



IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF WILLIAM EDWARD BECKNELL, JR. and CAROL ANN BECKNELL

Upon the Petition of)

WILLIAM EDWARD BECKNELL, JR.)

Filed March 14, 1977

Appellant,)

And Concerning)

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3-59737

CAROL ANN BECKNELL,)

Appellee.)

Appeal from Polk District Court - Dale Missildine, Judge.

Appeal from the decree in a dissolution of marriage concerning custody, child support, attorney fee and establishment of a support and education trust. - Modified in part and affirmed.

Ed Skinner and Mary Hellweg of Irish, Skinner and Wieslander of Altoona, for appellant.

William F. Denman of Denman, Albers, Judkins and Bowles of Des Moines, for appellee.

Raymond J. Gazzo, of Des Moines, for children.

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

SNELL, J.

This appeal arises out of a dissolution of the parties' marriage and raises questions of custody, amount of child support, payment of an attorney fee for the children's attorney and the failure by the trial court to require the establishment of a support and education trust for the children. We affirm the trial court on all issues excepting payment of attorney fees.

Petitioner, William Edward Becknell, Jr. and respondent, Carol Ann Becknell were married in Kentucky in 1962, after graduating from high school. William obtained a medical degree from Kentucky Medical School and Carol received a degree in nursing from the University of Kentucky. The parties have two children, Shawn, now 13, and William III, now nearly seven.

The parties moved to Des Moines from Kentucky in June of 1974 so that William could enter a surgery residency at Veteran's Hospital. At the present time he is continuing this residency which will be completed in 1978. Carol is employed as a registered nurse at Veteran's Hospital taking advanced training toward becoming an anesthetist.

The dissolution of marriage action was instituted by William on February 18, 1976. On filing the petition, an ex parte order was entered by the trial court granting temporary custody of the children to William. Five days later the parties met with their attorneys and Judge Missildine who thereafter presided at all of the subsequent proceedings. Judge Missildine reversed the temporary custody order and placed custody of the children with their mother, Carol. A trial date of March 1, 1976 was set for the issue of child custody. Trial was held on that date after which Judge Missildine entered findings of fact, conclusions of law and ordered that temporary custody of the children be placed with their father, William. Trial on all matters involved in the dissolution proceedings, including the matter

of permanent custody, was then held on July 20, 1976 and thereafter. In his findings of fact, conclusions of law and decree entered August 6, 1976 Judge Missildine found that it was in the children's best interests that their permanent custody be placed with their mother, Carol. On motion made to the Iowa Supreme Court an order was entered staying enforcement of the trial court's decree so far as custody is concerned. During these proceedings the two children have remained in the same home where the parties lived prior to the commencement of this action.

William appeals the trial court's award of custody of the children to Carol and asks that the child support payment of \$200 per month, per child, be reduced to \$30 per week, per child. He also appeals the court's order that he pay the childrens' attorney fee of \$1350. Carol cross-appeals asking this court to order William to provide a support and education trust for the children as prayed for in the trial court.

I. Regarding custody, William's principal issues are that he should be granted custody instead of Carol because of Carol's illicit relationship with another man during the marriage and her lying under oath about it and other matters.

Our review of these matters is de novo. In re Marriage of Bowen, 219 N.W.2d 683 (Iowa 1974). The principles that guide us in determining what is the best interest of the child are set forth in In re Marriage of Winter, 223 N.W.2d 165 (Iowa 1974). The court there listed twelve principles that have bearing on custody. The fourth principle of the twelve is the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the child. While very important, we note, as has the supreme court several times before, that parents' morality cannot become the sole deciding factor in custody cases.

The record in this case abundantly establishes that both William and Carol are loving parents of their children and are both willing and able to provide for their needs. An attorney was appointed to represent the children who conducted an investigation and made a report to the court which was made part of the evidence. The report concluded that neither parent had any gross deficiency rendering either as unfit. Nor is either so clearly superior as to commend him or her as the appropriate custodial parent. The children's attorney, however, recommended to the court that it was in the best interests of the children that custody be granted to their mother. The attorney's report was made a part of the findings by the trial court. This report is clearly one of the relevant factors to be considered under the guidelines of *Winter*.

A further consideration under the *Winter* guidelines is the preference of the child, if the child is of sufficient age and maturity. The attorney's report stated without contradiction that both children adamantly and repeatedly said they wanted to live with their mother. They stated that they felt their mother would be able to be with them more often and they both recalled that their mother had done the primary job of raising them. Additionally, Shawn, age 13, indicated she felt more comfortable with her mother.

We also believe the history of this case is relevant on the matter of custody. Judge Missildine heard extensive testimony and ultimately changed his order of temporary custody in William to permanent custody in Carol. The supreme court in *In re Marriage of Callahan*, 214 N.W.2d 133 (Iowa 1974) observed:

"In these dissolution cases a court is greatly helped in making a wise decision about the parties by listening to them and watching them in person."

While we do not abdicate our responsibility to review these cases anew, it is appropriate to rely to some extent on the judgment of the district judge who actually saw and listened to the parties. *Baker v. Baker*, 243 N.W.2d 234 (Iowa 1976). In *In re Marriage of Dawson*, 214 N.W.2d 131 (Iowa 1974), the court considered whether an adulterous relationship and lying under oath were sufficient negative factors to justify depriving the mother of custody. The court said that the mother's apparent disregard for truthfulness and the sanctity of an oath as well as the adulterous conduct reflected adversely on her custodial fitness and weighed heavily against her. Nevertheless, the trial court found, and the supreme court affirmed, that the interests of the children were best served by custody in the mother. Although reviewed *de novo*, reversal of the trial court should be made only when discretion has been abused. In *re Marriage of Dawson, supra*. We hold the trial court did not abuse its discretion.

II. During his residency in surgery at Veteran's Hospital, William earned approximately \$16,000 per year. On completion of his residency his earnings will greatly increase. Carol is currently earning approximately \$10,000 per year. The court ordered William to pay child support of \$200 per month continuing until the children become of legal age, are married or become self-supporting. The record does not support any abuse of the trial court's discretion in making this award.

III. The attorney for the children recommended to the court the establishment of a support and education trust which would require William to deposit 10% of his net annual income into the trust for the children. There is nothing in the

record to support the need for such a provision. William has clearly established that he loves his children and intends to provide for their needs. We are satisfied that such will be done.

IV. William is required by the trial court decree to pay the attorney fee for his children in the amount of \$1350. We modify that as follows by allowing an additional \$350 for said attorney's work on this appeal and find that William shall pay \$1062 and Carol shall pay \$638 of the total fee.

Except as modified herein, the judgment is affirmed.