

IN THE COURT OF APPEALS OF IOWA

No. 1-833 / 11-0798
Filed November 23, 2011

**IN RE THE MARRIAGE OF JERRY RADEMACHER
AND HEATHER JO RADEMACHER**

**Upon the Petition of
JERRY RADEMACHER,**
Petitioner-Appellee,

**And Concerning
HEATHER JO RADEMACHER,
n/k/a HEATHER JO McCLEARY,**
Respondent-Appellant.

Appeal from the Iowa District Court for Floyd County, Colleen Weiland,
Judge.

A mother appeals the custodial and economic provisions of the decree
dissolving the parties' marriage. **AFFIRMED.**

James P. McGuire of McGuire Law, P.L.C., Mason City, for appellant.

Mark A. Young of Young Law Office, Mason City, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Heather Rademacher, now known as Heather McCleary, appeals the custodial and economic provisions of the decree dissolving her marriage to Jerry Rademacher. We affirm.

I. Background Facts and Proceedings.

Heather and Jerry were married in August 2008. They have one child together, who was born shortly after the parties' marriage. Both parties also have children from previous relationships. Heather has two daughters, ages five and seven, who lived with the couple during their marriage. Jerry also has a daughter, age ten, with whom he exercised regular weekly visitation.¹

Jerry filed a petition for dissolution of marriage in June 2010 after Heather took her two daughters and the parties' child to Texas. He was fearful Heather would not come back to Iowa, as she had family in Texas and had not told him she was going there. Heather and the children returned in early July to the parties' marital home, where Jerry was also living. Upon their return, Heather's attorney informed Jerry the child would "not be taken out of state without prior agreement/arrangements. I believe Heather understands this and does not intend to do so again."

Heather was fired from her job in September 2010 because of excessive absences. After her termination, Jerry again became concerned Heather would take their child to Texas. His concerns were realized one day in early December. Jerry went home during his lunch break from work. He found a suitcase in the

¹ Jerry considers his daughter's half-sister, age eight, to be "adopted" by him. Both girls live with their mother fifteen blocks from Jerry's residence, and when exercising visitation with his daughter, Jerry has both girls.

couple's bedroom closet filled with the children's clothes. He called Heather and asked her what the suitcase was for. She told him that she and the two older children were going to spend the night at a friend's house. Jerry accepted her explanation and returned to work. When he came home that night, the house was "like someone robbed it. . . . [E]verything just gone, clothes, bedding, silverware . . . even the toaster." Jerry tried calling Heather, but she did not answer her phone until the following day. She informed him that she and the children were on their way to Texas.

Jerry immediately filed an application for temporary custody of the parties' child. A hearing was held, following which the district court entered an order placing the child in Jerry's physical care and ordering Heather to pay child support pending the dissolution trial.

The matter proceeded to trial in March 2011. Heather, who was thirty years old at the time, was residing in Texas with her two oldest children. She and the children were living with Heather's brother and his fiancée. Heather was working part-time at a company run by her cousin and had plans to attend a community college to become a nurse. Her mother and grandmother helped provide childcare for her children.

Heather testified she moved to Texas because she had family and better opportunities there. She stated the move was also to distance her and the children from Jerry's drinking, rages, and dangerous behavior. Heather said Jerry drank beer every night while taking sleeping pills, making him incoherent and forgetful. She testified that he frequently called her names and belittled her in front of the children. On one occasion, he threw a phone at a wall and on

another, he punched a hole in the bathroom door. Heather testified Jerry struggled with depression and had threatened to commit suicide in the past.

Jerry was thirty-four years old at the time of the trial and employed by a trucking company as a mechanic. His parents and siblings lived near him and saw the child frequently. Heather's father and grandparents also lived in the same city as Jerry and saw the child once or twice a month. Jerry's mother watched the child during the day while Jerry worked.

Jerry denied Heather's claims that he abused alcohol and drugs. He additionally testified he did not have an anger-management problem. According to Jerry, "the stuff that was being said was totally opposite with [Heather] throwing the cell phone, throwing baskets at me because she was angry at me." He also said Heather frequently took his prescription medication for a blood disorder without his knowledge. And one of Heather's friends testified that Heather had asked her for some of her prescription medication in the past.

Jerry testified that before Heather was fired from her job, she worked from 2:00 p.m. until 10:30 p.m. during the week. He stated that when he was done with work at 5:00 p.m., he would pick the children up from daycare, take them home, and prepare dinner for them. After dinner, Jerry testified he helped the children take baths and got them ready for bed. Heather testified she came home most nights on her break from work to say goodnight to the children. She said she would occasionally find the children unsupervised in the house with Jerry working in the garage. Jerry denied this claim as well.

Following the trial, the district court entered a detailed ruling placing the child in the parties' joint legal custody and in Jerry's physical care. The court

found that although both parents “have strengths and flaws,” Jerry would be better able to provide stability and consistency for the child. The court lamented having to separate the child from her half-sisters with Heather but found “the benefits of [the child] remaining in Jerry’s care compellingly outweigh the benefits of her remaining with her sisters.” The court’s decision was based in large part on its finding that Jerry was more credible than Heather, whom the court viewed as “furtive and manipulative.”

The district court also divided the parties’ property, awarding Jerry the marital residence, two cars, and two motorcycles he had built, along with the debts associated with these items. Heather was awarded her vehicle, as well as any personal property in her possession. The court additionally ordered, at Heather’s request, that “Heather may retrieve any personal belongings that she brought into the marriage from Jerry’s home within 90 days of this decree.”

Heather appeals. She claims the district court erred in placing physical care of the parties’ child with Jerry in its temporary and final custody orders because its decision separated the child from her half-siblings. She additionally claims the court erred in inequitably dividing the parties’ property.

We review these claims de novo. See Iowa R. App. P. 6.907; *In re Marriage of Fennelly*, 737 N.W.2d 97, 100 (Iowa 2007).

II. Discussion.

A. Temporary Order.

Heather argues the district court “erred in failing to consider the issue of separating siblings in making an award of temporary physical care of [the child] to [Jerry] in its order on temporary matters.” Jerry counters that this claim is

moot because an order on final custody was entered in this case. We agree. See *In re Marriage of Denly*, 590 N.W.2d 48, 50 (Iowa 1999) (“Temporary custody orders . . . are subsumed in the final custody determination and are not judgments that can be separately enforced.”); see also *Bartsch v. Bartsch*, 636 N.W.2d 3, 10 (Iowa 2001) (finding appellant’s claim regarding the court’s temporary protective order on child custody and visitation issues was moot because the court had entered a permanent order, at which point “the temporary order became ineffective”).

B. Physical Care.

When considering the issue of physical care, the child’s best interests are the overriding consideration. *Fennelly*, 737 N.W.2d at 101. The court is guided by the factors set forth in Iowa Code section 598.41(3) (2009), as well as those identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). See *In re Marriage of Hansen*, 733 N.W.2d 683, 696 (Iowa 2007) (stating the custodial factors in section 598.41(3) apply equally to physical care determinations). Among the factors to be considered are whether each parent would be a suitable custodian for the child, whether both parents have actively cared for the child before and since the separation, the nature of each proposed environment, and the effect on the child of continuing or disrupting an existing custodial status. See Iowa Code § 598.41(3); *Winter*, 223 N.W.2d at 166-67. The ultimate objective is to place the child in the environment most likely to bring the child to healthy physical, mental, and social maturity. *Hansen*, 733 N.W.2d at 695.

With the foregoing principles in mind, we find the district court was correct in placing the child in Jerry's physical care despite the separation it caused between the child and her half-sisters with Heather. In reaching its physical care determination, the district court said:

Custody decisions would generally test the wisdom of Solomon, and this one is no exception. . . . Both Jerry and Heather have strengths and flaws. The court worries about both parents' past (and perhaps continuing) abuse of alcohol and prescription medications. The evidence demonstrates that both parents participated in [the child's] (and the other children's) care during the marriage. . . . Both have family members willing to provide care and love to [the child]. In general, either parent can provide a reasonably safe and loving home for [the child].

In such situations, where the child would do well in the care of either parent, the choice of physical care necessarily turns on narrow and limited grounds. When faced with close cases like this, we give careful consideration to the findings of the trial court. See *In re Marriage of Wilson*, 532 N.W.2d 493, 495-96 (Iowa Ct. App. 1995). This is because the district court, unlike this court on appeal, has the opportunity "to view, firsthand, the demeanor of the witnesses when testifying." *Id.* at 495; see also *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984) (stating that because appellate courts "must rely on the printed record in evaluating the evidence" and are "denied the impression created by the demeanor" of the witnesses, there is "good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses"). A witness's facial expressions, vocal intonation, eye movement, gestures, posture, body language, and courtroom conduct, both on and off the stand, are not reflected in the transcript. Hidden attitudes, feelings, and opinions may be detected from this "nonverbal leakage." Thomas Sannito & Peter J. McGovern,

Courtroom Psychology for Trial Lawyers 1 (1985). Thus, the trial judge is in the best position to assess witnesses' interest in the trial, their motive, candor, bias and prejudice.

After finding both parents were suitable custodians, the district court concluded the child should be placed in Jerry's physical care based in large part on its overall disbelief of Heather's testimony, explaining:

I rely on determinations of credibility in reaching these conclusions, which I resolve generally in favor of Jerry. The court found Jerry to be more sincere and forthright in his testimony, and corroborating evidence supports Jerry's explanations and opinions more than it does Heather's. The court further found some of Heather's testimony to be furtive and manipulative.

We defer to this clearly expressed credibility finding, which is supported by several instances in the record where Heather was less than honest with the court.

For example, Heather denied being involved in a relationship with a man in Texas even when confronted with pictures and statements from her Facebook page documenting that relationship. And when asked why she did not describe Jerry's concerning behavior in interrogatories propounded by his counsel before the trial, Heather responded: "Oh. Probably because there's so much stuff to go through that you don't remember to think to write everything down. I'm human. People forget things. People remember things later on."

Finally, despite other evidence to the contrary, Heather maintained she informed Jerry of her move to Texas before she left. She pointed to her answer to an interrogatory provided to Jerry's counsel in October 2010, which broadly stated:

I would like to have the primary physical custody of [the child]. All of my family is in Texas and I have a furnished home, baby-sitting and day care lined up already. I plan to bring [the child] back for holidays, birthdays, spring breaks and other special occasions along with working out an extended summer visitation schedule with Jerry.

Heather agreed she did not tell Jerry of the exact date she was moving to Texas with the child but said that was because she was not sure of it herself. Yet her daughter's preschool teacher testified Heather informed her of the move two or three weeks before she left.

The district court found Heather's move to Texas, and the manner in which she left Iowa, a significant factor in its physical care decision, stating:

[T]he court suspects that Heather will not support and encourage [the child's] relationship with Jerry. Although she paid lip service to preserving that relationship in her testimony, Heather's actions have proven otherwise. That she was willing to sneak herself and the kids away to a different state tells of her true opinion of Jerry's relationship with [the child] and of her ability to co-parent in a respectful and cooperative manner. That she still fails to recognize the significance of that action demonstrates that Heather has little interest in maximizing [the child's] relationship with Jerry. On the flip side, the court finds Jerry to be sincerely motivated to encourage [the child's] relationship with Heather and [the child's] sisters.

(Footnote omitted.)

We disagree with Heather that the court "was . . . punishing [her] for her departure to her former home in Texas" in placing the child's physical care with Jerry. Under section 598.41(1)(c), the denial by one parent of a child's opportunity to have meaningful contact with the other parent is a significant factor in determining the custody or physical care arrangement. See *In re Marriage of Will*, 489 N.W.2d 394, 399 (Iowa 1992). The court must consider the willingness of each party to allow the child access to the other party. *In re Marriage of*

Kunkel, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996) (“Successful parenting following a dissolution implicates far more than a parent’s ability to attend to the daily details of raising a child.”).

Other factors supported the district court’s physical care decision as well, including Jerry’s greater stability and consistency. As the court found,

Jerry has remained in [the child’s] family home, in her community and surrounded by family and friends with whom [the child] is closely bonded. Child care for [her] is established. Jerry remains in a stable job and has maintained a consistent financial life for the family.

In contrast, Heather has chosen to uproot the children for a move to a less familiar location. She is reliant on the good will of her family for housing, employment, and child care. The court also questions Heather’s financial stability. The evidence demonstrates that Heather has been unable to meet past financial responsibilities, even with adequate income. And even with few fixed expenses, Heather has depleted sizable sums of money. Notable, also, is that Heather has paid none of the temporary child support ordered by the court.

(Footnotes omitted.) We fully agree with these findings and find these same factors also supported the district court’s decision to separate the child from her half-sisters, who currently reside in Texas with Heather.

Although there is a presumption that siblings, including half-siblings and step-siblings, see *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993), should not be separated, that rule is not ironclad. See *Will*, 489 N.W.2d at 398. “[C]ircumstances may arise which demonstrate that separation may better promote the long-range interests of children.” *Id.* Among those circumstances are a parent’s willingness to promote meaningful contact between the child and the other parent. *Id.* at 399. The district court found that significant factor, as well as Jerry’s superior ability to minister to the child’s long-range best interests,

“compellingly outweigh[ed] the benefits of [the child] remaining with her sisters.”

We agree and additionally observe that although the child was separated from her half-sisters with Heather, she will continue to have contact with her other half-sisters with Jerry.

C. Property Division.

Heather claims the district court’s property division was inequitable. See *In re Marriage of Robison*, 542 N.W.2d 4, 5 (Iowa Ct. App. 1995) (stating the partners in a marriage that is to be dissolved are entitled to a just and equitable share of the property accumulated through their joint efforts). She argues the court erred in accepting Jerry’s testimony regarding the value of the house, as well as his testimony regarding loans owed on the vehicles and motorcycles awarded to him. Heather asserts this case is a “classic example of certain family members trying to help the son receive a good financial result in the divorce by arranging last minute loans to reduce the value of the property the son is expected to receive.” Jerry does not respond to these arguments on appeal.

“Ordinarily, a trial court’s valuation will not be disturbed when it is within the range of permissible evidence.” *Hansen*, 733 N.W.2d at 703. “In ascertaining the value of property, its owner is a competent witness to testify to its market value.” *Id.* Though our review is de novo, we defer to the trial court “when valuations are accompanied by supporting credibility findings or corroborating evidence.” *Id.*

The district court valued the parties’ house at \$80,000. Heather argues it should have been valued at \$85,000, which she claims was its purchase price and appraised value. However, Jerry testified that he purchased the house for

\$81,000 in 2007, before the parties' marriage. He did not recall the house being appraised at \$85,000, and Heather offered no proof of such an appraisal. An exhibit showing the house was assessed at \$77,100 in 2010 was also entered into evidence. We accordingly find the court's valuation of the marital residence was within the range of the evidence and should not be disturbed. *See id.*

We also find no reason to disturb the court's findings regarding the loans owed on the vehicles and motorcycles awarded to Jerry. Both Jerry and his father testified about the loans his father made to him to help finance the purchase of these items. Jerry's father kept a detailed record of the money he loaned to Jerry throughout the years, which was admitted as an exhibit at trial, and Heather acknowledged that Jerry's father loaned him a considerable amount of money during their marriage. We thus defer to the court's valuations on those items as well. *See id.*

Finally, Heather argues the court erred in awarding "virtually . . . all of the personal property to Jerry." However, the court's decree states the parties were "not requesting that the court make any order on division of [personal] property, except that Heather may retrieve any personal property she brought into the marriage." With that proviso, the court awarded each party the "personal property and household contents currently in his or her possession." The court also allowed Heather ninety days to retrieve from Jerry's home any personal belongings that she brought into the marriage. We find no inequity in this order, especially as Heather appears to have agreed to this division of the parties' personal property at trial.

III. Conclusion.

We affirm the custodial and economic provisions of the dissolution decree entered by the district court.

AFFIRMED.