IN THE COURT OF APPEALS OF IOWA

No. 1-108 / 10-1456
Filed April 27, 2011

IN RE THE MARRIAGE OF TODD BRECHWALD AND JENNIFER BRECHWALD

Upon the Petition of

TODD BRECHWALD,
Petitioner-Appellee,

And Concerning

JENNIFER BRECHWALD, n/k/a JENNIFER GALM,
Respondent-Appellant.

Appeal from the Iowa District Court for Buena Vista County, Don E. Courtney, Judge.

Jennifer Brechwald appeals from the decree dissolving her marriage to Todd Brechwald. **AFFIRMED AS MODIFIED.**

Julie A. Schumacher of Mundt, Fanck & Schumacher, Denison, for appellant.

Colin J. McCullough of McCullough Law Firm, Sac City, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

Jennifer Brechwald appeals from the decree dissolving her marriage to Todd Brechwald. She contends the district court erred in granting Todd physical care of the parties' minor children. She also contends the court erred in failing to award her $1700 per month in alimony for a period of twelve years.

I. Backgrounds Facts and Proceedings. Todd and Jennifer were married in 1991. They have three children: Jayna, born in 1994; Kathryn, born in 1995; and Clarice, born in 2000. The family lived in Ida Grove until 1998 when they moved to the farmstead near Alta, where Todd lived as a child.

Todd was born in 1965. He served in the Marine Corps for four years and has attended some college. Todd has been employed as an Iowa State Trooper since 1993. At the time of trial, he described his schedule as follows:

> Currently, I'm serving two weeks of days and two weeks of nights . . . . I'll get three days off, work five days, three days off. The day shift consists from 0700 in the morning to 1600 at night or 4 p.m. The night shift starts at 4 p.m. and goes to 1:00 and that again is five nights, three off, five nights, and three off.

He earned over $68,000 in 2009.

Jennifer was born in 1971. By agreement of the parties, Jennifer did not work outside the home. She homeschooled the children until Jayna was in third grade and Katie was in second grade, and then they enrolled in public school. At the time of trial, Jennifer was a self-employed Tae Kwon Do instructor earning approximately $5000 per year. She was also enrolled as a full-time student at Buena Vista University, studying art with the hope of becoming an art therapist.

In August 2008, Jennifer filed a petition in Polk County for relief from domestic abuse pursuant to Iowa Code chapter 236 (2007), alleging Todd had physically and sexually abused her and threatened her safety. A temporary protective order was issued and Jennifer was granted temporary care of the children. On September 15, 2008, Todd filed a petition to dissolve the marriage. The chapter 236 proceeding was then joined with the dissolution proceeding in Buena Vista County.

After a hearing on temporary matters, Jennifer was granted physical care of the children and Todd was ordered to pay $1251 per month in child support. The chapter 236 action was closed and Todd was prohibited from contacting Jennifer in any manner other than by email. Todd was also ordered to pay Jennifer $1500 in attorney fees.

Trial on the dissolution action was held in January and February 2010 to determine issues of child custody, child support, property division, alimony, and attorney fees. At trial, all three girls testified in camera and told the judge they wished to live with their father. A counselor who saw the girls between August and December of 2009 also testified the girls consistently stated they wished to live with their father.

On May 27, 2010, the district court entered its decree dissolving the parties' marriage. The court granted joint legal custody of the children and placed physical care with Todd. Jennifer was ordered to pay Todd $100 per month in child support. The court divided the property and ordered Todd to pay Jennifer $50,000 in property settlement and $500 per month in alimony for a

period of four years. The decree acknowledged the expiration of the no-contact order and found it was not necessary to prohibit contact between Todd and Jennifer. The court stated it "[did] not believe the Respondent to be in any physical danger from the Petitioner."

On June 7, 2010, Jennifer filed a motion to enlarge or amend. A hearing on the motion was held July 6, 2010, and the court entered its ruling on August 5, 2010, making minor amendments to the decree. Jennifer filed her notice of appeal on September 3, 2010.

II. Scope and Standard of Review. Because dissolution of marriage cases are reviewed in equity, our standard of review is de novo. Iowa R. App. P. 6.907; *see also In re Marriage of Hansen*, 733 N.W.2d 683, 690 (Iowa 2007). We examine the entire record and adjudicate rights anew on the issues presented. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa 2001). We give weight to the findings of the district court, especially where credibility determinations are involved. *Hansen*, 733 N.W.2d at 690. However, we are not bound by them. *Campbell*, 623 N.W.2d at 686.

III. Physical Care. Jennifer first contends the district court erred in granting Todd physical care of the children. Specifically, she argues the court (1) gave an inappropriate amount of weight to the fact Todd resides in the marital home, (2) failed to consider Todd's history of domestic abuse and a no-contact order violation, and (3) erred in determining Todd could provide the children stability.

The best interest of the children is our standard for deciding child custody. Iowa R. App. P. 6.14(6)(*o*); *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). Our objective is to place the children in the environment most likely to bring them to healthy physical, mental, and social maturity. *Murphy*, 592 N.W.2d at 683. In considering what custody arrangement is in the best interest of the children, we consider statutory factors. Iowa Code § 598.41(3). All these factors bear upon the "first and governing consideration" as to what will be in the best long-term interest of the child. *In re Marriage of Vrban*, 359 N.W.2d 420, 424 (Iowa 1984). These statutory factors and the factors identified in *In re Marriage of Winter*, 223 N.W.2d 165, 166-67 (Iowa 1974)[1] are appropriately considered in determining the award of physical care. *In re Marriage of Will,* 489 N.W.2d 394, 398 (Iowa 1992).

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[1] These factors are:

> 1. The characteristics of each child, including age, maturity, mental and physical health.
> 2. The emotional, social, moral, material, and educational needs of the child.
> 3. The characteristics of each parent, including age, character, stability, mental and physical health.
> 4. The capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the child.
> 5. The interpersonal relationship between the child and each parent.
> 6. The interpersonal relationship between the child and its siblings.
> 7. The effect on the child of continuing or disrupting an existing custodial status.
> 8. The nature of each proposed environment, including its stability and wholesomeness.
> 9. The preference of the child, if the child is of sufficient age and maturity.
> 10. The report and recommendation of the attorney for the child or other independent investigator.
> 11. Available alternatives.
> 12. Any other relevant matter the evidence in a particular case may disclose.

Winter, 223 N.W.2d at 166-67.

A. Marital residence. We first consider Jennifer's claim the court gave too much weight to the fact Todd resides in the marital home. The district court noted the following facts in determining which parent could better minister to the children's healthy physical, mental, and social maturity:

> Todd lives in the marital home which is a large five-bedroom, two-bath farm house and has been the marital residence since Jayna was approximately four years old. The farm house had previously been his grandfather's and Todd and Jennifer took advantage of purchasing the property because of the family connection. The farm home allows the children access to their pets, is close to the school district, and close to friends. . . .
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> . . . The court believes that the marital residence of the parties, the farm home which the children have known most of their lives [and] provides access to friends and school as well as access to pets appears to be the more stable and wholesome environment.

In contrast to Todd's residence, Jennifer moved into a store front that has a residence above it. She runs her Tae Kwon Do school out of the first floor.

It was not improper of the court to consider the residences of the parties as a factor in determining custody. The children stated their preference to live with Todd based on the factors enumerated by the court. Considering the children's preference was permissible under section 598.41(3)(f) as the children were nine, fourteen, and fifteen years of age respectively at the time of the trial.

Jennifer's main argument is the weight the court gave this evidence is inappropriate in light of the fact there was a no-contact order pursuant to chapter 236 that gave Todd temporary possession of the home. Accordingly, we next consider Jennifer's argument the court failed to consider Todd's history of domestic abuse and a no-contact order violation.

B. No-contact order. This court has recognized domestic abuse is a factor in determining which parent should be granted child custody. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). This is because domestic abuse can have ravaging and long-term consequences on children. *Id.* at 54-55. Spousal abuse discloses a serious character flaw in the batterer and an equally serious parenting flaw. *Id.* at 55.

> Consequently, we believe evidence of untreated domestic battering should be given considerable weight in determining the primary caretaker, and under some circumstances even foreclose an award of primary care to a spouse who batters. Domestic abuse is, in every respect, dramatically opposed to a child's best interests.

Id.

The district court did give consideration to whether a history of domestic abuse existed. In the decree, the court states:

> A 236 action was commenced in Polk County, Iowa, and a temporary protective order was issued against Todd. This matter was dismissed with the parties' temporary stipulation entered on March 9, 2009. The DHS reports are attached as part of the pleading in the court file and introduced as exhibits at trial. The reports allege an incidence in which Todd is alleged to have used a choke-hold to discipline Kathryn; that may have caused her to lose consciousness temporarily. The report is not confirmed and the incidence was denied by Jayna and Kathryn.

We conclude Jennifer's allegations of domestic abuse are not substantiated by the record. The first allegations were made in August 2009 in the petition for relief from domestic abuse. In it, Jennifer alleged Todd physically and sexually abused her, as well as threatened her and made her fear for her safety. The most recent incident she described in her petition was the allegation Todd choked Kathryn a year and a half prior to Jennifer's filing. The allegation

was denied by the children. Jennifer alleges Todd physically abused her when he reached for her throat with both hands to demonstrate the alleged choke-hold on Kathryn.

As to the sexual abuse Jennifer alleged in her chapter 236 petition, she "didn't feel sexually safe" and reported: "I was in fear of my physical safety not able to defend myself sexually. When I asked him to stop touching me, he would find excuses for his behavior and continued with the same."

Jennifer also alleged Todd verbally and emotionally abused the family. She claimed Todd makes "intimidating threats to the children." As an example, she stated, "If the girls are fighting and one of them hits the other he says, 'If you do that again, I'm going to hit you.'" She also claimed Todd made "hurtful and degrading" comments. For example, "If someone says to him 'Oh, you have such wonderful girls,' Todd says, 'Yeah, it's from daily beatings.'" Todd told the girls that if they got pregnant, he would kick them out of the house. Finally, Todd allegedly told one of the girls, who has knee problems, "If you aren't going to do the exercises, I'm done helping you. I will not pay for knee surgery."

While the incidents reported, if true, may demonstrate occasional parental frustration and ill-advised attempts at humor, we conclude they do not establish a history of domestic abuse.

C. Stability. Finally, Jennifer argues Todd has not shown himself to be the more stable parent. As support, she cites the following: (1) Todd posted pictures of the girls to his Facebook account; (2) has dated women he's met on

the Internet; (3) a violation of the no-contact order; and (4) has not attended parent-teacher conferences or taken the children to appointments.

We find the incidents Jennifer complains of do not establish a lack of stability or responsibility in Todd's parenting. The evidence shows the girls used Facebook at both parents' homes and no risk to the children was established by the posting of photos to Todd's Facebook account. Nor has Jennifer shown the children were placed in any danger by meeting two of the women Todd has dated since the parties' separation, simply because he met the women on the Internet.

Nor do we find Jennifer's claims that Todd was not involved in parenting the girls credible. Todd testified he did not attend any parent-teacher conferences for the children because Jennifer told him they were not necessary throughout their marriage, and attempts to learn when the conferences were held after their separation went unanswered. The evidence further shows Todd was unable to attend medical appointments due to his work, but regularly attended the children's activities.

The single incident Jennifer cites of Todd violating the no-contact order occurred when Todd called Jennifer about rescheduling visitation when he was unable to reach her by email. She did not answer and he left a voicemail message for her.

D. Best interests of the children. Reviewing the record de novo, we find both parents are suitable caretakers for the children. However, we conclude the evidence supports granting Todd physical care of the children.

Although Jennifer has been the children's primary caretaker, the evidence shows Todd has been actively involved in his daughters' lives. During the parties' separation, he made extra efforts to stay in contact with the children, which Jennifer thwarted by, among other things, confiscating cell phones and not allowing the older girls the opportunity to jog with their father. Todd is the parent better able to support the children's relationship with the non-custodial parent.

Most persuasive is the children's testimony on the matter of custody. All three girls testified they preferred to live with their father and gave cogent reasons for their preference. We must give consideration to this preference. *See In re Marriage of Pettit*, 493 N.W.2d 865, 868 (Iowa Ct. App. 1992) ("The preferences of minor children, while not controlling, are relevant and cannot be ignored in a child custody case."). This is especially true in light of the reasons given, the children's age and educational level, and the strength of and the reasons for the preference. *In re Marriage of Levsen*, 510 N.W.2d 892, 894 (Iowa 1993).

When considering the relevant factors set forth in the Iowa Code, as well as the factors enumerated in *Winters*, we conclude the children's best interests are served by granting Todd physical care.

IV. Alimony. Jennifer also contends the court erred in denying her the alimony she requested. She seeks a modification of the decree to award her $1700 per month in alimony for a period of twelve years.

Alimony is not an absolute right. *In re Marriage of Dieger*, 584 N.W.2d 567, 570 (Iowa Ct. App. 1998). Instead, an award of alimony depends on the

circumstances of each particular case. *Id.* When determining the appropriateness of alimony, the court must consider the length of marriage, the age and health of the parties, and the distribution of property. Iowa Code § 598.21A(1)(a)–(c) (2007). The court also considers "(1) the earning capacity of each party, and (2) present standards of living and ability to pay balanced against the relative needs of the other." *In re Marriage of Hettinga*, 574 N.W.2d 920, 922 (Iowa Ct. App. 1997) (citation omitted). We consider the economic provisions of the dissolution decree as a whole, taking into consideration both the property division and spousal support award in evaluating their individual sufficiency. *In re Marriage of O'Rourke,* 547 N.W.2d 864, 866 (Iowa Ct. App. 1996).

The parties were married for nineteen years. Jennifer was thirty-eight years old at the time of the dissolution and healthy. She was earning an estimated $5000 per year working as a Tae Kwon Do instructor while Todd earned $68,000 in 2009. The parties received roughly equal shares of the marital property, and Todd was ordered to pay Jennifer $50,000 for a property settlement.

Jennifer sacrificed pursuit of a career during the marriage to raise the children and, as such, is at an economic disadvantage in re-entering the work force. With many working years ahead of her, she was pursuing a degree that would allow her to work as an art therapist. The district court found it was likely that after completing her studies, Jennifer would enjoy a standard of living comparable to the one she enjoyed during the marriage.

Considering the factors set forth in section 598A.21(1), we conclude an award of $750 per month in alimony for a period of four years will assist Jennifer in obtaining the education necessary to become self supporting.

IV. Appellate Attorney Fees. Finally, Jennifer seeks an award of appellate attorney fees.

An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez,* 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). 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. *See In re Marriage of Maher,* 596 N.W.2d 561, 568 (Iowa 1999).

We decline to award Jennifer any appellate attorney fees. Costs of the appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.