

FILED

MAY 20 1977

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IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

IN RE THE MARRIAGE OF)

LINDA D. BLACK,)

Appellant,)

And Concerning)

PATRICK LEO BLACK,)

Appellee.

Filed May 20, 1977

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3-59354

Appeal from Pottawattamie District Court - E. F. Hanson,
Judge.

Appeal of children's custody awarded to father. Affirmed.

Kenneth Sacks, of Perkins, Sacks & Hannan, of Council
Bluffs, for Appellant.

Raymond E. Pogge, of Pogge, Root and Steege, of Council
Bluffs, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger
and Carter, JJ.

SNELL, J.

This is an appeal by petitioner, Linda D. Black, from the judgment of the district court in a dissolution of marriage action awarding custody of her two minor children to respondent, Patrick Leo Black. The only question presented on appeal is the proper custody of the parties' two children.

The children are Vincent, born April 3, 1970, and Dawn, born March 7, 1972. In August, 1975, the parties separated and Linda commenced the action for dissolution of marriage. On November 15, 1975, the parties met with their attorneys to discuss settlement terms. At that time, Linda received \$2400 as her share of the sale of the parties' home. Arrangements were made for Patrick to pick up the children that afternoon for the weekend. When he went to Linda's mobile home to get the children, he found a note on the door stating that Linda was visiting relatives and he could have the children the following Monday for a week. On Monday he was unable to locate Linda or the children. She had taken the children and gone to Texas with one Harry Moritz. She remained in Texas living with Moritz until February 7, 1976, without telling her husband, Patrick, or anyone else, other than a girlfriend, where she was. Patrick was unable to locate her until sometime during the latter part of January, 1976.

When Linda returned to Iowa, Patrick obtained the children and subsequently refused to return them to her. Since February 13, 1976, Patrick and the children have been living in his parents' home in Silver City, Iowa.

Our review of these matters is de novo. In re Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974). The principles that guide us in determining what is the best interest of the child are set forth in In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974). The court there listed twelve principles that have

a bearing on custody.

Linda suggests that the determination by the trial court of custody partakes of punishing her for her moral conduct. She argues that she can best take care of the children being at home more than their father who is working and away from home during some of the nights of the week. Linda further argues that Patrick's parents may not be able to adequately care for the children since his mother is 60 years old, his father is 62 and has recently undergone lung surgery.

We have examined the record and find that the best interests of the children will be served by having permanent custody with Patrick. There is ample evidence of Patrick's love for his children and his concern for their welfare. He has a good relationship with his children, spends considerable time with them, is concerned with their religious training and attends to their discipline. He exhibited patience and understanding with Vincent and often took him fishing. The record shows that Patrick, with the help of his parents, is better able to provide a stable environment for the physical and emotional growth of his children.

Patrick's father, though recovering from lung surgery, is otherwise in good health and his mother is in good health. His mother raised four children and acted as foster parent at various times for several others. They own and live in a 24 room house which is where Patrick and the children also live. The house is paid for and Patrick's mother states they have no financial problems.

Linda proposed to marry Harry Moritz after her dissolution from Patrick and take the children to Arlington, Texas. She did state that if required to stay in Iowa in order to have custody of the children, she would do so. However, the record

does not disclose prospects for a stable home life for the children in any way equal to that available with Patrick.

During Linda's stay in Texas with Harry Moritz, she pooled her \$2400 with his money and mostly spent it for household furnishings and living expenses. She did this at the same time she had a paid-up rented mobile home in Iowa. Harry Moritz' occupation was selling jewelry through various truck stops in Iowa. However, he recently abandoned that employment in favor of selling Datsons for an agency in Arlington, Texas. Additionally, there is evidence of poor house-keeping by Linda, neglect of her children, inattention to their needs and failure to supervise them. Evidence also appears in the record of the children's fear of Harry Moritz.

Patrick is a union carpenter in a local at Omaha, Nebraska. For the last four years he has worked as a millwright erecting grain elevators for his father's corporation. Although this work has wained, Patrick is confident that he can always get work in his trade.

We find no evidence that the trial court determined custody with a view to punishing any party. The best interests of the children lie in permanent custody with Patrick. Judgment affirmed.

Carter, J. concurs; Allbee, C.J., and Donielson, J. each specially concur; Oxberger, J. dissents.

ALLBEE, C.J. (specially concurring)

Lengthy recital of evidence of the shortcomings of one party or the other is of no useful purpose in this case. Both Linda and Patrick love the children. Both parents have demonstrated concern of their children's care and needs. Both are fit to be the custodial parent. But Patrick has convincingly shown he is more able and willing to make the sacrifices necessary in rearing the children such as will provide for their long range best interests. *See In re Marriage of Abild*, 243 N.W.2d 541, 542 (Iowa 1976). Accordingly, I concur in the result reached by the majority.

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DONIELSON, J. (concurring specially)

I concur with the results of the majority. The evidence is overwhelming in respect to Patrick's love, affection and ability to care for the children satisfactorily through his parents' home. The evidence relating to Linda's lack of concern and consideration for her children is substantial. Just prior to the dissolution, Linda had venereal disease and Patrick's tests were found to be negative. When she was taking care of the children, the testimony indicates that several times a week, she would have a babysitter, leave home and sometimes not return home until the next day. The children were unable to get into the home at times. She failed to keep a clean house and showed in general a lack of genuine concern for the children. There was testimony that the children had been mistreated by Linda's new paramour and the children were afraid of him. Her conduct with him in front of the children is illustrative of the lack of consideration for the children.

I do not agree with the special concurring opinion which states that both are fit to be custodial parents. I view the evidence as being that Patrick is fit to be a custodial parent and Linda is not. This case is similar to *McNamara v. McNamara*, 181 N.W.2d 206, 209-210 (Iowa 1970). If rule 344(f)15, Rules of Civil Procedure, and the guidelines and principles set forth in *In re Marriage of Winter*, 223 N.W.2d 165 (Iowa 1974) and *In re Marriage of Bowen*, 219 N.W.2d 683 (Iowa 1974) are to mean anything, then this is the case that requires a strong and positive decision by this court which has not occurred. I view the record here as overwhelmingly supportive of the trial judge's decision.

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Oxberger, J. (dissenting)

I dissent.

We sit as trier de novo of this case. We have no disinterested parties. No attorney to represent the children was appointed. No professional social worker's counsel or psychologist's advice appears in the record. A psychiatrist was consulted but not called as a witness. The future course of these two children's lives turns upon our discernment of which parent should care for and guide them on a day-to-day basis.

Linda was before the trial court in what proved to be a devastating posture. In mid-November 1975 upon the conclusion of a stipulation between she and Patrick, with counsel for each present, she received \$2400 property settlement, a promise of \$30 weekly child support, custody of Vince and Dawn, and no alimony. Linda, within a few days, left Iowa with the two youngsters and quickly established, with her lover, Harry Moritz, a household in Texas. She and the children remained there from mid-November, 1975 until early February, 1976. She made no contact with Patrick until the eve of her return for a visit to Iowa. Returning to Iowa, she immediately allowed the children access to their father and his family. For all practical purposes her custody of the children ended with this overture toward Patrick.

For the folly of her ways she now finds neighbors of varying degrees of acquaintance, a formidable array of in-laws and Patrick ready to condemn her parenting capacity, fault her housekeeping skills and performance, and in general to attest to her unfitness as a custodial parent.

Without dispute the children appear normal, healthy, spirited and, under the circumstances, happy. Without dispute until February 8, 1976, Linda was the de facto custodial parent for these children from the day of their birth. Patrick was

required by his work to be away from home from Monday through Friday each week during these six years. From the age of sixteen Linda has devoted herself to the maintenance of the children and the home. By her account, she sewed much of the children's wardrobe, disciplined and nurtured the children's days, endured protracted and extensive household remodeling and kept a tolerable order in the household.

By Patrick and his witnesses, she kept a slovenly household, neglected the children by ignoring their safety, their cleanliness and their diet, and stayed away from home overnight leaving the children with a sitter. By Linda's account Patrick's work-imposed absences stunted not only the marriage but inevitably his relationship with the children as well. She asserted his discipline was inconsistent and confusing and far too often rooted in anger.

For all practical purposes, Patrick's parenting began February 8, 1976. His fathering to this time consisted of weekends devoted to fishing with Vince and the neighbor fathers and sons and of frequent visits to his family enclave (by Linda's testimony). In February 1976 he took the children, with whom he had no time for more than two and one half months, immediately for a succession of family and neighbor visits. He, at the children's insistence by his account, allowed them to stay overnight with these various families while he stayed overnight nearby with various relatives and neighbors. With these visits he immediately embarked on a tit-for-tat course secreting the children from Linda as she had earlier done from him. He, thereby, kept Vince from school for the entire week.

The record of the months of separation further discloses Patrick's attitude toward his family. In mid-November 1975 Patrick fully aware of the meagre earnings of Linda, and the

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bleak prospect for any increase, stipulated to pay a total of \$30 weekly child support for two children and no alimony. He had a yearly taxable income of \$25,000 plus. Linda testified during the months after she filed for dissolution Patrick harassed, harangued and maintained surveillance of her with a constant attack upon the inadequacy of her parents' home as a home for she and the children. She said he used her financial plight as an occasion to attack her inadequacy and to threaten to gain custody.

Linda claimed the anger which led Patrick earlier to forceably detain her in the household and to throw her against a truck and yank the children by their hands down the street extended into the separation. Never once did he say he would exit from the house so that Linda could maintain the children in the family home and continue their relationships in the neighborhood. Rather, he hastened, after the filing of the petition and Linda's move, to vacate the house, move in with his parents and sell the house.

By all accounts this marriage began in pregnancy when Linda was 16. It ends with both Linda and Patrick devoted, each in their own fashion, to the children. The trial court awarded custody to Patrick on the basis of less than 45 days of demonstrated parenting. I submit this award cannot stand. The children themselves are the best testament - they are products of Linda's days and her wisdom. They should not be denied this sustenance because for a brief period of time their mother's wisdom faltered.

In judging Linda's faltered wisdom we must view it in perspective. Her back was to the wall. Her marriage had collapsed. For some time, Patrick had remained in the marriage for the children's sake. Linda felt Patrick had married her not for love but because she was pregnant. Nothing Linda could

do would please Patrick. She tried to get him to go with her to a marriage counselor but he told her it wouldn't do any good, it wouldn't change him to please her.

Linda was desperate financially. Patrick had been threatening to take the children because she didn't have large enough quarters. Yet, it was he who had insisted that she and the children vacate the family home. He would only agree to \$15 per week per child and no alimony. This, in spite of the fact he earned \$25,000 annually. Finally, the last straw broke. Patrick called and told her that the children wanted to live with him and he was going to let them. She had had it with the problem of getting the children adjusted each week after visits with Patrick.

Moritz offered her a way out of her dilemma. He cared for her and treated her better than Patrick had. We must judge Linda's actions, not in a vacuum, but in the total circumstances. She was drowning and grabbed for help. It was that simple.

The only issue before this court is whether Linda can provide, *in the future*, the necessary parenting. I submit her acts with Moritz were out of keeping with her previous life pattern. Further, throughout these indiscretions she remained daily attentive to the children and their needs.

Unlike the mother to whom custody was affirmed in *In re Marriage of Dawson*, 214 N.W.2d 131, 132 (Iowa 1976) she did not deny sexual intercourse with Moritz. *Dawson*, at the trial level and in the Supreme Court, recognized that despite the mother's frequent sexual misconduct she was the parent with "the capacity to provide more love, affection and kindness to the children." Linda's parenting life has demonstrated this capacity and she has further shown a remarkable fidelity to truth in the most bitter and exacerbating of circumstances.

In deciding this case we must look for capacity for parenting as it is indicated from the years logged in to date. In re Marriage of McFarland, 239 N.W.2d 175, 178 (Iowa 1976). Charlotte Rowen was the one neighbor appearing before the court who had had frequent and sustained contact with the household from 1973 until its demise. She became a close friend and confidante of Linda. Her account of Linda and Patrick is the only non-family account which stems from observations of both parties in the household as parents. Her words are a graphically balanced and revelatory witness. She concluded quite simply Linda should have custody of the children because she had sustained them by love and discipline. Linda yelled but she loved. She was finding through love and discipline a way to reach the anger in Vince and release it. Rowen saw Dawn as living in a dream world and Linda able to win her to reality. Rowen said Linda and Patrick were like all other parents on the block in the amount of freedom and supervision accorded the out-door activities of their children.

This case should not turn on three sacks of garbage setting beside the back door, or pajamas and wet pants in the yard, or a little child's inability to reach or maneuver the screen door handle yelling to get in the house. All of these allegedly damaging incidents-albeit for most parents routine and negligible events-happened well before the petition was filed and long before Patrick's stipulation Linda should be the caretaker parent.

Linda stood before the court and staunchly answered for each transgression of this volatile period and she did not turn away. She said, in fact, she was not saying what she had done was the right thing. She said if the court deemed it necessary she would establish a home for herself and the children within the jurisdiction of the court.

The children have not been shown to have been adversely affected by her misconduct. Indeed, she continued throughout all those difficult and trying days to minister to their needs.

Linda is only a little like the *Jacobs* mother, In re Marriage of *Jacobs*, 216 N.W.2d 312 (Iowa 1974), who had used up a "lifetime of mistakes". Yet, the *Jacobs* court refused in the face of the birth of two illegitimate children and arrests for drunkenness and drug possession *after* dissolution to award a parttime father custody.

In re Marriage of *Snyder*, 241 N.W.2d 733 (Iowa 1976) involved a mother's appeal from an award of custody of the three-year-old son to the father. Upon separation the father kept the boy refusing to honor his promise to turn over custody. He promptly turned over the major responsibility for the child to his mother. He was a father often away from home because of his occupation. The court, on the whole record, despite asserted incidents of the mother's adulterous and irresponsible conduct, reversed the trial court. The father had had the child for almost two years from the separation to the appeal decision when the court concluded the long range best interests of the child lay with the mother.

On the whole record, Vince and Dawn have always had a full-time mother and a part-time father. The trial court erred in uprooting their lives and awarding custody to Patrick. Such custody amounts to little more than an award of the children to their paternal grandmother and a withholding from the mother.

Linda should continue the daily custodial care of Vince and Dawn. Patrick should accommodate his fathering to his available hours for such activity-weekends. Further, he should be required by the court to assume his support duties for the children and for Linda at a level which will provide Linda with the requisite financial resources to establish a household and maintain it.