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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF ROXANNE M. BAXTER AND JOHN H. BAXTER

Upon the Petition of)

ROXANNE M. BAXTER,) Filed November 19, 1979

Petitioner-Appellant,)

And Concerning)

JOHN H. BAXTER,) 258
3-62934

Respondent-Appellee and Cross-Appellant.)

Appeal from Pottawattamie District Court - LeRoy M. Johnson, Judge.

Petitioner-mother appeals child custody provision of dissolution decree. Respondent-father cross-appeals trial court's failure to award child support. AFFIRMED WITH MODIFICATION.

F. J. Kraschel of Kraschel & Comes, Council Bluffs, for appellant.

Dennis M. Gray of Peters Law Firm, P.C., Council Bluffs, for appellee and cross-appellant.

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

JOHNSON, J.

Petitioner-mother, Roxanne Baxter, appeals child custody provisions of a dissolution decree which awarded custody of the parties' two minor children to respondent-father. On appeal, petitioner contends she is better able to provide for the present and long-range needs of the children. Respondent-father, John Baxter, cross-appeals asserting that he should have been awarded child support from petitioner. We affirm trial court's judgment with modification.

I. Our review of this equitable proceeding is **de novo**. Iowa R. App. P. 4. We give weight to fact-findings of the trial court, but will not abdicate our responsibilities to review the record anew. Iowa R. App. P. 14(f)(7). As in all cases of this type, we must base our decision on the unique facts of the case. In re Marriage of Moorhead, 224 N.W.2d 242, 244 (Iowa 1974); In re Marriage of Jennerjohn, 203 N.W.2d 237, 240 (Iowa 1972).

Our first and governing consideration in determining custody is the best interests of the children involved. Iowa R. App. P. 14(f)(15). 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 (Iowa 1973). There is no inference favoring one parent as opposed to the other in deciding which is the most fit custodian, except that arising from the peculiar facts of the case. In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). The relevant factors to be considered in determining custody are listed in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). We need not elaborate on them here other than to point out that they are intended to provide a guide to the court in determining under the whole record which parent can minister more effectively to the long-range best interests of the children. Id.; Bowen, 219 N.W.2d at 687-88.

II. The evidence in this case, as in many custody disputes, is in conflict. Neither parent is a paragon of virtue; neither is unfit. See In re Marriage of Joens, No. 62928, (Iowa, Oct. 17, 1979). Each claims to be the better custodial parent. The record clearly shows both parents have love and concern for these two young boys.

The evidence elicited at trial demonstrates respondent has been a dependable provider of the material and moral support that the children will require in the coming years. He has a good job and has alleviated financial problems which developed while petitioner was in charge of the family finances. The family home was awarded to respondent and would provide a suitable place to raise the children. Additionally,

respondent appears to have an interest and concern in the children's nutritional requirements, as well as their religious education and training. The older child, Adam, born April 19, 1974, enjoys being with his father. Aaron, born December 30, 1977, was too young at the time of trial to have developed such an identification.

Evidence in the record indicates petitioner's difficulties in managing family financial matters. This mismanagement resulted in a foreclosure of the mortgage on their home. A previously-owned family home was likewise lost due to her failure to make the payments. Several of respondent's witnesses testified to accumulation of unwashed dishes, cat feces in the kitchen, and the general unkempt nature of the house. Respondent complained about the content and nutritional value of the meals the children were eating. The author of a psychiatric evaluation report, a Dr. P. Mehta, characterized petitioner as a "very stubborn, opinionated, liberated woman who lacks capacity for give and take and capacity for accommodating the demands of married life."

Focusing on other evidence, however, we find petitioner has been the dominant parent throughout the young lives of the children. Although respondent has assisted petitioner, petitioner has been primarily responsible for the care and discipline of the children. There is no evidence petitioner's mismanagement of money was due to luxurious self-indulgence, but rather was a result of poor judgment. There also is substantial evidence to show her housekeeping performance was adequate. Her performance has withstood two investigations by professionals who had no reason to be anything but objective. Focusing on respondent, however, one sees an individual unwilling to accept any responsibility for the marital failure, who felt it was petitioner who had to change if the marriage was to survive, a person who was willing to place all financial management responsibilities on petitioner, and one who was willing to assume an armchair role in pointing out petitioner's deficiencies as a housekeeper. The record reveals no efforts on respondent's part to assist in reaching the standards of cleanliness he expected petitioner to maintain. Further, respondent has no "track record" of parenting which would give us any indication of his real abilities to parent on a full-time basis. The evidence shows the children are well adjusted and healthy, a condition largely attributable to petitioner's efforts. Petitioner also has testified to her belief that the children should have continued, meaningful contact with their father through liberal visitation rights.

After a careful consideration of the record as a whole in light of the criteria outlined in Winter, we conclude petitioner can more effectively minister to the needs of these two children. We, therefore, modify trial court's award of custody to respondent.

III. Considering the relative needs of the parties and the minor children, we find respondent should pay to petitioner $125 per month per minor child as child support. The support for each child shall continue until the child reaches 18 or graduates from high school, whichever event occurs later, provided the child is regularly enrolled as a high school student subsequent to his eighteenth birthday. Trial court shall retain jurisdiction to determine the responsibility of either party to pay support for education subsequent to high school graduation. So long as both parties reside in Council Bluffs or Omaha, the respondent shall have the same rights of visitation with the minor children of the parties as was awarded to petitioner by trial court, with the following exceptions: every Father's Day (in lieu of Mother's Day) and summer visitation commencing in 1980 instead of 1979. Trial court's judgment is affirmed in all other respects.

IV. In light of our modification of the trial court's decree, we will not address respondent's assertion on appeal that he should have been awarded child support from petitioner.

Costs of this appeal are assessed against respondent.

AFFIRMED WITH MODIFICATION.

All judges concur except Donielson, J., who dissents.

DONIELSON, J. (dissenting)

I dissent from Division I of the majority's opinion. The evidence, as indicated by the majority, does not conclusively establish that one parent is better able than the other to assume the responsibilities of providing for the children's well-being; although I believe the evidence tends to favor respondent. In such a case, I believe it is particularly appropriate to give weight to the findings of the trial court "in recognition of its superior position to observe the conduct of all witnesses including the parties. Paxton v. Paxton, 231 N.W.2d 581, 584 (Iowa 1975)." In re Marriage of Junkins, 240 N.W.2d 667, 668 (Iowa 1976); see Iowa R. App. P. 14(f)(7). This position is in no way an abdication of our responsibility to review the record anew, but rather is the more appropriate determination where the credibility and conduct of the parties is of such paramount importance to the ultimate determination. Protection of the best interests of the children involved in a custody determination requires us to be as certain as possible regarding the correct disposition and look to every reliable source of information. In this case, where the evidence is controverted and almost evenly split, the trial court's decision that respondent is better able to provide for the present and future needs of the children should be a deciding factor for affirmance. Accordingly, I would affirm the trial court.