

IN THE COURT OF APPEALS OF IOWA

FILED

FEB 26 1986

IN RE THE MARRIAGE OF ARTHUR W. VAN BRUGGEN AND PHYLLIS M. VAN BRUGGEN
CLERK SUPREME COURT

UPON THE PETITION OF
ARTHUR W. VAN BRUGGEN,

Petitioner-appellee/Cross-Appellant,

AND CONCERNING
PHYLLIS M. VAN BRUGGEN,

Respondent-Appellant/Cross-Appellee.

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Appeal from the Iowa District Court for Sioux County (No. 15745), Dewie J. Gaul, Judge.

Both parties have appealed from the custody and property provisions of their divorce decree and certain rulings of the court. **AFFIRMED AS MODIFIED.**

James W. Redmond and Molly M. Williams of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for the respondent-appellant/cross-appellee.

Michael W. Ellwanger of Kindig, Beebe, Rawlings, Nieland, Probasco & Killinger, Sioux City, for petitioner-appellee/cross-appellant.

Heard by Oxberger, C.J., Snell, and Schlegel, JJ.

Both parties have appealed from the decree which dissolved their marriage. The mother-respondent contends physical custody of the parties' two children should have been placed with her, that the child support award is too high, portions of the property award improper, and a new trial should be granted because too much emphasis was placed upon "fault" of the respondent. Petitioner asserts the debts of the parties were not properly allocated and the court erred in not allowing medical records of respondent's hospitalization to be admitted into evidence. We affirm as modified.

The parties, Phyllis and Art Van Bruggen, married in 1977. Phyllis had a teenage daughter at the time of the marriage, Joy, who is now an adult. Two children were born during the marriage, David, born April 26, 1978, and Cindy, born July 28, 1980. During the marriage a trust came into effect from funds left to Phyllis following her father's death. She receives approximately \$2000 per month from this trust plus an additional \$243.87 from the contract sale of a house she previously owned. Art is thirty-six years old and a Certified Public Accountant. He operates three accounting offices and in 1984 received gross income of \$21,058. Art also invests in commodities which have brought income ranging from \$120 to \$14,192 between 1979 and 1983. He did not obtain any income from such investments in 1984.

Toward the end of the marriage, the couple decided to build an earth home. It cost considerably more than expected and resulted in substantial debt to the family of \$225,000. Each party claims the other made additions to the original plans for the home that resulted in increasing the costs. Some of the money for the project came from Phyllis's trust. Art estimates \$30,000 was paid from trust income Phyllis received, and they obtained a loan from her trust.

The marriage continued to deteriorate and Phyllis says she felt considerable

pressure in taking care of construction of the house, moving into the house, caring for her elderly mother and her two children during a period when Art was frequently not home because it was tax season. She admitted herself to a hospital for rest for five days. Following counseling, the couple separated in September 1983. After reconciling, separating again and reconciling, Phyllis moved with the couple's two children to Michigan in February 1984. Her daughter Joy was seventeen and wished to finish her high school senior year in Sheldon. Phyllis says she allowed her daughter to stay because Art would "keep an eye on her." Art says he did not agree to this.

It is undisputed that there was considerable friction between Joy and Art. Art did not like the friendly relationship between Joy and her father and stated he did not understand why she had to visit him. The friction caused additional problems between Phyllis and Art.

After moving to Michigan with the two young children, Phyllis moved in with a man she had known, Ed Fisher. They made plans in fall of 1984 to be married after the divorce was final.

A guardian ad litem was appointed on behalf of the minor children. He recommended that Phyllis be given physical custody of the children. The court instead awarded custody to Art. It also provided that the earth home would be sold and the proceeds used to pay the debts on the house. Any moneys left over would be split equally. Phyllis was ordered to pay \$670 per month in child support.

We will first dispose of Phyllis's contention the decree should be overturned and a new trial ordered on the ground the court based its award upon a finding of fault by Phyllis or because the guardian ad litem did not cross-examine witnesses. Phyllis and Art stipulated the guardian ad litem could file

his report and not attend trial. We see no reason why they should not be held to this agreement. Fault is not to be considered in making an award in a divorce decree except as it affects the children. In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). The court put considerable emphasis on what it found to be Phyllis's "moral misconduct" in living with Fisher following filing of the divorce petition. The court went on at length, giving its opinion regarding relationships which develop before a divorce is finalized. It said in part:

The Respondent's behavior and what some might term her fatuous rationalization that her desires and her impatience over the fact that these dissolution proceedings, instituted less than one year ago, are only now terminating justify her moving into another man's home with young children and absolve her from moral blame in so doing, cannot, under the record here made, be deemed acceptable in one to have the physical care of impressionable children when a more acceptable alternative is present. Respondent's attitude and the apparent attitude of her male housemate in this regard justify skepticism by Petitioner and by the court about the children being in the physical care of Respondent a majority of the time.

There is a fine line between considering the moral misconduct of a party, a factor properly included in determining a custody award, In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983), and punishing a person for "fault," which is not permitted, Dawson, at 132; Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972). The court put more weight into Phyllis's actions than we believe should have been accorded; however, we find it unnecessary to order a new trial since we find custody should be awarded to the mother.

This court has repeatedly indicated that a spouse's activities in dating another person are to be given little consideration unless there is evidence that it in some way affects the children. In re Marriage of Grandinetti, at 879; Dawson, at 132; see also In re Marriage of Kramer, 297 N.W.2d 359, 362 (Iowa 1980)); In re Marriage of Kehrli, 241 N.W.2d 923, 024 (Iowa 1976). While we

will consider it a strong factor against awarding custody to a particular parent if that parent's conduct adversely affects the child, that is clearly not the case here. The trial court admitted in its ruling that Phyllis's actions in living with a man while taking care of her children has little affect on them now because they are so young. Yet the trial court worried that as the children grew older, it would affect them. However, Phyllis intends to marry Fisher once the divorce decree is final.

The trial court also criticized Phyllis's actions in taking the young girl to a day care center for a portion of the day during the week, although she did not work outside the home. Phyllis explained she was doing this so the four-year-old would be prepared for kindergarten and would have the chance to interact with other children. The trial court and Art do not dispute that both children have thrived while in their mother's care. The guardian ad litem approved of the action taking the girl to day care. We do not find this a significant factor weighing against Phyllis, but rather an indication of her thoughtfulness in providing good social interaction for the children.

We also do not agree that respondent should be condemned for allowing her daughter, Joy, now twenty years old, to live on her own in Iowa.

On the other hand, the evidence is considerable that Phyllis has been the primary caretaker of these children since their birth and that the children have prospered in her care. Art acknowledges this in a letter sent by him to Phyllis and admitted into evidence. It shows he agrees he did not treat Joy well. He also admits Phyllis has been a superior mother and that David and Cindy are receiving excellent care with Phyllis.

The man Phyllis intends to marry also shows excellent parenting capabilities. Fisher was previously married for thirty-six years before being widowed. He

has sixteen children, and all but two have finished college degrees. One retarded child has been cared for by Fisher in his home. He testified at trial that he encourages a close relationship between Cindy and David and their father. A review of the record confirms he is a thoughtful and patient parent, and that Phyllis is a protective and loving mother.

Art also loves his children and could provide them with a good home on an Iowa farm. However, it is undisputed that Art's work requires him to spend considerable amount of time away from home. Phyllis testified that Art did not show a lot of interest in the children in the past. He agrees this may be true, but says that he has now changed. Art did not want physical custody of the children, but later decided he wanted custody, saying he had decided work was not as high a priority as it had been. Art presented a number of witnesses who lived in Iowa testifying to his abilities as a parent. Phyllis says she is more careful with the children, noting her objection to Art taking David with him on a motorcycle when David was four or five years old and another time when Art took the two young children out in a boat without life jackets although neither could swim. Art also never carried medical insurance for the children, and said he did not know how he would pay the bills if either child needed significant medical care.

Finally, Art points to Phyllis' five-day hospitalization as evidence of her emotional instability. However, we find evidence of Phyllis's maturity in admitting herself to the hospital for help when she was undergoing a period of severe stress. We also reject Art's contention the court erred in not admitting the medical records compiled during Phyllis's brief stay. He says the records should be allowed into evidence because it is an element of the lawsuit, while Phyllis says the court properly found the evidence to fall within the doctor-patient

privilege. The parties have not cited this court to Iowa authorities supporting the propositions that the mother's mental condition is or is not an element of the action which allows an exception to the doctor-patient privilege codified at section 622.10. During trial, counsel referred to one case from another jurisdiction, Roper v. Roper, 336 So. 2d 654, 656 (Fla. Dist. Ct. App. 1976) which held the wife's mental condition ordinarily is not an element of a custody claim, but may become an issue which would allow the medical evidence. We do not find it necessary to address this issue. The pertinent medical records were presented in an offer of proof in this case. After examining this offer of proof, this court concludes that the information in these records is limited to brief nurses' notes and various lab tests, and would offer little relevant evidence on the subject of Phyllis's mental state.

In reviewing the testimony of the witnesses, the guardian ad litem report, and all the evidence available on appeal, we find that the record shows the children's best interests will be best served by continuing their placement with their mother and allowing Art the same generous visitation privileges which the court originally gave to Phyllis in its decree. We so modify the award.

As a result of this determination, we must also modify the child support award. Phyllis's income is approximately \$2243 per month, while Art has available approximately \$1754 per month. In addition, Phyllis has no utility or house expenses since she began living with Fisher. Fisher testified his financial situation is "comfortable" and that his father was the president of S.S. Kresge Company. Considering the needs of the children and the financial situation of the parties, we find Art shall contribute \$200 per month in child support and shall be required to pay one-half of the children's college expenses when they reach eighteen if the conditions of section 598.1(2) are met. Phyllis shall be able to claim the children as dependents on her tax returns.

Phyllis contends the property award is inequitable because certain portions

of the earth home and its furnishings and a tractor were purchased with Phyllis's separate inheritance. However, Phyllis voluntarily placed her money into the project for her own benefit and that of the family. Each party claims the other added to the costs of the home, but the record confirms added costs were the results of changes made by both Phyllis and Art. Inherited property when not used for family expenses during the marriage will ordinarily be kept with the party receiving it. In re Marriage of Wood, 325 N.W.2d 774, 775 (Iowa Ct. App. 1982). This money was used for family expenses and we find the court equitably divided the debts and assets of the home. We further disagree with Art's argument that the earth home debt should be divided differently since Phyllis has three times the income of petitioner. We find no basis for this claim, and instead the record shows Phyllis receives only slightly more in income each month than does Art.

All other aspects of the decree are affirmed.

AFFIRMED AS MODIFIED.