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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CECIL A. HAWKINS and AUDREY J. HAWKINS

Upon the Petition of)
CECIL A. HAWKINS,) Filed September 20, 1979
Petitioner-Appellant,)
and Concerning)
AUDREY J. HAWKINS,) 226
Respondent-Appellee.) 3-62695

Appeal from Linn District Court - Ansel J. Chapman, Judge.

Petitioner-father appeals from dissolution decree awarding custody of parties' minor child to respondent-mother. Respondent-mother cross appeals seeking additional child support and attorney fees. AFFIRMED AS MODIFIED.

Robert D. Houghton and W. R. Shuttleworth of Shuttleworth & Ingersoll, Cedar Rapids, Iowa, for petitioner-appellant.

Francis J. Pruss of Cedar Rapids, Iowa, for respondent-appellee.

Heard by Oxberger, C.J., and Donielson, Snell and Johnson, JJ. Carter, J., takes no part.

PER CURIAM

Petitioner-father, Cecil A. Hawkins, appeals from a dissolution decree that awarded custody of the parties' minor child to respondent-mother, Audrey J. Hawkins. Audrey cross appeals from the economic provisions of the decree, seeking increases in the amount of child support and attorney fees awarded to her, as well as additional attorney fees incurred in connection with this appeal.

Our review is **de novo.** In re Marriage of Meier, 267 N.W.2d 46, 47 (Iowa 1978); Hobson v. Hobson, 248 N.W.2d 137, 139 (Iowa 1976); Iowa R. App. P. 4. Although we are not bound by the trial court's findings of fact, we recognize the superior position of the trial court to assess the credibility of witnesses, and in this regard, we accord weight to those findings. In re Marriage of Snyder, 241 N.W.2d 733, 733 (Iowa 1976); In re Marriage of Junkins, 240 N.W.2d 667, 688 (Iowa 1976); Iowa R. App. P. 14(f)(7).

I. In addressing the issue of child custody, we recognize that each case must be decided ultimately on its own facts. Boyes v. Boyes, 247 N.W.2d 265, 267 (Iowa 1976); In re Marriage of Peterson, 227 N.W.2d 139, 141 (Iowa 1975). It is well established that in all child custody cases, the first and governing consideration is the long-range best interests of the child. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975); In re Marriage of Moorehead, 224 N.W.2d 242, 244 (Iowa 1974); Iowa R. App. P. 14(f)(15). This consideration does not consist of rewarding one parent and punishing the other. Schoonover, 228 N.W.2d at 34; In re Marriage of Ballinger, 222 N.W.2d 738, 740 (Iowa 1974). The inference that the interests of children of tender years are best served by placing them in their mother's custody has been abandoned in Iowa. In re Marriage of Meier, 267 N.W.2d 46, 47 (Iowa 1978); In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). Conduct of the child's parents, good or bad, is admissible in evidence as it bears on and reflects the parents' character and fitness for custody of the child. Peterson, 227 N.W.2d at 141; Ballinger, 222 N.W.2d at 739. Moral misconduct by either parent is merely one factor to be considered in assessing the character and fitness of a parent to have custody. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976); Ballinger, 222 N.W.2d at 739. Other factors that must be addressed in a child custody determination are set out in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

In this case, the trial court considered the Winter criteria and concluded that the best interests of the minor child, Kimberly, would be served by placing her custody with her mother, Audrey. Our review of the record, combined with the weight we give to the trial court's findings of fact leads us to the same conclusion.

The record shows that both parents are not without faults in their character and fitness to have custody. Audrey became sexually involved with another man soon after Cecil moved away to Dallas and before the dissolution hearing. Without condoning such moral misconduct, we conclude that such behavior by itself, is not sufficient to preclude awarding custody to Audrey. Cecil contends that Audrey's continued participation in an organization known as the "Institute of Man" is evidence of her lack of fitness for the custody of Kimberly. While we note that Audrey's involvement with the "Institute" does indeed comprise a substantial amount of time that could otherwise be devoted to Kimberly, we cannot conclude that because of the nonconformity of many of the beliefs espoused by the "Institute," Audrey's participation in that organization will preclude her from adequately looking out for the best interests of Kimberly.

Cecil's behavior, on the other hand, raises questions about his ability to serve Kimberly's best interests if he were granted custody. Testimony uncovered at least two alleged incidents of sexual misbehavior that raise doubts about Cecil's fitness as a parent due to the facts and circumstances of their occurrence. Furthermore, Cecil's action in removing Kimberly from her mother and the State of Iowa, and his attempts to isolate Kimberly from any contact with her mother indicate that the interest of Kimberly in maintaining a relationship with both parents might not be best served by granting her custody to Cecil. Cf. In re Hobson, 248 N.W.2d 137, 143 (Iowa 1976) (evidence that mother, through stealth and deception, had deliberately attempted to deprive children, on a continuous basis, of opportunity to see, know, and love their father, coupled with mother's abnormal conduct, was sufficient to change custody from mother to father); In re Ferguson, 244 N.W.2d 817, 819 (Iowa 1976) (evidence tending to an inclination on part of mother to discourage relationship between child and father indicated that with father as custodian, child would have better chance of substantial contact with both parents).

Notwithstanding this questionable behavior, Cecil contends that Kimberly prefers to remain with him, and additional testimony at trial supported that contention. At the

time of trial, Kimberly was eight years old. While the preference of a child for a particular parent may be relevant in custody proceedings, In re Marriage of Bowen, 219 N.W.2d 683, 689 (Iowa 1974); In re Marriage of Bare, 203 N.W.2d 551, 554 (Iowa 1973), it is also true that the wishes of a child of the tender age of seven or eight should be given little if any weight since children that young are not of an age to exercise discretion. Smith v. Smith, 257 Iowa 584, 591, 133 N.W.2d 677, 681 (1965).

Consequently, our review of the record combined with the according of weight to the findings of the trial court leads us to the conclusion that the determination of the trial court, awarding the custody of Kimberly to her mother, Audrey, should not be disturbed.

II. The trial court decree ordered Cecil to pay $200 per month to Audrey for child suport. Audrey contends on appeal that this amount is insufficient to properly raise a single child in these inflationary times. The factors to be considered in determining a proper child support allowance are set forth in In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). In light of the Zoellner criteria, and with emphasis on the discrepancy between Cecil's $501 gross weekly salary and Audrey's $140 gross weekly salary, as well as on the cost of raising a single child as affected by our economy's present rate of inflation, we conclude that the child support award of the trial court was insufficient and should be increased to $300 per month.

III. The trial court also ordered Cecil to pay Audrey the sum of $750 for her attorney fees incurred as a result of the dissolution proceedings. Audrey contends that this award of attorney fees was insufficient. The elements to be considered in determining reasonable attorney fees are set out in In re Marriage of Jennerjohn, 203 N.W.2d 237, 245 (Iowa 1972) and In re Marriage of Jayne, 200 N.W.2d 532, 534 (Iowa 1972). The trial court also considered the amount received by Audrey as her share of the proceeds from the sale of the home, as well as the amount awarded to her as her share of the amount Cecil was reimbursed by his company in connection with the sale of the home. In light of those considerations, we are not inclined to disturb the trial court's award of attorney fees for costs incurred by the dissolution proceeding.

Audrey also seeks allowance of attorney fees incurred in connection with this appeal. Cecil contends that Audrey's failure to file an itemized schedule of attorney's

services performed in connection with this appeal should preclude the granting of her request. However, failure to file such a schedule of services is not fatal to a request for attorney fees incurred on appeal. In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977) (citing In re Marriage of Dowie, 215 N.W.2d 276, 278 (Iowa 1974) and In re Marriage of Gudenkauf, 204 N.W.2d 586, 588 (Iowa 1973)).

Attorney fees are not recoverable as a matter of right. In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). In evaluating a request for attorney fees incurred on appeal, we must consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Stom, 226 N.W.2d 797, 800 (Iowa 1975). With these considerations in mind, and without fixing the amount to be charged by Audrey's attorney, we conclude that Cecil should be required to pay $700 to Audrey for her attorney fees incurred by this appeal.

We affirm the trial court's judgment awarding the custody of Kimberly to Audrey, and modify the economic provisions of the decree so that Cecil is required to pay $300 per month to Audrey for child support and $700 for Audrey's attorney fees incurred by this appeal. Costs are taxed to Cecil.

AFFIRMED AS MODIFIED.

All judges concur, except Oxberger, C.J., who concurs in the result.