

IN THE COURT OF APPEALS OF IOWA

No. 4-016 / 93-0321

FILED

MAR 24 1994

CLERK SUPREME COURT

IN RE THE MARRIAGE OF DUANE E. VORWALD AND LINDA J. VORWALD

Upon the Petition of
DUANE E. VORWALD,

Petitioner-Appellant/Cross-Appellee,

And Concerning
LINDA J. VORWALD,

Respondent-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Howard County,
John Bauercamper, Judge.

Duane appeals and Linda cross-appeals from various
provisions of their dissolution decree. **AFFIRMED AS
MODIFIED.**

Judith O'Donohoe of Eggert, Erb, Ott, O'Donohoe & Fry,
Charles City, for appellant.

Mark E. Huegel, New Hampton, for appellee.

Kevin Schoeberl of Anderson, Story & Schoeberl, Cresco,
for minor children.

Heard by Oxberger, C.J., Sackett, J., and Critelli,
S.J.*, but decided by Donielson, C.J., Hayden, Sackett,
Habhab, Cady, and Huitink, JJ.

*Senior judge from the 5th Judicial District serving on
this court by order of the Iowa Supreme Court.

SACKETT, J.

Petitioner-appellant Duane E. Vorwald appeals and respondent-appellee Linda J. Vorwald cross-appeals from the decision dissolving their nearly twelve-year marriage. We address challenges to the award of physical care, the visitation schedule, the property division and provisions made for attorney fees and court costs. We affirm as modified.

Linda and Duane Vorwald were married on October 21, 1981. Linda had been married earlier and had two sons; Cory, born in May 1976, and Jason, born in November 1977. The children are in Linda's parents' custody. Linda and Duane had two children; Autumn, born in December 1982, and Shelby, born in October 1984. Linda's sons eventually came to live with Linda and Duane although they continue to remain under the guardianship of Linda's parents. Duane had a good relationship with Linda's sons and was ready to adopt them but their natural father objected.

The parties separated in about February 1990, and, in February 1991, they agreed Duane would have physical care of the girls and Linda would have liberal visitation. Duane stayed in the family home and it was agreed Duane and Linda would move in and out of the home to implement the visitation schedule. In June 1991, Linda moved with the children to Durant.

After a lengthy trial, the trial court put the girls in the joint custody of Linda and Duane and awarded Linda

physical care. Duane was granted visitation every other weekend and midweek visitation two evenings a week, if the parties were residing in the same community.¹ Duane was given visitation certain holidays and two three-week periods between June 15 and August 15 each year. The property was divided. Duane appeals contending he should have been made the physical custodian but, if he is not, then he should have more than six weeks visitation during the summer months.

The trial court found both Duane and Linda to be loving and caring parents, an assessment with which we agree. The trial court found the girls had spent most of their lives in the same home as their half-brothers and have a good relationship with their half-brothers. The court then found it in the children's best interest to place them with their mother finding she can best meet their needs. The court also found a change of placement would be disruptive. The trial court expressed concern about the conduct of Jeff Dietz, a boyfriend of Linda's who has lived with her since after the separation, but said it believed Linda would insure that Jeff's actions did not adversely impact upon the girls. The trial court made no other findings as to the custody issue.

The children were represented in the proceedings by

1. Duane and Linda are not living in the same community.

attorney Kevin E. Schoeberl. Mr. Schoeberl filed an extensive brief in the children's behalf and argued that physical care should be with Duane. He felt the evidence showed Duane could provide a more stable environment than Linda. He expressed concern about lack of supervision in Linda's household. He also expressed concern about the children living where Jeff Dietz was residing. Schoeberl was of the opinion Duane would promote the girls' contact with their mother and the evidence showed Jeff Dietz had interfered with Duane's visitation rights.

Duane advances most of the same arguments made by the attorney for the children in the trial court in seeking physical care of his children.

In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7). The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3), in In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). The best interests of the child will be served if we grant custody or physical care to the parent who the evidence shows will do better in

raising the child. Id. The gender of the parent seeking custody and the child or children is not relevant to our determination; and a mother and a father share the same burden in attempting to gain custody in a dissolution proceeding. See In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

The trial court put some reliance in reaching its decision on the temporary placement of the children with Linda during the pendency of this action and the fact it would be difficult for them to move back to Cresco where they had grown up. Duane and the attorney for the children have discounted this factor contending it would not be difficult for the girls to return to the Cresco community. We do not consider a temporary custody order in a final custody determination. See 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). Additionally, we see no difficulty for the children returning to the town where they had grown up to live with their father.

Our concern with the custody determination made by the trial court is Linda's relationship with Jeff Dietz and the fact he lives in Linda's home. The trial court and the attorney for the children both, also, voiced this as a concern.

Linda's relationship with Jeff started prior to her separation from Duane. There is considerable evidence

Linda and Jeff have a volatile relationship. The record suggests Jeff has suggested marriage but Linda has not been receptive, although at trial it appeared her long-range plans are to continue the current living conditions.² The trial court specifically found that Jeff Dietz appears to have a significant alcohol abuse problem and a violent temper.

There was evidence advanced about Jeff's use of guns and evidence that on one occasion Jeff pointed a gun at Linda. There also was evidence Jeff had used physical force with Linda and one of the boys. The attorney for the children argued Jeff has a quick temper, pointed a gun at Linda on at least one occasion, and hit Jason, Corey, and Shelby on occasions. From our review of the record, we agree with the trial court that Jeff has a quick temper and a serious problem with alcohol abuse. We find Jeff has hit the children on occasion, at least once with substantial force, and did on at least one occasion point a gun at Linda.

We also find visitation arrangements appeared to work well except when Jeff thwarted them. Linda places blame on Duane for not promptly returning the children. The attorney for the child pointed out and we note Duane has provided nearly all the transportation for the visitation.

Duane admits he has had a relationship with several

2. Linda, though, in her brief advances she and Jeffrey plan to be married.

women since the separation, but he has not moved anyone in his home because that would create confusion for the children.

A strong factor in Linda's favor is the girls' two half-brothers are in Linda's care. The girls have an excellent relationship with their half-brothers. Although testimony that causes some concern is that one of the boys shot and killed the girls' pet cat, apparently because Jeff said if the cat pissed on his tool box one more time he would shoot it.

The Iowa law has long subscribed to the premise that the custody of siblings should not be separated without good and compelling reasons. In re Marriage of Woodward, 228 N.W.2d 74, 75-76 (Iowa 1975). The rationale behind this premise is children who are innocent victims of a marital breakup should not have their relationship with each other also destroyed. See In re Marriage of Wahl, 246 N.W.2d 268, 270 (Iowa 1976). This presumption also applied even if the children are only half-siblings. See In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986).

This is not a hard and fast rule. There are cases where separation of the children is in their best interest. Children are not automatically put in a home merely because they have half-brothers or half-sisters in the home.

Duane argues that any presumption in favor of not separating siblings is not applicable in this case and should not come into play because the boys are under the guardianship of their grandparents, not Linda. He also points out the age difference in the children. The older boy was born May 4, 1976, and the younger boy was born November 17, 1977. The boys, today, are nearly seventeen and sixteen. Shelby, born October 30, 1984, is nine, and Autumn, born December 4, 1982, is eleven.

We, like the trial court and the attorney for the children, have concern about Linda's current choice of a partner and his relationship with the girls. We also have concern about Linda going from one relationship to another without giving herself time to sort out the problems that occurred in her marriage to Duane.

We are troubled by the fact Duane was convicted of drunken driving in 1991. Linda contends Duane has a substance abuse problem. The trial court made no findings on this issue. The attorney for the children argues a review of the record illustrated Duane has no substance abuse problem. The record does not show Duane to use alcohol to excess. Duane has exhibited more stability in his relationships, living, and employment than Linda.

Linda points to her less than full-time work and flexible hours in support of her position, while Duane points to his more lucrative and stable employment in support of his position.

We cannot discount the problems the girls may have living in a home with Jeff. While we agree with the trial court that to date there have been no serious problems caused by Jeff's presence, we find Jeff's excessive use of alcohol coupled with his explosive temper, reckless use of firearms, and his continual use of firearms poses a risk to the children's well being if they live in Linda's home on a full-time basis.

We therefore modify the custody decision to award physical care to Duane and award the same visitation to Linda that the trial court awarded to Duane. In doing so, we have considered Duane's argument, had he not been awarded physical care, he should have had continuous time in the summer rather than two three-week periods. Linda appeared satisfied with the visitation awarded Duane. Our concern about Jeff has entered into our decision not to increase Linda's summer visitation schedule.

Linda on cross-appeal challenges the property division made by the trial court. Linda contends the trial court should not have divided a John Deere tractor one-half to her and one-half to Duane. She said the trial court should have found the tractor was her parents' and ordered it returned to them. Linda's parents were not parties to this action. The issues before the trial court concerned the ownership rights of Linda and Duane. We will not disturb the trial court decision on this issue.

Linda's last contention is the trial court should have awarded her an interest in the parties' personal residence. The trial court allocated property between the parties, including the home, vehicles, bank accounts, retirements accounts, and shares of stock. Linda does not argue the total allocation was not equitable nor does she direct us to where in the record the values of the various items of property allocated appear. See Iowa R. App. P. 14(g); In re R.B., 493 N.W.2d 897, 900 (Iowa App. 1992). The trial court did not use values in allocating the property.

We consider the entire property division in evaluating its sufficiency. See In re Marriage of Dahl, 418 N.W.2d 358, 359 (Iowa App. 1987); In re Marriage of Griffin, 356 N.W.2d 606, 608 (Iowa App. 1984). Duane counters Linda's argument with the proposition that there was no equity in the home, and the mortgage he was directed to assume exceeded the value of the house. Linda has not shown the property division made by the trial court was not equitable. We affirm on this issue.

Linda next contends the trial court should not have charged her with one-half of the court costs and should have awarded her attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to consider the needs of the party making the request,

the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. In re Marriage of Moorhead, 224 N.W.2d 242, 245 (Iowa 1974). We affirm the trial court decision on the allocation of costs and the refusal to award Linda attorney fees.

Linda and Duane shall pay their own attorney fees on appeal and the costs on appeal shall be taxed one-half to each party.

AFFIRMED AS MODIFIED.