FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CARLA R. JENNINGS
AND REGINALD F. JENNINGS

Upon the Petition of)
CARLA R. JENNINGS,)
)
Petitioner-Appellant,)
)
And Concerning)
REGINALD F. JENNINGS,) 8-712
88-892
)
Respondent-Appellee.)

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Appeal from the Iowa District Court for Cedar County (D-1110), L.D. Carstensen, Judge.

The wife appeals from a dissolution decree, challenging primarily the placement of the parties' three children in the husband's custody. **AFFIRMED AS MODIFIED.**

David P. McManus, of Olinger & McManus, Cedar Rapids, for the petitioner-appellant.

Lowell Dendinger, of Casterline, Hamiel and Dendinger, for the respondent-appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

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Carla Jennings appeals from a dissolution decree. She primarily challenges the placement of the parties' three children in her husband's custody. Our review is de novo. Iowa R. App. P. 4. 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). We affirm as modified.

Carla and Reginald Jennings were married in 1970. They are the parents of three children, girls born in 1972 and 1973 and a boy born in 1984. The dissolution decree placed all three children in Reginald's legal custody and physical care. The decree awarded Reginald the parties' house, subject to a $7,500 lien in Carla's favor. The decree directed Carla to pay Reginald child support on the following schedule: $285 per month when all three children are eligible for support; $240 per month when two children are eligible; and $170 per month when one child remains eligible.

I. Custody

Carla challenges primarily the placement of the children in Reginald's custody. She contends she is a better custodial parent. Carla also suggests the possibility of separating the children.

Siblings should ordinarily not be separated. In re Marriage of Grandinetti, 342 N.W.2d 876 (Iowa App. 1983). The separation of siblings requires a compelling reason. Id. In child custody cases, the primary concern in making the determination as to which parent shall be awarded primary care is the long-term best interests of the child. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983); Iowa R. App. P. 14(f)(15). We utilize the factors enumerated in Iowa Code section 598.41(3), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1979).

The record contains testimony of two psychologists. They both recommend physical custody of Douglas be awarded to Reginald. In the very early years of Douglas' life, Reginald was his primary caretaker. During this time Reginald and Douglas established a bond together. The psychologist did not see the other children nor express an opinion on their custody. We agree with the psychologist's recommendations and affirm custody of Douglas with Reginald.

Aimee, fourteen at trial, is a troubled child and has had some problems relating to both parents. Katie Wolfe, the attorney for the children, suggests there may be some problems between Douglas and Aimee and Helen Decker, Reginald's live-in girlfriend, and Aimee. While this may be true, we note Carla testified at trial she could not handle Aimee and did not want to live with her. However

she has vacilliated on this issue, as has Aimee. Aimee has expressed strong objections to living with her father and his live-in girlfriend.

We find that at the present time the circumstances are too volatile to make a decision. The better course is to leave the decision in juvenile court where the resources are available to respond to changing conditions.

Angela, the oldest daughter, was fifteen at trial. Angela has indicated a strong preference to live with her mother. Preferences of a minor child while not controlling are relevant and cannot be ignored. In Marriage of Ellerbrock, 377 N.W.2d 257, 258 (Iowa App. 1985).

In examining the factors bearing on Angela's custody issue we look to the district court's written findings of fact. The findings are skimpy and the only facts cited by the court remotely relevant were the statements that "these people can't work together on such problems," (problems with the children), and "these parents are not able at this time to communicate and cooperate with each other." However, these statements were cited to support the court's decision to deny joint custody.

We are not left without the judge's thinking regarding Reginald, as the judge made several oral remarks during the course of the trial. The following are a sample of some of those remarks:

> THE COURT: (addressing Reginald) Well, then, stop playing. It's just one day. It's no big deal. But you spend more time making yourself look holier than anybody I have ever seen.
>
> THE COURT: But you whine and whimper, and you put all the pluses and minuses behind everything. You hesitate. You fiddle along. You know, you hit her. (Aimee) You sit and you wait and then you say, 'Yes. I hit her.' And then you start telling me something about it's Carla's fault. Come on. Get with it. Go ahead and ask some more questions. I'm analyzing out loud.
>
> THE COURT: And after breaking up the marriage, he very quickly took care of his own needs first, making relationships agreeable to him. (Reginald)

Angela, born February 27, 1972, testified expressing strong preference to live with her mother. Dr. John Hartson, Ph.D., pediatric psychologist, did not testify but said in his report admitted into evidence:

> He (Reginald) was relatively uninvolved with his family for a number of years and was often with 'the guys' for socializing. This lack of previous commitment on Mr. Jennings' part (is worrisome).
> Mr. Jennings also had a history of relatively impulsive, and at times harsh, discipline practices with his children. He readily admitted that he has made mistakes in the past but had learned other management techniques through counseling with the Cedar County Department of Human Services. While it is relatively easy to control a child of Doug's age, I would have some reservations about the possibility that he might 'slip back' into old parenting practices when Douglas becomes more defiant in the next several years.
> Mr. Jennings' behavior in regards to his current relationship with his daughters has at times raised questions, in this examiner's mind, regarding his reasoning. However, this has not appeared to have affected his involvement or parenting role, whatsoever with his son. Mr. Jennings presents as very verbal, very social

> and very 'smooth.' He clearly knows what to say based on what he thinks people want to hear. My concern would be that there may be some incongruity between his level of verbal commitment and his actions in the future.

In assessing the current needs of Angela, now age 17, we find that her best interest would be served by placing her custody with Carla. Carla has been the primary caretaker during Angela's life. Carla shows stress from the extra demands placed on her to raise the children due to Reginald's lack of involvement in the past. Her response to these demands and the divorce are inappropriate but it is likely they are only temporary. Given Angela's strong feelings against being placed with her father, we modify the trial court's decree to award custody of Angela to Carla. We remand the issue of child support to the trial court.

II. Jurisdiction

Carla contends the district court lacked jurisdiction to consider custody of the two girls because both girls are presently subject to juvenile court proceedings. Angela has been accused of delinquency while Aimee has been adjudicated a child in need of assistance.

Iowa Code section 232.3 provides:

> 1. During the pendency of an action under this chapter, a party to the action is estopped from litigating concurrently the custody, guardianship, or placement of a child who is the subject of the action, in a court other than the juvenile court. . . .

> 2. The juvenile court with jurisdiction of the pending action under this chapter, however, may, upon the request of a party to the action or on its own motion, authorizes the party to litigate concurrently in another court a specific issue relating to the custody, guardianship, or placement of the child who is the subject of the action. . . .

Our review of the record finds that a valid order pursuant to Iowa Code section 232.3(2) was entered by the juvenile court. This order conferred jurisdiction to the district court for purposes of considering the issue of custody of Aimee who had been adjudicated a child in need of assistance. The district court need not receive authority from the juvenile court as to the custody of Angela because Angela's action is juvenile court was for delinquency and therefore the issue of custody was not concurrently before both courts.

Carla also contends she was not given adequate notice of concurrent jurisdiction. However, all parties were present at the time the order was signed.

We find the district court had jurisdiction to decide the custody of both Angela and Aimee. However we conclude that the decision regarding Aimee's custody should be made by the juvenile court.

III. Motion For New Trial

Finally, Carla contends the district court should have granted her motion for new trial and also her motion for expanded findings and conclusions. Granting of a motion for new trial is within the discretion of the trial court. See Vanden Berg v. Wolfe, 196 N.W.2d 420 (Iowa 1972).

When adequate grounds for granting a new trial appear, it must still be shown that the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; that it is material and not merely cumulative or impeaching; and that it will probably change the result if a new trial is granted. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981) (citing Vanden Berg v. Wolfe, 196 N.W.2d 420, 422 (Iowa 1972)). We have examined the record and the posttrial motions. We conclude the trial court did not abuse its discretion in failing to grant a new trial.

We also find the trial court did not abuse its discretion in denying Carla's motion for expanded findings and conclusions. As our review is de novo and with the controlling issue on appeal being the award of custody, we do not concern ourselves with the lack of stated reasons. See In re Marriage of Miller, 390 N.W.2d 596, 599 (Iowa 1986).

Costs of this appeal shall be equally divided between the parties.

AFFIRMED AS MODIFIED.