



IN THE IOWA COURT OF APPEALS

IN RE THE MARRIAGE OF ANNE M. AHRENS AND GEORGE L. AHRENS

Upon the Petition of	)	
ANNE M. AHRENS,	)	Filed May 26, 1981
Petitioner-Appellant,	)	1-26
And Concerning	)	3-64987
GEORGE L. AHRENS,	)	
Respondent-Appellee.	)	

Appeal from Boone District Court. Albert Habhab, Judge.

Petitioner wife appeals from provisions of dissolution decree concerning child custody, possession of the home and personal property award. MODIFIED AND AFFIRMED.

James H. Waters, Ankeny, Ia., for petitioner-appellant.

Jim P. Robbins of Mahoney, Jordan, Mahoney & Danielson, Boone, Ia., for respondent-appellee.

Heard by Oxberger, C.J., and Danielson, Snell, Carter, and Johnson, JJ.

OXBERGER, C. J.

Petitioner, Anne Ahrens, appeals from dissolution decree provisions regarding child custody, occupation of the family home and personal property division. We modify and affirm.

The parties were married in 1964. Anne filed petition for dissolution on May 16, 1978. A default decree of dissolution was filed on February 12, 1979. Following George's motion and pursuant to a stipulation by the parties, this decree was set aside with the exception of the dissolution of the marriage. The matters concerning child custody, support and property division came up on hearing February 7, 1980. On April 29, 1980 trial court issued a ruling awarding George custody of the parties' three daughters, ages 15, 13 and 9, and awarding him the present possession of the family farm and home until the daughters are grown at which time the property is to be sold and the proceeds divided. Anne appeals those provisions and also the award of a 1973 Chevy pickup truck to George. She seeks attorney fees on appeal. Our review is de novo. Iowa R. App. P. 4.

L. Custody.

The general principles concerning child custody have been set forth in In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974). We do not reiterate them here but view this matter under those guidelines. We also consider the fact the trial court has considerable discretion in a custody determination. See In re Marriage of Dawson, 214 N.W.2d 131 (Iowa 1974).

The trial court based its custody conclusion on what it termed the moral misconduct of Anne. We view moral misconduct as a factor to consider, but such conduct does not per se deprive a parent of custody. Each case must be decided on its own facts. Dawson, *supra* at 132.

We find evidence of extra-marital relationships on the part of both parties. At the time of hearing George had a girlfriend with whom he had spent "a few nights." Four months after the original dissolution of the marriage, Ken McConnell moved into the Ahren's home with Anne and the children. The violent propensities attributed to Mr. McConnell stem from one, isolated incident upon which Anne took positive steps to remedy. Anne and the girls fully discussed Mr. McConnell's association with them and agreed he would be welcome in their home provided he control his drinking. Mr.

McConnell promised to do this; and he and Anne, at the time of hearing, were attending counseling sessions for alcoholic treatment and stress-related problems. We cannot conclude Anne's relationship with Mr. McConnell to be detrimental to the children's welfare.

Furthermore, we find the moral misconduct factor is outweighed by other considerations. For the past few years, George has held two, full-time jobs and has spent his vacations and spare time apart from the family. In all, he has been absent from the home and family more than half the time. His involvement with the girls and their activities was naturally limited throughout those years. During the pendency of the custody issue, George made no marked attempt to increase his contact with the girls. Nevertheless, he testified he would modify his employment if necessary to alleviate the absences. His assurance to the court pales, however, under the past record of Anne's continued devotion and commitment to the daily care of the children over the years.

We next consider the children's preference and according to the Winters criteria afford it some weight. The evidence shows and trial court recognized the girls to be mature, well-adjusted young people. Two of the girls unequivocally stated their preference for Anne's custody with liberal visitation by George, while the third surmised this arrangement would be the better alternative. We find no reason to disregard this preference. We do not find the evidence supports the award of custody to George and so modify the trial court's ruling to place custody of the children with Anne.

As we have modified the custody award, it becomes necessary to modify the child support provisions of the order. In 1979 George earned \$22,500 and Anne earned \$16,500. We, therefore, provide that George shall pay Anne as child support, into the office of Clerk of Court, the sum of \$40 per week per child continuing until such time as each child attains the age of 18 years, dies, marries or becomes self-supporting, whichever comes first. Educational expenses shall be permitted under section 598.1(2), The Code 1979, for each child qualifying thereunder.

II. Occupation of the Home.

It is clear from the record the children's custodian should possess the home and farm during the children's minor years. In addition, we find the home and farm should be awarded to Anne. The property was originally owned by Anne's mother and was sold on contract to the parties fifteen years ago. The contract price was indisputably low,

but no evidence appears of the fair market value at that time to determine any inheritance or gift value to Anne. Since that time each party contributed certain inheritances to improve the property, George in the amount of \$16,000 and Anne in the amount of \$25,000. Fixing the property's present value at \$160,400 less \$4,500 outstanding debt and allowing for the contributions, we find George's share of the marital asset to be \$68,950, which amount shall constitute a lien on the property. This share shall be payable by Anne within one year after the youngest child graduates from high school or becomes eighteen years of age, whichever occurs last. George shall receive annual interest at the rate of 9% per annum on the unpaid balance due on or before May 1st of each year. Anne is responsible for payment of the outstanding balance on the contract of \$4,500. Other provisions of the original decree relating to the property are modified to conform to this award.

III. Personal Property.

The evidence supports Anne's position that the 1973 Chevy pickup was to be considered a unit with the horse hauling equipment used exclusively by Anne and the girls. We modify the order and award Anne the 1973 Chevy pickup. George is awarded the 1955 International pickup.

IV. Attorney Fees.

Anne seeks an award for attorney's fees on appeal. As firmly established attorney fees are not awarded as a matter of right. It depends on the parties' needs and abilities to pay. We find under the circumstances no attorney fees should be awarded. Costs are assessed to George.

MODIFIED AND AFFIRMED.

All judges concur, except Donielson and Carter, JJ. who dissent.

DONIELSON, J. (dissenting)

Our first and governing consideration in determining child custody is the best interests of the children involved, Iowa R. App. P. 14(f)(15), with the ultimate question being, based on the entire record, which of the parents can minister more effectively to the long-range best interests of the children. Id.; In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). There has been no showing made in the instant case that that parent is the petitioner. If anything, there is evidence to the contrary. Although I agree that evidence of the petitioner's moral misconduct is not controlling, particularly since both parties seem to have engaged in extra-marital relationships, it certainly merits serious consideration. In re Marriage of Morton, 244 N.W.2d 819, 821-22 (Iowa 1976). Moreover, I cannot condone the children's prolonged exposure to the petitioner's boyfriend, who has demonstrated a violent nature in connection with his drinking problem.

Although our review is de novo, we may reverse the trial court's custody determination only when an abuse of discretion has been demonstrated. In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). No such showing has been made here. Moreover, we should bear in mind that the trial court judge, who had the opportunity to observe the witnesses and their demeanor, concluded that the best interests of these children required an award of custody to the respondent father. Such findings are accorded weight by this court, particularly where the credibility of witnesses is involved. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). On the basis of these considerations, I would affirm the award of custody to the respondent.

Carter, J., joins in this dissent.