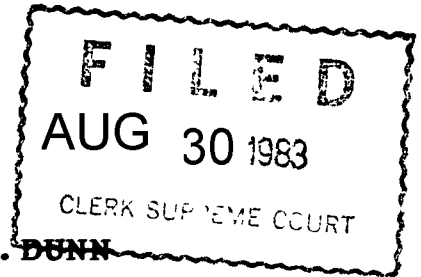


IN THE COURT OF APPEALS OF IOWA



IN RE THE MARRIAGE OF ROGER D. DUNN AND SHELLY A. DUNN

UPON THE PETITION OF
ROGER D. DUNN,

Petitioner-Appellee,

AND CONCERNING
SHELLY A. DUNN,

Respondent-Appellant.

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Filed August 30, 1983

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3-69422

Appeal from Scott District Court, Max R. Werling, Judge.

Respondent-wife appeals from the decree dissolving the parties' marriage.

AFFIRMED AS MODIFIED.

Patricia Rhodes Cepican of McDonald, Stonebraker & Cepican, Davenport,
for respondent-appellant.

Edmund H. Carroll of Shorey, Plath & Carroll, Davenport, for petitioner-
appellee.

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

DONIELSON, J.

Respondent-wife appeals from the decree dissolving the parties' marriage. On appeal, respondent-wife asserts (1) that the best interests of the parties' two children require that she be awarded custody; (2) that if the trial court's award of custody to petitioner-husband is affirmed, the child support respondent-wife is required to pay should be reduced and the restriction against her exercising overnight visitation with the children when she is sharing a residence with a male to whom she is not married should be removed; (3) that the property division should be modified by awarding respondent-wife the roll-away couch, by excluding respondent-wife's inheritance, and by requiring petitioner-husband either to return a certain charge card or pay the bill; and (4) that the trial court should have awarded respondent-wife attorney fees. Both parties request attorney fees on appeal. We affirm as modified.

I. Scope of Review

Our review of this dissolution action is de novo. Iowa R. Civ. P. 4. We review the facts and the law and determine anew from the credible evidence the rights of the parties on the issues presented. In re Marriage of Winegard, 257 N.W.2d 609, 613 (Iowa 1977). While the trial court's findings are accorded considerable weight, they are not binding upon us. In re Marriage of Burham, 283 N.W.2d 269, 274 (Iowa 1979).

II. Custody of the Children

The overriding consideration in custody disputes is the best interests of the children. Custody is not to be used either as a reward or as a punishment for either parent. In re Marriage of Castle, 312 N.W.2d 147, 149 (Iowa App. 1981).

One of the considerations that led the trial court to conclude that Roger was more suited to be the custodial parent than Shelly was Shelly's marital misconduct. During the course of the marriage, Shelly had more than one

adulterous relationship, and the present dissolution action was occasioned by Roger's discovery of Shelly and his brother in compromising circumstances. Shelly's affair with Roger's brother continued at least up to the time of the decree.

Marital misconduct and unconventional sexual behavior are not in themselves sufficient to justify denying to one parent or the other custody of his or her children. However, it is not inappropriate for the court to take such facts into account when determining which parent is more likely to provide a stable, healthful home environment for the children.

In this case, however, the court based its conclusions upon considerations that weigh far more heavily than Shelly's adulterous relationships.

Roger lives in a rented three-bedroom home in a residential neighborhood. Shannon, aged nine, attends a neighborhood school about a mile from home. Donnie, aged four, is not yet in school. Each of the children has his or her own bedroom. The children and their father have a well-organized routine, with specific chores assigned to the children. When Roger is at work, the children are cared for by Roger's mother in her two-story residence. The children attend church and have friends in the neighborhood and (in the case of Shannon) at school, and Shannon is doing well in school.

Shelly abandoned Roger and her children in order to pursue her relationship with Roger's brother. She lives in a small apartment with Roger's brother. She has suffered from severe depressions and has attempted, on at least one occasion, to commit suicide. On two prior occasions, she has left the children with Roger, saying that he was better able than she to care for them. For a time, at least, she neglected her household duties and her children.

Although some of Roger's behavior reflects some immaturity, we cannot say that it raises serious doubts in our minds about his ability to care for his children and to provide a healthful, stable environment for them.

In the light of these considerations, we cannot say that the trial court erred in awarding custody of the children to Roger. We therefore affirm the court's action in that regard.

III. Visitation

The trial court awarded Shelly rights of visitation "for short periods of time, such as weekends or summer vacations." The court ordered Shelly to provide adequate sleeping arrangements for the children during their visits, and ordered her not to keep them with her overnight "in a residence she occupies with a party of the opposite sex, to whom she is not married."

Shelly argues that the restriction on overnight visits amounts to a punishment for her life-style, and that such punishment raises an unnecessary barrier between her and her children. We disagree. Although the court's visitation solution is somewhat unusual, the circumstances of this case are likewise unusual. Under the totality of the circumstances, including the fact that Shelly is living with Roger's brother and given the tender age of the children (ten and five), the court's visitation orders are justified in this instance. We do not foreclose allowing Shelly the opportunity to modify the trial court's visitation provisions upon a showing of her greater maturity and concern for the children's sensitivities but under the present facts we cannot disagree with the trial court's disposition.

IV. Division of Property

Shelly has agreed to assume the debt on a credit card if the card is turned over to her. Roger agrees to turn the card over to Shelly if he is absolved of all debts on that account. The decree is so modified, Shelly is ordered to pay the debt and to hold Roger harmless for any debt owing on that account, and Roger is ordered to turn the credit card over to Shelly.

We do not find that the property division was inequitable, and therefore affirm it in all other respects.

V. Child Support

Shelly argues that the requirement that she pay child support at the rate of \$15 per week per child is inequitable, since it amounts to over half of what she calls her "assured gross income."

Both parents share the duty to provide for the support of their children. In re Marriage of Fleener, 247 N.W.2d 221 (Iowa 1976).

Our examination of the record convinces us that the support obligation imposed upon Shelly was not unduly onerous, and that it should not be disturbed.

VI. Attorneys Fees

Shelly seeks payment by Roger of a greater portion of her attorneys fees than the \$200 the trial court ordered him to pay. She also asks us to order Roger to pay the costs of her attorney fees on this appeal.

Applying the criteria set forth in In re Marriage of Jennerjohn, 203 N.W.2d 237 (Iowa 1972), we find that the amount that Roger was ordered to pay to Shelly's attorney at trial was equitable under the circumstances, and that each party should pay his or her own attorneys fees on appeal.

VII. Conclusion

Except as modified in Division IV of this opinion, the decree is affirmed in all respects.

AFFIRMED AS MODIFIED.

All judges concur, except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

I respectfully dissent on that portion of the opinion dealing with the visitation rights of Shelly. The court's restriction, strictly construed, would forbid Shelly to have her children visit her in her home or apartment even when no other person was present if she cohabited with another person in that residence. She seeks a narrower restriction more clearly designed to prevent harm to the children and to protect their interests without imposing unnecessary and irrelevant restrictions upon her when the children are not present.

I see no evidence that this restriction was intended to punish Shelly for her chosen way of life, but I agree that it would serve its purpose better if it were more narrowly drawn. I would modify the restriction as follows:

At such time as the Respondent exercises her right to have the children with her, she shall provide adequate sleeping arrangements for them, and shall not keep them overnight in a residence which is occupied by any other person unless a separate bedroom is available for the visiting child or children.