-56 (Iowa 1983), and *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue is which parent will do better in raising the child; gender is

irrelevant, and neither parent should have 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 parent granted physical care must be willing to recognize and nurture the place of the non-custodial parent in the children's lives.

While the primary care parent is not necessarily the parent to be granted primary physical care, we consider Eileen's position as the primary caretaker to be a factor in her favor. As is Daniel, and as was the trial court, we are concerned about the fact Eileen smokes heavily in the presence of the children and in the house where they reside. We cannot ignore evidence second-hand smoke presents health risks. We consider this a factor against Eileen's claim for primary physical care, but find the other factors weigh more strongly in her favor. We affirm the award of primary care to Eileen.

Daniel's next challenge is to the property division made by the trial court. At the time of the marriage, Daniel had accumulated a substantial net worth. Eileen had few assets, but she had an excellent job working for General Electric in Carroll, a job she gave up for the lower-paying employment she now has when the parties first started having children. Eileen had accumulated some pension benefits before marriage.

The trial court made an equal division of certain property. However, in doing so, it did not divide some $146,000 in assets it determined Daniel brought into the marriage, nor did it divide pension benefits Eileen had at the time of marriage. Daniel received $146,000 in addition to other benefits and Eileen received her pension benefits prior to marriage.

Daniel challenges the division claiming he should have had additional credit for growing crops he had at the time of the marriage, and the figure the trial court used in valuing a checking account did not consider some outstanding checks of approximately $3000.

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 Russell*, 473 N.W.2d 244, 246 (Iowa App. 1991). 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.* While the court is directed to give consideration to property one or the other partner brought to the marriage under Iowa Code section 598.21(1)(b), this does not dictate an automatic set aside of the asset. Rather, it is considered with the other factors of section 598.21(1). *See In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996).

Eileen made financial sacrifices in giving up her job with General Electric. She has made substantial contributions to the marriage and to the preservation of

assets Daniel had at the time of marriage. We find the trial court made an equitable allocation of assets and affirm.

Eileen has requested appellate attorney fees. She has property in her own right and has the ability to pay her own fees. We do consider the factor Daniel was not successful in this appeal and award her $500.

AFFIRMED.