IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JANICE B. MITCHELL AND JERRY JOHN MITCHELL

Upon the Petition of)

JANICE B. MITCHELL,)

Petitioner-Appellant,)

And Concerning)

JERRY JOHN MITCHELL,)

Respondent-Appellee.)

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Appeal from Polk District Court---Gene L. Needles, Judge.

Petitioner-wife appeals from the child custody provisions of the decree dissolving the parties' marriage. REVERSED AND REMANDED.

Harlan M. Hockett and Joseph G. Bertogli of Flagg, Hockett, Benhart & Golden, Des Moines, for petitioner-appellant.

Henry J. Haugan of Haugan & Miller, Des Moines, for respondent-appellee.

Heard en banc.

Petitioner-wife appeals from the child custody provisions of the decree dissolving the parties' marriage. We reverse and remand.

The parties were married May 20, 1967, and the decree of dissolution was filed August 28, 1981. At the time of trial, petitioner was forty years old and respondent was thirty-nine. The parties had two children born of their marriage, Alex born in 1969 and Kathryn born in 1972.

In the trial court's dissolution decree, the court awarded respondent physical custody of the two children, but reserved joint decision making and legal custody in both petitioner and respondent. Respondent was also given the use of the family home while the children were minors, and petitioner was ordered to pay $10 per week per child in child support. Petitioner was granted liberal visitation rights, but the court reserved jurisdiction to determine visitation in case the parties could not agree. The court also made a property division, and stated that a $1,500 savings account maintained by respondent was to be divided equally between the parties.

After the findings of fact and conclusions of law were filed, but before the decree was entered, petitioner filed a motion to determine visitation rights, to reopen the proceedings for presentation of additional evidence, to set aside the court's findings of fact and conclusions of law, to appoint an attorney to represent the minor children and determine their custodial preference, to order respondent to submit to a mental examination, and to order respondent to disclose the name of the the bank where his $1,500 savings account was kept.

The court set out visitation rights for petitioner, but denied her other motions. The decree of dissolution was entered on August 21, 1981, and petitioner has appealed.

On appeal, petitioner contends (1) that the trial court should have awarded her custody of the children, use of the parties' home during the children's

minority, and child support; (2) that the trial court should have made a fact finding as to the children's custodial preference; (3) that the trial court abused its discretion in refusing to appoint counsel for the children, to require respondent to submit to a psychiatric examination and to reopen the record for evidence of respondent's conduct since trial; and (4) that the trial court inadequately described a $1,500 bank account which the parties were to divide equally so that petitioner cannot collect her share.

I.

Our review is de novo, Iowa R. App. P. 4, and it is our duty to examine the whole record and adjudicate anew rights on the issues which are properly presented. Boyes v. Boyes, 247 N.W.2d 265, 267 (Iowa 1976). While we give weight to the trial court's findings of fact because the trial judge had the opportunity to hear and observe the witnesses firsthand, we are not bound by its findings and conclusions. Iowa R. App. P. 14(f)(7); In re Marriage of Jones, 309 N.W.2d 457, 462 (Iowa 1981); In re Marriage of Burham, 283 N.W.2d 269, 274-5 (Iowa 1979).

II.

Petitioner argues that the trial court should have reopened the proceedings to take further evidence and act on a number of points she raised in several motions she made after the trial court had made its findings of fact and conclusions of law but before the final decree had been filed. Petitioner refers us to In re Marriage of Williams, 303 N.W.2d 160 (Iowa 1981) as authority. In that case the procedure is outlined for counsel to follow if the court suggests to counsel that the record is inadequate on an issue. Counsel should do further investigation on the issue, and then move to reopen the case so the new evidence could be offered and received. Williams, 303 N.W.2d at 164.

In the instant case, it appears that because petitioner did not agree with the trial court's findings and conclusions, she moved to present further evidence on points which she knew the trial court had decided adversely to her interests.

There is no indication that the trial court deemed the record to be inadequate. The procedure contemplated in Williams is therefore not appropriate We find no merit in petitioner's argument that the trial court erred when it refused to reopen proceedings after its findings and conclusions had been filed.

III.

Petitioner has appealed the trial court's order giving physical custody of the parties' two children to respondent. Additionally, she contends the court incorrectly imposed joint custody.

In the dissolution decree, the court set out the following:

> . . .the legal custody of the minor children will remain with both Petitioner and Respondent, subject to the physical custody granted to Respondent hereinabove, and the parties shall counsel together upon and decide jointly as it concerns the children all of those areas that are not merely concerned with the physical comfort of the children, such as medical and dental consultation, educational goals of the children, and religious training and considerations shall be shared by the parents of the children.

Our review on the custody issue is de novo. While we believe that the sharing of parental responsibility contemplated by the trial court's order closely resembles joint custody, and that under the principles established in In re Marriage of Burham, 283 N.W.2d at 274, this is not a proper case for joint custody, our disagreement with the trial court's decree is more fundamental. Our review of the record convinces us that petitioner should have both physical and legal custody of the children.

When we review the record de novo, and apply the criteria set out in In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974), we think that petitioner can minister more effectively to the children's long-range best interests than can the respondent. Though petitioner spent a great deal of time away from home the year before the hearing, we must consider that she was working full-time and learning a new profession in night school. Despite all of her activity, she still

played an important role in her children's lives. During all prior years of the marriage, petitioner was the marriage partner responsible for both the household and the daily care of the children.

Respondent seems to fault petitioner for her concern regarding Alex's nightmares, social development and poor test scores. While respondent attributed Alex's problems to something he would grow out of and something inherited from the Mitchell family, petitioner took positive action by having Alex evaluated by professionals and changing the school he attended. His testing scores improved dramatically as a result of petitioner's concern.

Petitioner involved herself in her children's school and social activities. She encouraged the children's friendships with other children. Petitioner worked to keep the children involved in stimulating activities. She seemed to develop a rapport with and understanding of her children and their needs that is possible only through many years of nurturing and care. Respondent's relationship with the children in these important particulars suffers by comparison to the relationship enjoyed by petitioner. Overall, petitioner appears to be the parent who can better provide for the emotional, social, moral, and educational needs of the children.

IV.

Petitioner asks that we assist her in obtaining her share of respondent's $1,500 bank account. We find that the decree is ambiguous as to whether petitioner is awarded $750 to be paid by respondent, or half of a designated account believed to contain $1,500. If the latter is true, the description of the account is not clear. We therefore remand this issue to the trial court for further clarification, and an order implementing petitioner's rights to this account.

V.

For the reasons herein stated, the trial court's custody decree is reversed and the matter is remanded for a decree awarding custody of the parties' minor children to petitioner.

We direct that respondent pay $55 child support per week for each child. He shall have the same visitation rights that the trial court had awarded to petitioner. Petitioner shall have possession of the marital residence during the children's minority, and while she remains unmarried. The home shall be sold when the last child reaches the age of eighteen, graduates from high school, marries, or otherwise becomes self-supporting, or if petitioner remarries. When the home is sold, petitioner is entitled to $5,000 from the net proceeds before an equal division of the balance. No interest shall be payable on this $5,000 award. The furniture necessary for the children's well-being should remain in the family home, and petitioner and respondent shall move her or his personal possessions in or out of the home accordingly.

REVERSED AND REMANDED.

Oxberger, C.J. and Snell, J. concur; Johnson, J. concurs in part, and dissents in part; Donielson, J. dissents.

JOHNSON, J. (specially concurring in part, dissenting in part)

I agree with the majority's decision which makes petitioner the parent responsible for the physical care of the minor children. However, I also believe that trial court correctly reserved joint decision making and legal custody in both parents. See § 598.1, The Code 1981, as amended by H.F. 2442, Acts of the 69th G.A.

DONIELSON, J. (dissenting)

I dissent.

Child custody is always a difficult and emotionally charged issue. I fully realize we are not bound by the trial court's findings, Iowa R. App. P. 14(f)(7); In re Marriage of Jones, 309 N.W.2d 457, 462 (Iowa 1981); In re Marriage of Burham, 283 N.W.2d 269, 274-75 (Iowa 1979); however, this case turns upon the credibility and demeanor of the witnesses, and in my opinion the majority has failed to give proper weight to the trial court's findings and conclusions.

I cannot agree with the majority's decision to award custody to the petitioner. The trial court found: "that John's interest in the well-being of the children continued throughout the marriage and, frankly, increased after the marital problems with his wife manifested themselves .... Janice, on the other hand, retained her interest and concern for the children throughout the marriage except during the last year. It appeared to the Court that during this period of time while she continued to profess concern and interest in the children, she was also concerned about her own self-interest to the detriment of the children."

The record clearly supports a finding that petitioner is increasingly concerned with satisfying her own needs rather than looking out for the best interests of the children. While the dissolution was pending she continued her extramarital affair and upon several occasions took the children with her when she visited the new man in her life. Furthermore, she participated in a picture-taking episode of herself and other women in various stages of undress and subsequently went out of her way to show some of the pictures to her eleven-year-old son. Her recent behavior does not indicate she is the parent best able to minister to the children's long-term needs.

I believe these facts justify the trial court's award of physical custody of the children to respondent. I would affirm.