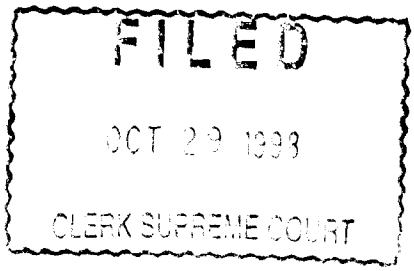
IN THE COURT OF APPEALS OF IOWA

No. 8-430 / 97-2340
Filed October 29, 1998



IN RE THE MARRIAGE OF BRADLEY D. NEREM AND KAREN M. NEREM

Upon the Petition of
BRADLEY D. NEREM,
Appellee,

And Concerning
KAREN M. NEREM,
Appellant.

Appeal from the Iowa District Court for Boone County, Timothy J. Finn, Judge.

Respondent appeals, and petitioner cross-appeals, from the custodial and economic provisions of the parties' dissolution decree. **AFFIRMED.**

Leslie Babich of Babich, McConnell & Renzo, P.C., Des Moines, for appellant.

John D. Jordan of Jordan, Mahoney & Jordan, P.C., Boone, for appellee.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

I. Background Facts and Proceedings.

Brad and Karen were married on June 27, 1981. They have five children, Robert (Bobby), age sixteen, Bradley, Jr., age fourteen, Jonathan, age twelve, Benjamin, age nine, and Madison, age three. Brad is thirty-seven years of age and Karen is thirty-five.

Brad is a minority share holder and manager of Bohlen and Associates, an insurance and real estate business in Madrid. His net monthly income is $2329. Karen is a sales consultant for PDI, a subsidiary of Hy-Vee corporation. Her net monthly income is $1531.

These proceedings were initiated on Brad's petition filed January 3, 1997. The parties continued to reside together with the children until February 4, 1997, when Karen obtained an ex parte domestic abuse order removing Brad from their home. A temporary custody order providing for shared physical care of the children was subsequently entered after Karen's domestic abuse petition was dismissed on its merits.

Because Brad and Karen were unable to resolve disputed custody issues, the district court ordered a custody evaluation by Lutheran Social Services (LSS). LSS recommended joint custody and divided physical care of the children. Under this arrangement, Brad would have physical care of Robert and Bradley, Jr., Karen would have physical care of Madison, and the parties would share Jonathan's and

Benjamin's physical care. Both Karen and Brad opposed this recommendation, preferring to keep the children together.

Following trial, the district court awarded Brad and Karen joint custody of their children. Brad was awarded physical care of all of the children subject to Karen's visitation rights. Karen was ordered to pay $673 monthly child support.

The parties' failure to resolve financial issues necessitated the court's division of their real and personal property. Brad was awarded the family home valued at $124,000, subject to payment of a $47,000 mortgage, and his interest in Bohlen and Associates valued at $36,000. Brad was also ordered to pay Karen $47,100 within six months of the decree to compensate for her share of equity in their home and Bradley's business. The court explained:

> This $47,100 represents her [Karen's] $56,600 share of equity in the house ($38,500) and her marital/equitable share in the business ($18,000), to be reduced by $9,400 for Bradley's share of the Precious Moments ($1,000) and of the furs, rings, and jewelry ($7,200), which were awarded to Karen, as well as an additional $700 for Karen's one-half share of various bills and costs which Bradley has paid on her behalf.

The district court, over Karen's objection, also set aside to Brad an office building valued at $13,500, after determining it was a gift to Brad from his parents. Bradley was additionally ordered to repay a $25,000 promissory note to his parents.

On appeal Karen argues the district court erred in awarding Brad primary physical care of their children and the district court's property division was inequitable. Karen also requests an award of appellate attorney fees.

On cross-appeal, Brad also disputes the equity of the district court's property division. He also requests an award of appellate attorney fees.

II. Standard of Review.

Our review is de novo. *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996). We are obliged to examine the entire record and adjudicate rights anew on the issues properly presented. *In re Marriage of Geil*, 509 N.W.2d 738, 740 (Iowa 1993). No hard and fast rules govern the economic provisions in a dissolution action; each decision turns on its own uniquely relevant facts. *In re Marriage of Gaer*, 476 N.W.2d 324, 326 (Iowa 1991). We accord the trial court considerable latitude in resolving disputed claims and will disturb a ruling only when there has been a failure to do equity. *Benson*, 545 N.W.2d at 257.

III. Physical Care.

Karen's custodial claims are premised on her greater primary care experience and strong relationship with the children. She also claims Brad's history of abusive behavior renders him unsuited for physical care.

Brad cites personal stability and his intention to maintain the children in their familiar environment in support of his custodial claims. He also claims a strong relationship with the children and denies Karen's allegations of abuse.

In child custody cases, our first and governing consideration is the best interests of the children. The critical issue is not which parent possesses the greater right to the child, rather the controlling consideration must be the best interests of the

child. *Heyer v. Peterson*, 307 N.W.2d 1, 7 (Iowa 1981). This decision requires selection of a custodial parent who can minister more effectively to the long-range best interests of the child. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). The objective should always be to place the child in the environment most likely to bring that child to healthy physical, mental, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). The court should also consider the characteristics and needs of the child, the characteristics of the parents, the capacity and desire of each parent to provide for the needs of the child, the relationship of the child with each parent, the nature of each proposed environment and the effect of continuing or changing an existing custodial status. *Id.*

There is no presumption in favor of the mother or the father. *See In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974). Greater primary care experience is one of many factors the court considers but it does not ensure an award of physical care. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa 1995). Insofar as is reasonable and in the best interests of the child, the court should make an award of custody which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents and which will encourage the parents to share the rights and responsibilities of raising the child. *See* Iowa Code § 598.41(1) (1997).

We reject Karen's claims that Brad's abusive behavior makes him unsuitable for physical care of the children. Karen's petition for relief from domestic abuse was

dismissed on its merits as an attempt to gain advantage in her custody dispute with Brad. Karen's allegations that Brad physically abused the children were similarly unsubstantiated following investigation by the Department of Human Services.

The record includes assessments of the children's characteristics, needs, relationships with each other, and relationships with their parents by LSS and a family counselor. Both note the children's close relationship with each other and the comfort and security they enjoy in their familiar environment.

These assessments also note Karen's declining relationship with the children since they became aware of her relationship with another man. following her extramarital affair. Although the children's negative sentiments were influenced by Brad's interpretation of these events, the LSS report notes "Karen's lack of explanation of some of her activities . . . appears to have had the concerning side effect of implying secrecy and dishonesty." The report also cites Karen's need to redevelop a strong relationship with her children through "open and honest communication, keeping the children informed of basic events that effect them and modeling moral behavior." There is also evidence Karen is unable to control the older boys and has deferred their discipline to Brad.

We share the district court's opinion that both parties are able to attend to the children's primary care needs. Although Karen has more experience, Brad has also contributed to the children's care during the marriage. Additionally, the record

indicates Karen's primary care role has diminished since her return to full-time employment.

Although neither parent is free from imperfection, we believe Brad has distinguished himself as the preferred physical care provider. His preference and ability to maintain the children in a familiar environment is consistent with their expressly identified needs. He enjoys a better relationship with the children and is a more competent disciplinarian than Karen. Brad's residence and employment circumstances are also more compatible with the daily demands of physical care.

In reaching this conclusion, we do not intend to minimize the value of Karen's parental contribution. The fact that she has not been awarded physical care does not imply the children will no longer enjoy the benefit of her parenting skills and experience. As joint custodian, Karen has the right to continuing physical and emotional contact with the children and is entitled to share in the rights and responsibilities of raising them. Iowa Code § 598.41(5); *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). We, however, must determine which of two capable parents offers the environment most suitable for the children's physical, emotional, and social maturity. *See In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). In this case, we conclude the prospects for achieving these custodial objectives are greater if Brad is awarded physical care. We affirm on this issue.

IV. Property Division.

The partners to 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 circumstance. *Id.* The distribution of the property should be made in consideration of the criteria codified in Iowa Code section 598.21(1) (1991). *In re Marriage of Estlund*, 344 N.W.2d 276, 280 (Iowa App. 1983).

Karen contends the district court undervalued Brad's interest in Bohlen and Associates. She cites expert testimony valuing Bohlen and Associates at $380,000. Karen also cites Brad's admission to her and his financial statements claiming one-third ownership of the company. Brad disputes Karen's claim he owns one-third of Bohn and Associates and claims his corporate interest is worth $500 or $600.

The valuation of a closely held corporation is difficult, and the market value of stock in a closely-held corporation can rarely be ascertained. *In re Marriage of Steele*, 502 N.W.2d 18, 21 (Iowa App. 1993). Because of the difficulty of this task, the district court is allowed considerable discretion to devise its own valuation scheme. *Id.*; *In re Marriage of Dennis*, 467 N.W.2d 806, 808 (Iowa App. 1991).

Brad owns one share or 2.5% of Bohlen and Associates. The corporation's accountant, using a recognized multiple of net earnings method, valued Bohlen and Associates at $380,000 (2 x $186,000 = $372,000 + $8,000 other assets = $380,000).

He discounted the resulting value of Brad's interest (2.5% x $380,000 = $900) to $500 or $600 because of the limited market value of a minority interest in a closely-held corporation.

The record also includes financial statements Brad gave to a local bank in which he claimed a one-third interest in Bohlen and Associates. Karen also testified Brad told her his corporate interest was worth $150,000. There is no evidence concerning Karen's contribution to the value of Brad's business interest.

In an effort to reconcile this disparate evidence, the district court noted Brad's disproportionate control of the corporation's Madrid office in relation to his equity interest. The court concluded Brad's unrestrained access to corporate income for payment of personal expenses justified a higher valuation. The court valued Brad's equity interest at $36,000. We believe the district court acted within its broad discretion by awarding Karen $18,000, or one-half of Brad's share of net corporate income for one year. We affirm on this issue.

We also agree with the district court's determination that the disputed office building was a gift to Brad from his parents. Generally, gifts received by a party during the marriage are not subject to a property division unless the failure to do so would be inequitable to the other party. *In re Marriage of Hardy*, 539 N.W.2d 729, 731 (Iowa App. 1995); *see also* Iowa Code § 598.21(2) (1997). In evaluating the character of the gifted property, the intent of the donor and the circumstances surrounding the gift control whether it is to be set off in the dissolution. *See In re*

Marriage of Hoffman, 493 N.W.2d 84, 89 (Iowa App.1992). The placement of the property in joint ownership is not controlling. *In re Marriage of Higgins*, 507 N.W.2d 725, 727 (Iowa App. 1993).

The testimony of Dean Nerem clearly indicates he intended to give the Madrid building solely to Bradley. He testified Karen's name was included on the deed at Brad's request and he would not have given the building to Karen otherwise. Under these circumstances, we find no inequity resulting in its set off to Brad as a gift.

We have considered both parties' additional arguments concerning the property distribution, and find them to be without merit.

V. Attorney Fees.

Both parties request payment of appellate attorney fees. In making such a determination, 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 district court's decision on appeal. *In re Marriage of Garst*, 573 N.W.2d 604, 608 (Iowa App. 1997). Both Bradley and Karen are financially able to pay their own attorney fees. Both parties were required to defend this action on appeal. For these reasons, we decline to award any attorney fees. Costs are to be taxed equally to both parties.

AFFIRMED.