

**IN THE COURT OF APPEALS OF IOWA**

No. 7-039 / 06-1370  
Filed March 28, 2007

**IN RE THE MARRIAGE OF ROBERT LEE EISBRENNER  
AND JANE B. EISBRENNER**

**Upon the Petition of  
ROBERT LEE EISBRENNER,**  
Petitioner-Appellant/Cross-Appellee,

**And Concerning  
JANE B. EISBRENNER,**  
Respondent-Appellee/Cross-Appellant.

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Appeal from the Iowa District Court for Jasper County, Dale B. Hagen,  
Judge.

The petitioner appeals, and the respondent cross-appeals, following the  
entry of the decree dissolving their marriage. **AFFIRMED.**

Dennis Chalupa of Brierly Charnetski, L.L.P., Newton, for appellant/cross-  
appellee.

Eric Borseth of Borseth Law Office, Altoona, for appellee/cross-appellant.

Heard by Huitink, P.J., and Vogel and Eisenhauer, JJ.

**VOGEL, J.**

Following the district court's entry of the decree dissolving the marriage of Robert and Jane, Robert appeals the child custody provisions granting Jane physical care of their two children. Jane cross-appeals the distribution of debts by the district court. We affirm on all issues and award Jane attorneys fees on appeal.

**I. Background Facts and Proceedings.**

Robert and Jane married in 1995 and have two children, Jacob and Abigail, ages six and four respectively. At the time of trial, Robert was age thirty-nine, held a degree in horticulture from Iowa State University, and worked as a golf course superintendent. Robert has a long history of recreational drug use, which includes marijuana use since age eighteen and some cocaine use. He admitted at trial to smoking marijuana during the marriage at least three times a day, at home, at work and even while driving with the children. At trial, Robert claimed that he quit "cold turkey" in June 2005 when the marriage deteriorated. Jane testified that Robert also consumes considerable amounts of alcohol on a daily basis. Overall, the district court questioned Robert's credibility, believed his period of abstinence from drugs insubstantial compared to his lengthy history of usage, and had concerns over his ability to abstain once the decree was entered.

Jane was age thirty-five at the time of trial and works as a registered nurse. She has also experienced difficulties with use of alcohol, but the district court characterized her usage as more episodic, related to the stress of the separation, and not affecting her ability to care for the children.

The district court also found Jane's testimony more credible than Robert's, principally as to the division of labor caring for the children. Although disputed by Robert, Jane was the primary caregiver during the marriage, attending to the daily needs of the children, their medical care, and educational requirements as well as being the primary disciplinarian for the children. Robert's care of the children increased after the parties separated. During the marriage, the record reflects that he spent a considerable amount of his spare time away from work either pursuing his own activities, including weekend off-roading excursions with his friends. During the week, Robert would drive the children to day care, but only after Jane had packed their lunches and dressed them for the day.

In the petition filed in July 2005, Robert requested joint physical care of the children, or in the alternative, physical care with him and visitation to Jane. Jane requested physical care of the children be placed with her, asserting Robert has manipulated and placed the children in the middle of the custody issue. A temporary joint physical care arrangement was ordered pending the dissolution trial, which was held in late April 2006. However, the district court determined that the arrangement was unreasonable on a permanent basis and not in the children's best interests.<sup>1</sup> The court found against joint physical care because of Robert's inability to communicate with Jane regarding the children, his limited role of caretaker, his lack of support for the children's relationship with Jane, Jane's intention to relocate from Newton to Des Moines to be closer to work, and Robert's troubling history of substance abuse. Citing the best interests of the children, the district court granted physical care of the children to Jane with

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<sup>1</sup> See Iowa Code § 598.41(5) (Supp. 2005).

liberal visitation for Robert. The decree also valued and distributed marital assets and debts between the parties. Robert appeals the custody provision of the decree, while Jane cross-appeals the allocation of debt, affecting the ultimate equalization amount ordered under the decree.

## **II. Scope of Review.**

We review the provisions of a dissolution decree de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). “Although we decide the issues raised on appeal anew, we give weight to the trial court’s factual findings, especially with respect to the credibility of the witnesses.” *Id.* (quoting *In re Marriage of Witten*, 672 N.W.2d 768, 773 (Iowa 2003)). We will not disturb the district court’s valuation of assets if it is within the permissible range of the evidence. *Id.* (citing *In re Marriage of Bare*, 203 N.W.2d 551, 554 (Iowa 1973)).

## **III. Physical Care of the Children.**

Robert asserts that the district court erred when it denied his request for joint physical care or physical care to Robert, instead granting physical care to Jane. In determining which parent should be granted physical care, our overriding consideration is the children’s best interests. *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). We consider a number of factors, including the children’s needs and characteristics, the parents’ abilities to meet the children’s needs, the nature of each proposed home environment, and the effect of continuing or disrupting the children’s current status. See Iowa Code § 598.41(3); *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974). In awarding physical care, the goal of the courts is to select the environment most likely to cultivate physically, mentally and socially healthy children. *In re*

*Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). While the children's physical and financial stability are important considerations, great emphasis is placed on achieving emotional stability for the children. *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct. App. 1998). We give significant consideration to placing the children with the primary caregiver, but it is not the singular factor in determining which placement would best serve the children's interests. *In re Marriage of Wilson*, 532 N.W.2d 493, 495 (Iowa Ct. App. 1995). Attempts by one parent to isolate the children from the other parent may also be considered. *See In re Marriage of Vrban*, 359 N.W.2d 420, 425 (Iowa 1984).

Having highlighted above only a portion of the testimony, we agree with the district court's conclusion that physical care is better placed with Jane than with Robert or in a shared-care arrangement. Robert correctly points out that Jane's impending move to Des Moines from Newton would be disruptive to the children, if in her physical care, removing them from their home, school and long-term day care provider. However, the record also reflects that Jane has been significantly more responsible for the children's care until the parties' separation. We note that although Jane's successful care of the children in the past does not ensure an award of physical care, it is a strong predictor that her care for the children in the future will likewise be dedicated and consistent. *See In re Marriage of Walton*, 577 N.W.2d 869, 871 (Iowa Ct. App. 1998). Robert also cites many instances where he believes Jane's care for the children has been inappropriate. While these instances have been considered on de novo review, they do not persuade us to disagree with the district court's ultimate conclusion that the children's best interests are in Jane's physical care. Like the district

court, we harbor concerns over Robert's extensive history of substance abuse. Although Robert appears to have stabilized his life as of late, we agree with the district court that Jane has been the more steady influence in the children's lives and better able to meet their ongoing emotional, physical, and social health needs. We affirm the custody provisions of the decree granting physical care to Jane with liberal visitation to Robert.

#### **IV. Distribution of Debt.**

In her cross-appeal, Jane contends that the district court should have allotted more of the marital debt to Robert as a result of money he wasted on illegal substances and recreational activities. Parties to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. *In re Marriage of Rebouche*, 587 N.W.2d 795, 801 (Iowa Ct. App. 1998).

We conclude that the district court's valuation and division of the marital assets and debts appropriately reflects the evidence presented at trial and is within the permissible range of that evidence. See *In re Marriage of Driscoll*, 563 N.W.2d 640, 643 (Iowa Ct. App. 1997). Before the equalization payment of \$7493.00 ordered by the court, Jane's net distribution of joint property totaled \$23,283.57 with \$12,817.66 allotted to Robert. A payment of \$7493.00 by Jane leads to Robert then holding \$20,310.66 and Jane allotted \$15,790.57. Although "generally assets acquired during a marriage are nearly equally divided," see *In re Marriage of Van Regenmorter*, 587 N.W.2d 493, 496 (Iowa Ct. App. 1998), the goal is to assure a just and equitable, rather than a mathematically equal, distribution. *In re Marriage of Dean*, 642 N.W.2d 321, 323 (Iowa Ct. App. 2002).

We conclude the allocation by the district court, while not equal, was equitable and affirm the division of property made by the decree.

**V. Appellate Attorney Fees.**

Jane seeks attorneys fees on appeal. Such an award is discretionary and is determined by assessing the needs of the requesting party, the opposing party's ability to pay, and whether the requesting party was forced to defend the appeal. *In re Marriage of Gaer*, 476 N.W.2d 324, 330 (Iowa 1991). We award attorneys fees on appeal to Jane in the amount of \$3000. Costs on appeal are assessed to Robert.

**AFFIRMED.**