

IN THE COURT OF APPEALS OF IOWA

No. 7-700 / 07-0006
Filed October 12, 2007

**IN RE THE MARRIAGE OF BRANDON J. POWERS
AND HEATHER R. POWERS**

**Upon the Petition of
BRANDON J. POWERS,**
Petitioner-Appellant,

**And Concerning
HEATHER R. POWERS,**
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

Brandon Powers appeals the district court's grant of physical care of his two minor children to Heather Powers. **AFFIRMED AS MODIFIED AND REMANDED.**

John J. Wood of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellant.

Heather Powers, Waterloo, pro se.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Brandon Powers appeals the physical care provisions of the district court's decree dissolving his marriage to Heather Powers. We affirm as modified and remand.

I. Background Facts and Proceedings

Brandon and Heather were married in August 1992. The marriage produced two children: Hayley, born in August 1993, and Noah, born in May 1999. The children were ages thirteen and seven at the time of the dissolution proceedings. The parties' marriage was stormy with many separations and reunifications throughout. The parties' final separation was in April 2005.

Brandon is thirty-four years old and is in good health. He is a high school graduate. He has been employed at Fahr Beverage as a district manager for over six years, earning \$57,629 in 2005. The district court's dissolution decree awarded Brandon the family home as well as the 2003 Yukon. Although he has a substantial amount of debt, he is financially stable. Brandon has a 1998 conviction of domestic assault committed against Heather. After the assault the parties reunited. Noah was born thereafter.

Brandon has dated Sarah Demoss since February 2006. Demoss has three boys, whose ages are approximately ten, eight, and five. Although Brandon maintains that Demoss and her children do not live with him, Hayley testified that Demoss and the boys stay at Brandon's on a regular basis and that bunk beds were placed in Noah's room for the boys. Demoss does, however, maintain her own home. In addition, Hayley testified that there has been discussion of moving the home office to another room to provide for an additional

bedroom. Demoss's ex-husband committed numerous acts of violence against her and is now in prison. There is a no-contact order in place against Demoss's ex-husband to protect her and the children. Demoss, herself, has been convicted of operating while intoxicated within the past year. Hayley testified that she does not like Demoss and would want to live with her dad if he did not have a relationship with Demoss. Hayley claims Demoss is rude to her and that the house rules have changed since Demoss's involvement in their lives. Additionally, Hayley testified that Brandon has cussed at her and called her and Noah names. Specifically, Hayley testified as follows:

Q. Okay. And finally, you started out by saying that you would prefer to live with your mom. Do you know why that is? A. I just don't like the living arrangement at my dad's, and I don't like the way he treats me and my brother. And my brother doesn't like it either.

Q. How - - what is it about the way he treats you that you don't like? A. He yells at us. He calls my brother a little A-hole. He calls me the B word. And one time, we got into an argument over [Demoss], and he told me F you. So I don't like the way he treats us. Neither does Noah.

The record also shows that Brandon has, at times, discussed the parties' relationship with the children and put down Heather in the children's presence. Hayley, however, testified that he mostly did this back when Brandon and Heather were still talking. Now, she states that Brandon's comments are mostly limited to putting down Heather's boyfriend, who has a history of selling drugs. Brandon maintains that he is supportive of the children's relationship with their mother. In fact, he testified that Heather is a good mother. Brandon also testified that since taking the Children in the Middle course he has learned what

is inappropriate to say around his children and no longer puts Heather down in front of them.

Brandon expresses that he is concerned that Heather puts the children in the middle of their relationship. He is also concerned about his children having contact with Heather's boyfriend. Brandon sought counseling for his children to help them deal with the parties' separation. He invited Heather to participate in this counseling. Brandon believes the children need some consistency in their lives to get back on track. He does not believe Heather can provide that consistency, pointing to the fact that she has moved around a lot and financially struggles.

Brandon claims that after the parties separated he gave Heather some money from time to time to help support the children. Heather claims he did not provide her with any money and she therefore struggled to make ends meet. In June 2006 Brandon was ordered to pay Heather child support. He was often late in making the payments. Brandon claims some of the late payments were because the parties were trying to come to an agreement on who would provide the children with health insurance, even though the court ordered Heather to do so. It is unclear from the record whether Brandon is current on his child support, but there does not appear to be a significant deficit.

Heather is thirty-one years old and in good health. She dropped out of high school to marry Brandon, but obtained her G.E.D. in 1994. Heather worked throughout the marriage. During the last five years she was employed at W.W. Grainger Company earning \$26,206.70 in 2005. She worked approximately thirty hours per week and was primarily responsible for the children. Her employment

was terminated, however, in 2006. Brandon claims she was terminated for falsifying her time card. Heather admits that she inadvertently recorded her time wrong and was required to pay back approximately fifty dollars to the company, but denies this was the reason for her termination. On direct examination Heather claimed she was terminated due to the downsizing of the company, but on cross-examination she admitted that she was terminated for misconduct. She claims, however, the misconduct was for answering the phone improperly. Heather now collects unemployment of \$360 per week and works at Prestige Dry Cleaning twenty hours per week earning seven dollars per hour. Heather was awarded little property in the dissolution decree. Upon separation from Brandon, she took the parties' 2000 Volkswagen Jetta, which was free of encumbrances. She refinanced the vehicle to pay for furniture, but failed to make the payments, resulting in repossession. Heather also cashed out her 401(k) account from W.W. Grainger and kept the parties' entire tax refund of \$4600 for herself. Although the children resided with Brandon approximately one-half the time since their separation, Heather testified she needed the money to support her children by paying rent, buying groceries, school clothes, and school supplies.

Over the past three years Heather has moved multiple times, including moving in and out of the family home. She currently maintains a two-bedroom duplex. The children share a room, although Noah usually sleeps with Heather. Heather testified that Noah often slept with her and Brandon when they were together. She states it makes him feel safe and secure. Heather claims she has always had a closer relationship with the children than Brandon. Indeed, Hayley's testimony reflects that she is bonded more closely with her mother.

Heather also claims the children do not like to go to Brandon's house and beg her to not make them go.

Heather has been involved with Carl Waters. Waters has served prison time for drug convictions, including a conviction for selling drugs to minors. He currently has two pending drug cases. One of the pending cases is the result of an arrest on June 28, 2006, on the same block as Heather's residence, for possession of cocaine and driving while suspended. Although Heather claims she is no longer dating Waters, she continues to drive his 1999 Tahoe and use his cell phone. The Tahoe is registered in Heather's name because it cannot be registered in Waters's name because his driver's license is revoked. Heather claims she is currently making the payments on the Tahoe, although the loan is not in her name. Hayley testified that she has never been introduced and does not know Waters. She testified that she knows what he looks like because Brandon pointed him out when they saw him while driving somewhere. Most of the information Hayley has regarding Waters she received from Brandon. Hayley believes Waters stays with Heather when Hayley and Noah are at Brandon's home.

Heather has a recent charge of domestic assault for an August 2006 incident. Heather went to the parties' home, where Brandon resides, with Hayley and asked Hayley to use her key to enter the garage. Heather then attempted to take Brandon's truck. When Brandon heard commotion in the garage, he tried to stop her. Hayley witnessed her parents' fight. The police were called, and Heather was arrested and charged with domestic assault. Heather testified she tried to take Brandon's truck because her car was repossessed when she could

not make the payment because Brandon did not pay his child support. She claimed she needed a vehicle because she had the kids that week. Heather has also failed to take the Children in the Middle course. The children have been emotionally affected by their parents' separation, and both children's grades are suffering.

Brandon filed a petition for dissolution of marriage on January 9, 2006. The court ordered that physical care be shared between the parties, exchanging custody every Sunday; ordered Brandon to pay temporary child support to Heather in the amount of \$564 per month; and ordered Heather to provide health insurance for the children. On November 28, 2006, after a dissolution hearing, the district court awarded joint custody of Hayley and Noah to Brandon and Heather with physical placement to be with Heather, awarded Brandon liberal and reasonable visitation, ordered Brandon to pay Heather \$708 per month in child support, ordered Brandon to maintain health and dental insurance coverage for the children with the first \$500 of uncovered medical bills to be paid by Heather, ordered that Brandon be allowed to claim the children as dependents on his tax return, and divided the debts and assets of the marriage. Brandon appeals the physical care award.

II. Standard of Review

We review actions tried in equity de novo. Iowa R. App. P. 6.4. We examine the entire record and adjudicate anew the parties' rights that were properly presented. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50-51 (Iowa 1999). We give weight to the district court's findings of fact, but are not bound by them. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

III. Merits

The primary consideration in determining which parent should have physical care is the best interests of the children. Iowa R. App. P. 6.14(6)(o); *Northland v. Starr*, 581 N.W.2d 210, 212 (Iowa Ct. App. 1998). We must consider the factors set forth in Iowa Code section 598.41(3) (Supp. 2005). The objective is to place the children in the environment most likely to bring them healthy physical, mental, and social maturity. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). We must determine which parent is most likely to minister to the long-range best interests of the children. *In re Marriage of Winter*, 223 N.W.2d 165, 167 (Iowa 1974). There is a presumption that siblings should not be separated. *In re Marriage of Pundt*, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996). The primary concern remains, however, to be the best interests of the children. *In re Marriage of Brauer*, 511 N.W.2d 645, 647 (Iowa Ct. App. 1993).

Upon our de novo review, we find that Brandon is the parent most likely to meet the long-term needs of the children. Making this determination is very difficult without the advantage of seeing into the future. In close cases such as this one, we must determine which parent will do the best job in raising the children by viewing all the evidence and putting isolated events into perspective. *In re Marriage of Ihle*, 577 N.W.2d 64, 69 (Iowa Ct. App. 1998). Both Brandon and Heather have their own downfalls as well as their own positive parenting abilities. Although we are to give considerable weight to the judgment of the district court, which had the benefit of hearing and observing the parties firsthand, we note that the district court's findings of facts are incomplete. See *In re Marriage of Ford*, 563 N.W.2d 629, 631 (Iowa 1997). A more detailed

explanation of the district court's considerations and reasoning would have enabled us to more easily defer to its decision. However, viewing the record as a whole, we disagree with the district court that Heather is the more suitable parent.

Although the record is scarce on the subject, it appears Heather was the primary caretaker of the children during the parties' marriage. It also appears that Heather is a decent mother. Brandon even testified to this. Heather adequately tends to the needs of her children, both physically and emotionally. It is obvious she loves the children, and they are bonded with her.

However, Heather has made some poor decisions in her life that have negatively affected her children. Upon separation from Brandon, she made some very poor financial decisions that have put her in a financial bind, keeping her from adequately providing for her children. To add to these problems, she lost her job due to her own actions and has not found employment to replace her earnings. In the midst of her financial problems, she involved her daughter in a domestic dispute by entering Brandon's home and attempting to take his truck without permission. These actions lead to Hayley witnessing a very disturbing encounter between her parents, with her mother being arrested in the end. This set a very poor example for the children. It is also noteworthy that Heather has failed to attend the Children in the Middle course.

Heather's connection with Waters deeply concerns this court. His involvement in drugs, specifically selling drugs to minors, and his arrest near Heather's home is something to which children should not be exposed. We commend Heather for isolating her children from this man, but the fact remains

that she is still involved with him in some capacity. This involvement is evidenced by Heather driving his vehicle and using his cell phone. Any significant involvement is likely to lead to exposure of this man to the children.

Brandon is capable of providing the children with stability, with which Heather has struggled. Brandon is more financially secure and maintains the family home. Although he may not have been the primary caretaker of the children during the marriage, he has had them every other week since the parties' separation over one year before the dissolution hearing. Although Hayley testifies she does not like the living arrangement at Brandon's, she gives no persuasive reason why it is so intolerable. Although she does not like her dad's new girlfriend, Hayley only claims that Demoss is rude to her at times. Hayley may complain about the rules, but none of the rules mentioned were so outrageous to be found unreasonable. Hayley testifies that Noah gets along well with at least two of Demoss's children. We are most concerned, however, with Hayley's testimony regarding Brandon's foul language and name-calling. We acknowledge that any parent is likely to argue with his teenage daughter, but the use of this language is entirely inappropriate.

Brandon has expressed that he believes his children have a good relationship with Heather and he intends to foster that relationship. Heather should be allotted very liberal visitation. Her bond with these children is very important. The stability Brandon can provide should be complimented with Heather's bond.

Accordingly, we modify the decree previously entered by the district court to award physical care of Hayley and Noah to Brandon. We remand the case to

the district court for entry of further orders consistent with this decision including visitation, child support, and completion of the Children in the Middle course by Heather. Costs of this appeal shall be divided equally between the parties.

AFFIRMED AS MODIFIED AND REMANDED.