

IN THE COURT OF APPEALS OF IOWA

No. 5-608 / 95-187

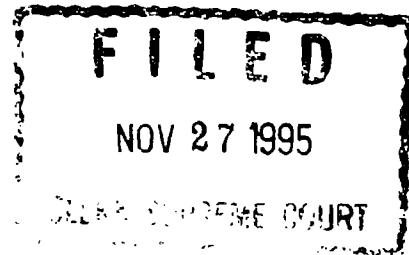
**IN RE THE MARRIAGE OF STEVEN PEKIOS
AND SHELLY LEE PEKIOS**

Upon the Petition of
STEVEN PEKIOS,

Petitioner-Appellee / Cross-Appellant,

And Concerning
SHELLY LEE PEKIOS,

Respondent-Appellant / Cross-Appellee.



Appeal from the Iowa District Court for Scott County, Margaret S. Briles,
Senior Judge.

Shelly Pekios appeals from the child custody and economic provisions of the
parties' dissolution decree. **AFFIRMED AS MODIFIED.**

Michael J. McCarthy of McCarthy & Lammers, Davenport, for appellant.

Robert E. Weinberg of Wells, Bowman & Smith, Davenport, for appellee.

Murray W. Bell of Newport, Bell & Oxley, Davenport, for minor children.

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

PER CURIAM.

Respondent-appellant Shelly Lee Pekios appeals the custody and economic provisions of the decree dissolving her marriage to petitioner-appellee Steven Pekios. Steven cross-appeals challenging certain economic provisions of the decree. We affirm as modified.

Steven and Shelly were married in 1978. Steven was seventeen and Shelly was sixteen. They have four children: Steven, Jr., born in September 1978; Ashley, born in February 1983; Michael, born in March 1986; and Kimberly, born in September 1987. Throughout the marriage, they have received personal and monetary assistance from Shelly's parents. Shelly operated a successful day-care business until she began to suffer from a series of serious medical problems. At the time of the dissolution hearing, Shelly was under treatment for a number of physical and mental problems. Steven was working as a salesperson and earning about \$70,000 per year. The parties had accumulated property primarily through a medical malpractice settlement in the amount of \$280,000 Shelly received. They also have substantial debt for her medical expenses.

The trial court awarded Shelly physical care of their son Steven, and physical care of the younger three children was awarded to Steven. Neither party was ordered to pay the other child support. Title to the family home was given the parties as tenants in common. Steven was allowed to live in the family home until the youngest

child graduated from high school. The balance of the assets and debts were divided nearly equally.

Shelly contends she should have been awarded physical care of all four children. The trial court found the interests of all the children would be best served by awarding their physical care to Steven. The trial court found, however, that Steven, Jr., does not want to live with his father and did not find it in his best interest to do so.

The trial court found Shelly seriously physically disabled, physically ill, and mentally ill, and Shelly was out of the home fifty-four of the fifty-six weeks commencing in May 1990. The court found Steven has assumed the primary care of the children in the four years prior to the dissolution, and during that time, Steven has been the solid and consistent parent. We review de novo. *In re Marriage of Bornstein*, 359 N.W.2d 500, 502 (Iowa App. 1984). We agree with these conclusions.

Shelly contends Steven should not have physical care because he used inappropriate physical discipline with the older child, Steven, Jr., when the child became involved with drugs. The court found no inappropriate discipline with the other children. Shelly does not advance there was any. The trial court found Steven had sought counseling and admitted he handled the discipline problem inappropriately. The court ordered Steven to attend parenting classes. Like the trial court, we have seriously considered Steven's conduct in assessing the issue of

physical care. We consider this form of discipline inappropriate and it weighs against Steven's claim for custody. We recognize, though, the events occurred at a time the child was using drugs, and Steven admitted he did not handle the situation properly, sought professional help, and has been ordered to attend parenting classes. Steven has assumed substantial parenting roles and is in good physical and mental health. Shelly has neither the physical nor mental health to care for the younger three children. In considering applicable statutory and case law, in child custody cases the interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) (1993), 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 interests of the child. *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984). The critical issue in determining the interests of the child 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). We find no reason to disagree with the award of physical care. Split care is appropriate in these circumstances. Steven, Jr., will soon leave the home and the fact Steven, Jr., will not live with his father should not dictate the physical care award of the younger children.

Shelly next contends she should have had exclusive possession of the home. She contends the home has more sentimental value to her. Her parents gave them the land on which the home was built, it accommodates her handicap, and it was purchased with the money from her medical malpractice settlement. She concedes the home should be available to the children, but contends she should have it when the children leave. She contends the other economic provisions of the decree were not equitable. Shelly contends she should have more property because the medical malpractice award was intended to compensate her for her physical injury.

A personal injury settlement received during marriage is assessed under our equitable distribution principles and divided according to the circumstance of each case. *See In re Marriage of McNerney*, 417 N.W.2d 205, 208 (Iowa 1987).

In assessing the property award, we consider it in its entirety. *See In re Marriage of Hoak*, 364 N.W.2d 185, 194 (Iowa 1985). The parties have equity of about \$65,000 in their home. The other principal assets include a stock account of approximately \$86,000 awarded to Shelly and a pension of approximately \$81,000 awarded to Steven. The trial court ordered Shelly's unpaid medical expenses of about \$100,000 to be paid one-half by each party.

Shelly also contends she should have additional alimony. The trial court ordered she receive alimony of \$1200 per month for thirty-six months. We consider the property division and alimony together. *In re Marriage of Callenius*, 309 N.W.2d 510, 513-14 (Iowa 1981). We find the property division equitable but believe an

award of permanent alimony is justified. After thirty-six months, the alimony shall continue at \$500 per month until the death of either party or Shelly's remarriage.

We award no attorney fees. Costs on appeal shall be taxed one-half to each party.

AFFIRMED AS MODIFIED.

Hayden, P.J., and Huitink, J., concur; Sackett, J., specially concurs.

SACKETT, J. (concurring specially)

I concur in all respects, except I would not order the alimony automatically terminated on remarriage.