

IN THE COURT OF APPEALS OF IOWA

No. 7-338 / 06-1879

Filed June 27, 2007

**IN RE THE MARRIAGE OF KATHERINE RIESSEN
AND BENJAMIN RIESSEN**

**Upon the Petition of
KATHERINE RIESSEN,**
Petitioner-Appellant,

**And Concerning
BENJAMIN RIESSEN,**
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, John Nahra, Judge.

A mother appeals from the physical care and property distribution provisions of the decree dissolving the parties' marriage. **AFFIRMED.**

Steve Newport and Cheryl Newport of Newport & Newport, P.L.C.,
Davenport, for appellant.

Jennie Clausen of Cartee & Clausen Law Firm, P.C., Davenport, for
appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Katherine Riessen appeals from the physical care and property distribution provisions of the decree dissolving her marriage to Benjamin Riessen. We affirm.

I. Background Facts and Proceedings

Katherine and Benjamin were married in November 2003. They are the parents of Brady, born in July 2004. Katherine has a nine-year-old daughter, Analise, from a previous relationship.¹ The parties' relationship began to seriously deteriorate in late 2005. Benjamin moved out of the family home on January 1, 2006. He moved back into the parties' marital residence on February 17, 2006.

Katherine filed a petition to dissolve the parties' marriage on February 22, 2006. The district court entered a temporary order on May 26, 2006, granting the parties joint legal and physical custody of Brady. Benjamin and Katherine were both residing in the marital home with Brady when that order was entered.

This case was tried to the court commencing August 23, 2006. At the time of trial, both parties were twenty-five years old. Benjamin and Katherine are college educated. They both work at the Rock Island Arsenal. The parties each earn an annual salary of \$51,000. Following trial, the court filed a decree of dissolution granting the parties joint legal custody of Brady. The court placed physical care with Benjamin and established a liberal visitation schedule for Katherine. The court also divided the parties' assets and debts.

¹ Katherine was fifteen when she gave birth to Analise. The child has resided with Katherine or her family since her birth. Analise visits her natural father on a regular basis.

Katherine has appealed. She contends she should have been awarded physical care of Brady. She also claims the property distribution was not equitable.

II. Scope and Standard of Review

We review dissolution of marriage proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Wagner*, 604 N.W.2d 605, 608 (Iowa 2000). Although we are not bound by the district court's factual findings, we give them weight, especially when assessing the credibility of witnesses. Iowa R. App. P. 6.14(6)(g).

III. Physical Care

Katherine claims the court erred in finding Brady's best interests would be served by placing physical care with his father. She claims she has provided the primary care for Brady since his birth, and she argues that Analise and Brady are bonded and need to remain together. Katherine has a variety of complaints about Benjamin. Among other things, she contends he has been verbally, emotionally, and physically abusive. Katherine argues she is best able to provide for Brady's emotional, social, moral, material, and educational needs.

When we determine physical care, our primary consideration is the best interests of the child. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). When we consider which physical care arrangement is in the child's best interests, we consider the factors set forth in Iowa Code section 598.41(3) (Supp. 2005), as well as the factors identified in *In re Marriage of Winter*, 223 N.W.2d

165, 166-67 (Iowa 1974).² The critical issue is which parent will do better raising the child; gender is irrelevant, and neither parent should have a greater burden than the other. *In re Marriage of Courtade*, 560 N.W.2d 36, 37-38 (Iowa Ct. App. 1996). Our primary objective is to place the child in the environment most likely to bring him or her to healthy physical, mental, and social maturity. *In re Marriage of Harris*, 499 N.W.2d 329, 332 (Iowa Ct. App. 1993).

After considering the testimony of the parties and their witnesses during a contentious three-day trial, the district court concluded the parties “hate each other.” Sadly, the record supports this conclusion. Both parties behaved very poorly at times in the months leading up to their trial. They have been verbally abusive toward one another and appear unable to communicate even when it is obviously in Brady’s best interests for them to do so.

² We consider the following factors from *Winter*, 223 N.W.2d at 166-67, when making physical care determinations:

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.

Fortunately, despite the parties' many criticisms of one another, the record reveals that they are both capable parents in many respects. Both parents have demonstrated the ability to provide adequate care for their child and meet his needs. Although Katherine and Benjamin inappropriately have placed Brady, and to some extent Analise, in the middle of this controversy, it is clear both parents love their son. Brady appears to be doing well despite his parents' inability to behave in a civil manner in each other's presence.

We now turn to the district court's decision to place physical care with Benjamin. The testimony given by Benjamin and Katherine at trial was conflicting in almost every respect. As a result, we believe the district court's fact findings and credibility assessments are particularly important. It is fair to say the court did not find Katherine to be particularly credible. The court stated her "memory at times is selective at best, desiring only to respond straightforwardly to questions she believes the answers favor her position or to avoid questions entirely in order to tell the [c]ourt what she wants this [c]ourt to hear." The court noted Katherine was unable to report even simple matters to the court without contradictions and ultimately concluded she was "controlling, manipulative, and relentless in the pursuit of her agenda at the expense of [Benjamin]."

Katherine claims she was physically abused by Benjamin. As we have said before, domestic abuse is in every respect dramatically opposed to a child's best interests. See *In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997). Prior to trial, Katherine attempted to remove Benjamin from the marital home on several occasions by claiming she had been physically abused. Two different judges found that she did not prove her claims of abuse. When

Katherine applied for a protective order in June 2006, she failed to advise the court that this dissolution action was on file. Katherine renewed her claims of abuse at trial. After carefully considering the evidence, the trial court concluded Katherine's allegations of abuse were not supported by the evidence and were made "to accomplish her agenda of limiting access by [Benjamin] to their son." Upon our de novo review of the record, we reach the same conclusion.

Katherine has contended Analise and Brady are bonded and need to remain together. Generally, siblings should be separated only for compelling reasons. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). The district court acknowledged Brady and Analise have a close relationship; however, the court determined it could not base a custody decision solely upon the relationship between Brady and his half-sister. The court concluded Katherine should not be allowed to use the relationship "as a sword to deter or deny [Benjamin] access to his child." We find no reason to disagree with the district court's conclusion.

Upon our de novo review of the record, we agree with the district court's decision to place physical care of Brady with Benjamin. Based on the evidence presented at trial, the district court was convinced that if Katherine were awarded physical care of Brady, she would refuse to foster any meaningful relationship between Brady and Benjamin, and she would use the award of custody to deny Benjamin contact with their son. *See In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996) (holding that courts must consider the willingness of each party to allow the child access to the other party). We concur with the district court's decision that Benjamin is better suited to minister to Brady's

needs, and it is in the child's best interests to award physical custody to Benjamin. In reaching this conclusion, we recognize the court had the parties before it, was able to observe their demeanor, and was in a better position to evaluate them as caregivers than we are. See *In re Marriage of Engler*, 503 N.W.2d 623, 625 (Iowa Ct. App. 1993).

IV. Property Distribution

Katherine claims the district court failed to equitably divide the parties' personal property and also failed to properly distribute the equity in the marital home. For the reasons which follow, we find no merit in either argument.

The parties are entitled to a just and equitable division of the property they accumulated through their joint efforts. *In re Marriage of Fynaardt*, 545 N.W.2d 890, 894 (Iowa Ct. App. 1996). Equitable distribution does not necessarily mean equal distribution; the parties are only entitled to what is fair under the circumstances. *In re Marriage of O'Rourke*, 547 N.W.2d 864, 865 (Iowa Ct. App. 1996). We look to the factors enumerated in Iowa Code section 598.21(5) to distribute the property equitably.

The district court awarded Katherine \$9020 of assets and assigned her \$28,024.93 of liabilities (including her school loan of \$27,086.93). The court awarded Benjamin \$25,470 of assets and assigned him \$33,758.52 of liabilities (including his school loan of \$17,391.59). Katherine argues, "[t]he Court failed to make an equitable distribution of the personal property of the parties by awarding Ben nearly \$10,000 of the net distribution." We disagree.

Both of the parties came into the marriage with school loans. This was a marriage of very short duration. Not surprisingly, the district court concluded

Katherine and Benjamin should “each be responsible for their student loans and hold the other harmless.” Excluding her school loans, Katherine received a net award of \$8082. Excluding his school loans, Benjamin received a net award of \$9103. We find nothing inequitable in the district court’s distribution of the parties’ personal property and debts.

Katherine also contends the district court failed to properly distribute the equity in the marital home. The court correctly noted that the parties offered very little evidence regarding their marital residence. The court ordered the parties to sell the residence and split the net proceeds equally. On appeal, Katherine contends the district court failed to give her credit for \$10,000 of equity she claims she put into the marital home at the time it was purchased. As Benjamin points out, the problem with this argument is that Katherine did not introduce any evidence regarding this alleged contribution of equity during trial. We reject this assignment of error and affirm the court’s distribution of property.

V. Attorney Fees

Both parties request attorney fees. Appellate attorney fees are not a matter of right, but rather rest in this court’s discretion. *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006). We award no attorney fees, and we assess the costs of this appeal to Katherine.

VI. Conclusion

We affirm the court’s decision to grant joint custody with physical care of Brady with Benjamin, we affirm the district court’s property distribution, and we award no attorney fees.

AFFIRMED.