DEC 23 1980
SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DEAN WILLIAM MORRIS AND JANE ANN MORRIS

Upon the Petition of)
DEAN WILLIAM MORRIS,) Filed December 23, 1980
Petitioner-Appellant,)
And Concerning)
JANE ANN MORRIS,) 0-311
64767
Respondent-Appellee.)

Appeal from Chickasaw District Court - C. W. Antes, Judge.

Petitioner husband appeals from custody and economic provisions of dissolution decree and contends that the trial court erred in finding him to be the father of respondent wife's unborn child. Affirmed in part; remanded for reconsideration of paternity question following birth of child.

Kevin J. Kennedy of Kennedy & Kennedy, New Hampton, for petitioner-appellant.

Richard P. TeKippe, New Hampton, for respondent-appellee.

Christopher F. O'Donohoe of O'Donohoe, O'Connor & O'Donohoe, New Hampton, for minor children.

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

DONIELSON, J.

Petitioner husband appeals from the parties' dissolution decree, contending 1) that he should have been granted custody of the couple's two minor children, 2) that the trial court erred in finding that he is the father of the respondent wife's unborn child, and 3) that the economic provisions of the decree were inequitable. We affirm the custody and economic provisions, but remand in order that the paternity question may be reconsidered after the birth of the child.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. In re Marriage of Full, 255 N.W.2d 153, 156 (Iowa 1977). While we give weight to the findings of the trial court, especially where the credibility of witnesses is involved, we are not bound by them. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

I.

On August 21, 1979, petitioner filed to dissolve his five-year marriage to respondent. The trial court, in a dissolution decree filed on March 5, 1980, awarded custody of the two children to the respondent, found that the petitioner was the father of respondent's unborn child, and ordered petitioner to pay $300 per month in child support. The decree also provided that respondent would receive all the household goods, the family car, and a property settlement of $1500. Petitioner was awarded the assets of his nursery business and was ordered to pay all debts that the parties had accumulated up to February 1, 1980. Although petitioner was ordered to pay child support for all three children, including the unborn child, the trial court specified that his visitation rights extended only to the couple's first two children.

Testimony at trial revealed that the parties were married in 1974 and their two daughters were born in 1975 and 1978. Respondent was pregnant at the time of trial and the paternity of this child is hotly disputed. Respondent had had several extramarital affairs prior to August of 1979, the month in which the child was conceived and in which the petitioner filed for dissolution of the marriage. During that August, respondent had had sexual relations with the petitioner and with two other men; petitioner denies being

the father of the unborn child. The respondent stated on cross-examination that she could not be sure who the child's father was, although at one point in the trial she said it could have been the petitioner and in a letter written to a friend she admitted that another man had fathered the child.

Other testimony at trial revealed that the petitioner is a steady and hard worker who sometimes works long hours, that he regularly goes to church, and that he is a very devoted and caring father who gets along well with his children. Respondent also apparently shares a good relationship with the children, although the petitioner testified to a concern that she had little patience with them and that on several occasions she exhibited a lack of control in administering physical discipline to the older daughter.

II.

Petitioner first contends that he should have been given custody of the couple's two children. Basically, he directs our attention to several adverse aspects of the respondent's character and urges us to conclude that he is the more capable and responsible parent. While we acknowledge that the record reveals petitioner to be a very good parent, we affirm the trial court's grant of custody to the respondent mother.

No hard and fast rule governs which parent should have custody. In deciding this issue, we seek neither to punish one parent nor to reward the other. In re Marriage of Bare, 203 N.W.2d 551, 554 (1973). Each case turns on its own particular 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). While Iowa has abandoned the inference that the best interests of young children will be better served if their custody is awarded to the mother instead of the father, In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974), it is clear that the court may consider which parent has provided basic day-to-day care for the children. In re Marriage of Tresnak, 297 N.W.2d 109, 113 (Iowa 1980). Because experience teaches that in most families it will usually be the mother who has provided for the children's basic needs, consideration of this factor may well result in eroding some of the force of the Bowen holding that parental fitness should not be based on sex. Other factors relevant to determination of custody are listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), with the ultimate question being, based on the entire record, which of the parents can minister more effectively to the long-range best interests of the children. Id; Iowa R. App. P. 14(f)(15).

Both respondent and petitioner claim to be the better parent and we are convinced

that both love these two children very much. In fact, a review of the record in light of the Winter factors reveals that the parties are equally competent to be the custodial parent. Petitioner enjoys a good relationship with the children and is a hard worker. He wants to remain in the family home and has arranged for a babysitter to keep the children while he is working. He is interested in the children's religious development and proposes to continue taking them to church with him. However, on the whole, the respondent mother seems to us to be an equally suitable parent. It should be noted that she admits that she engaged in extramarital relations towards the end of the marriage. Moral misconduct, however, is merely one factor to be considered in determining a parent's fitness to have custody; it will not by itself, preclude awarding custody to that parent. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976); In re Marriage of Ballinger, 222 N.W.2d 738, 739 (Iowa 1974); In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). In this instance, respondent admittedly engaged in extramarital sex twice and both times it was away from the family home and the children. We believe that these incidents of moral misconduct, while not condoned by this court, are outweighed in the respondent's case by other, more positive, factors. She appears to have maintained a warm and affectionate relationship with her two daughters and is concerned for their general well-being. Moreover, respondent has been the dominant parent in terms of providing for the basic daily needs of the children. While this circumstance may be in part attributed to the fact that the petitioner was at work while respondent cared for the children, it is significant that the respondent also worked during at least part of the marriage and still remained the parent primarily responsible for care of the children. Because in our estimation petitioner and respondent are equally fit parents, we affirm the trial court's grant of custody to the respondent in accordance with the rule enunciated in In re Marriage of McDowell, 224 N.W.2d 238, 239 (Iowa 1976).

III.

Petitioner also appeals the economic and child support provisions of the decree. Specifically, he maintains that the inventory from his landscaping business should be valued at its wholesale rather than its retail price, and that he cannot afford $300 per month in child support.

We note first that it is unclear whether the trial court valued the nursery stock at retail or at wholesale. Petitioner valued it at $2518 (wholesale), respondent at $7554

(retail), and the trial court at $3500. Without deciding specifically whether the stock should have been given its wholesale or its retail value, we conclude that the trial court's figure was sufficiently close to the value petitioner requests to justify affirming the trial court on this point. As regards petitioner's appeal from the child support provisions of the decree, we do not find the $300 per month figure imposed by the trial court unfair in light of the fact that petitioner's net income for 1979 was $9,000.

IV.

Finally, petitioner contends that the trial court erred in finding that he is the father of respondent's unborn child. We agree with the petitioner that it is impossible on this record to determine the paternity of the unborn child and we remand for consideration of the issue at some point after the child's birth.

Whether it is error to determine the paternity of a child prior to its birth is apparently an issue of first impression in Iowa. However, our decision to remand is mandated in this case by the fact that the paternity of this child cannot be determined to any reasonable degree of certainty. During the period of time in which the child could have been conceived, the respondent had sex with three men, one of which was the petitioner. The respondent herself is far from certain that the petitioner fathered her child; in fact, at one point before trial, she wrote to a friend and specifically named another man as the child's father. Given this high level of uncertainty on the paternity issue and the rather unusual circumstance that the child in question is not yet born, we think it proper to remand this case.

We are well aware of Iowa's adherence to the rule that children born in wedlock are presumed legitimate, § 598.31, The Code 1979, and that the presumption of legitimacy has been extended to children conceived in wedlock but born after termination of the marriage. Kuhns v. Olson, 258 Iowa 1274, 1277, 141 N.W.2d 925, 927 (1966). The presumption, however, may be rebutted by a preponderance of the evidence. Kuhns, 258 Iowa at 1276-77, 141 N.W.2d at 926-27. Application of the presumption in those cases where the child has not yet been born would seemingly deprive the presumed father of an adequate and fair opportunity to rebut the presumption, since he would not be able to avail himself of blood tests and other procedures that might rule him out as the child's father. Furthermore, since the presumption of legitimacy is based at least in part on the supposed virtue of the mother and the probability of morality rather than immorality, Nelson v. Nelson, 249 Iowa 638, 642-43, 87 N.W.2d 767, 770 (1958), it would

seem to be of questionable applicability in the instant case, where the respondent mother's immorality has been established by her own admission.

Finally, we think it is fundamentally unjust to the petitioner to require him to support a child for 18 years, and possibly longer if further educational needs arise, when a good chance exists that he is not the child's father and he has been denied a fair opportunity to prove it. Nor would such a result be in the best interests of the unborn child, who is entitled to at least some degree of certainty as to his or her paternity.

For all these reasons, we remand for a determination of paternity to be made after respondent's child is born. We note also that the $300 per month figure for child support may need to be modified, depending on the outcome of the paternity issue, to reflect support for two children instead of three.

AFFIRMED IN PART; REMANDED.

All judges concur, except Johnson, J., and Oxberger, C.J., who specially concur.

JOHNSON, J. (specially concurring)

While I concur in the result reached in this case, I take issue with the majority's statement that consideration of a parent's day-to-day care for the children as a factor in deciding child custody may erode the force of Bowen. It is the quality of time spent in caring for the children, not the quantity, that is important. The fallacy of the majority's conclusion is further enlarged by the relevant statistics on working women. For 1976, in over one-half of the married couples in Iowa, the wives were in the labor force. Of these working women, fifty-eight point two percent (58.2%) had children under eighteen years of age.[1] Predictions indicate that this percentage will increase in the future. This makes the sex-neutral principle of Bowen even more relevant in 1980.

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[1] "Marital & Family Status of Workers by State & Area," U.S. Dept. of Labor, Bureau of Labor Statistics, Survey of Income & Education, Report No. 545, p. 18, Table 11 (Iowa Statistics).