IN THE COURT OF APPEALS OF IOWA

FILED
JAN 24 1984
SUPREME COURT
69

IN RE THE MARRIAGE OF VALERIE K. JOHNSON AND DAVID J. JOHNSON

Upon the Petition of)

VALERIE K. JOHNSON,) Filed January 24, 1984

Petitioner-Appellee,)

And Concerning) 3-402
83-675

DAVID J. JOHNSON,)

Respondent-Appellant.)

Appeal from the Iowa District Court for Linn County - Harold J. Swailes, Judge.

Respondent husband appeals from the decree dissolving the parties' marriage. AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

Guy P. Booth, Cedar Rapids, Iowa, attorney for petitioner-appellee.

James L. Chipokas, Cedar Rapids, Iowa, attorney for respondent-appellant.

Considered by Oxberger, C.J., Donielson, and Sackett, JJ.

David J. Johnson, respondent, appeals from a dissolution decree contending that the trial court should have awarded custody of the parties' only child, Randy, to him, and that the property division made by the trial court was inequitable.

David and Valerie were married on February 6, 1976. Randy was born on January 25th of the same year. At the time of marriage Valerie was 17 and David was 21. Valerie moved from the home of her mother and stepfather at age 16 and moved in with David. Valerie's relationship with her parents at that time was stormy and Valerie had problems relating with her family early in the marriage. Valerie's parents were supportive of her at time of trial.

David's family has been consistently supportive throughout the marriage both of David and the couple. David appears to have a good relationship with his family. David's mother stood up with the couple when they were married. She assisted with Randy's care. David's family was very supportive when Valerie left the family home on two occasions. The marriage had problems from the start. David had graduated from high school, obtained employment and was working in a stable job. He had been wise in money matters and had bought and totally paid for the home in which he and Valerie lived during the marriage. He lives in that home now. Valerie, on the other hand, had not completed high school at the time of the marriage and had not yet completed high school at time of trial. During the marriage David was employed full-time and made improvements on the family residence. He was happy with Randy and seemed interested in his care. Valerie admittedly had little interest in the baby and was a poor housekeeper despite the fact that she was not employed outside the home. On one occasion, when Randy was about six months old, she left him alone for three or four hours in the second story of their home on a hot summer day. The house was locked. Valerie's parents rescued the child and were not going to give him back. David's mother interceded

on Valerie's behalf, however, and the baby was returned. On another occasion Valerie was arrested for shoplifting. She had the baby with her when the shoplifting occurred and used the space around the baby to stash her loot.

Valerie left the family home on at least two occasions (on one occasion for nearly 16 months) without explanation. She left Randy with David. She had little or no contact with David or the child on these occasions. During these time periods David accepted the care of the child. David toilet-trained Randy. David's family offered their support and help, and David's sister helped with child care. There is nothing in the record but complimentary remarks concerning David's care of the child during these periods.

While David and Valerie lived together Valerie had sexual intercourse in her home with men other than her husband. At the time she left for the last time, she left Randy with her mother and spent the night with Mr. Albaugh in his apartment over a local truck stop. Neither Valerie's mother nor David knew of her whereabouts. David finally became concerned and located her at about 11:30 a.m. at Mr. Albaugh's apartment. Randy was with David when David found Valerie. After Valerie's separation from David she lived in four different places. At the time of trial she shared an apartment and a bed with Mr. Albaugh in Mechanicsville. Randy lived with them in the apartment.

Valerie has maintained an unlisted phone number. After a temporary custody order, which will be discussed later, she took away David's baby-sitting privilege. Visitation has been difficult. At the time of trial Valerie was five months pregnant with Mr. Albaugh's child. Valerie testified that she does intend to marry Mr. Albaugh someday, but that she did not intend to become pregnant. Mr. Albaugh is divorced. He has two small children who are in his wife's custody. He testified that Randy's care is strictly Valerie's job.

David has been abusive toward Valerie. He admitted slapping her on one occasion. There was another incident after their separation when he hit her with

a plastic pipe in her parents' garage. The facts as to exactly what happened are in dispute, but David did plead guilty to what we assume to be assault. A friend of Valerie's testified that, on another occasion, she saw David grab Valerie by the arm and push her down.

On November 13, 1981, Valerie left the family home. On November 16, 1981, she filed a petition for dissolution of marriage. On November 25, 1981, an order was made setting a hearing on temporary custody for December 11, 1981. The parties were ordered to file affidavits and to be available for cross-examination on such affidavits. On December 11 Valerie appeared with her attorney. David appeared without counsel. The court considered statements and arguments of counsel for Valerie, as well as statements from David. The court also examined financial statements. The court order does not reflect that any evidence was taken. The court gave Valerie temporary custody and ordered David to pay $50 a week for child support. David owed $1,015 in delinquent temporary child support at the time of trial. The case did not come on for trial until September 22, 1982. The case was concluded on October 28, 1982. After trial the judge entered an order granting custody to Valerie.

I. Child Custody

David contends that the award of custody to Valerie was improper because the trial court failed to consider Valerie's continuing immoral behavior and other undesirable traits and otherwise failed to resolve the issue in accordance with the established criteria concerning the best interests of the child.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight to them, especially where the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

The parties here have sought to engage in a war on the domestic battlefield presumably because of their love and concern for their child. In reading the

record we would almost forget that the fault concept was erased by the Iowa Legislature from marriage dissolution cases. These parties have tended to lose focus of the best interest of their child, being more concerned instead with litigating fault.

In In re Marriage of Winter, 223 N.W. 2d 165, 166 (Iowa 1974), the court said:

> No hard and fast rule governs which parent should have custody. It is not a matter of reward or punishment. The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interest of the children. [emphasis added]

The custody issue is a matter far too important to be used as a device to reward or punish a parent. In re Marriage of Bauder, 316 N.W. 2d 697, 700 (Iowa Ct. App. 1981). In deciding the custody issue we seek neither to reward one parent nor punish the other. In re Marriage of Castle, 312 N.W. 2d 147, 149 (Iowa Ct. App. 1981). We intend, therefore, to look at the affirmative qualities of both parents first in our de novo review.

We are impressed with David's stability. He has maintained the same employment. He bought and paid for the family residence and has exhibited good sense in money matters. He has provided consistent and loving care to his son. He has the respect and affirmance of good parenting from neighbors and from child care providers who served the couple while they lived together. He provided an excellent play area with swings and a sandbox behind his home. He has not complicated his life during the parties' separations and during the dissolution by becoming involved in extra relationships.

Valerie has matured. She has reestablished good relationships with her parents. She has taken care of Randy during the pendency of this action. She has admitted that she made mistakes and indicates a desire to change. Both parties love their son.

Unfortunately we must also look at the less desirable qualities of each party. David is most concerned with Valerie's immoral conduct. In Harwell v. Harwell, 253 Iowa 413, 420, 112 N.W. 2d 868,873 (1962), the supreme court said:

> It is also true that a parent who has been guilty of some immorality may reform and be capable of making a proper home for children. But generally we have no way of judging the future but by the past.

Moral misconduct is a factor to be considered in child custody cases. In re Mariage of Dawson, 214 N.W. 2d 131, 132 (Iowa 1974). In commenting on custody cases the Iowa Supreme Court has said in Harwell v. Harwell, 253 Iowa at 418, 112 N.W. 2d at 872-73:

> It is always true in this class of cases that any decision in most difficult. There is no real remedy for a broken home; it will almost certainly impose a heavy handicap on the children who may be affected, no matter with which parent they may reside. The sins of the father, or mother, which cause this condition are too frequently visited upon the children.

Valerie has admittedly been guilty of immoral conduct on more than one occasion both prior to, during, and after the marriage. David has complained of Valerie's misconduct prior to their marriage. We note that David impregnated Valerie prior to marriage, so we give this complaint no credence. David and Valerie both participated in the act or acts. There is no dual standard of moral conduct. Men and women both must be held to the same standard.

David next complains of Valerie's having had intercourse with men in the family home during Randy's infancy and when Randy was in the home. "[C]onsiderable weight must be given to evidence as to the habits and propensities of the parties desiring custody of children." Fritz v. Fritz, 260 Iowa 409, 419, 148 N.W. 2d 392, 397 (1967). A parent's moral transgression must be considered with other relevant factors, including the habits and propensities of the parties, in determining what is best for the children. Utter v. Utter, 155 N.W. 2d 419, 422 (Iowa 1968). Randy obviously was not aware of any moral misconduct on the part of his mother. In In re Marriage of Welbes, 327 N.W. 2d 756, 758 (Iowa 1982), the supreme court in discussing custody said:

> She [the mother] has had numerous overnight male guests, although this probably has not yet had an adverse effect on

> Holly because of her tender age. Although this conduct is not determinative, it is a factor to be considered along with other circumstances. [emphasis added]

Moral misconduct does not ipso facto preclude the erring parent from custody. In re Marriage of Morton, 244 N.W. 2d 819, 822 (Iowa 1976). Since a child's learning process involves considerable imitation of his parents, however, the parent's personal characteristics are important. 20 Drake Law Review 386, quoting E. Simmel, R. Hobbe and G. Milton, Social Facilitation and Imitative Behavior (1968). We must inquire whether the mother's misconduct shows that she will be a poor custodian to her child. In re Marriage of Forest, 201 N.W. 2d 728, 729 (Iowa 1972). The supreme court has changed custody based on immoral conduct obvious to the children and other factors. Jones v. Jones, 175 N.W. 2d 389 (Iowa 1970). This conduct alone is not determinative, but will be considered with other facts.

David complains of Valerie's conduct in spending the evening prior to their separation with Mr. Albaugh. This conduct is especially bothersome because it shows a lack of concern for others and lack of responsibility to Randy. Finally, David is concerned with Valerie's and Randy's living with Mr. Albaugh and her becoming pregnant by him. The fact that Valerie has established a relationship and became pregnant by another person causes us more concern than does her other immoral conduct. We realize that Mr. Albaugh will have a major influence on Randy's life and we find little in his testimony that indicates any real love or concern for Randy. We recognize the complications, too, in involving one's self in a new relationship prior to terminating another.

At trial Valerie was asked:

> Q. . . . Now, do you feel that by leaving David's home and becoming pregnant by Mr. Albaugh and moving into an apartment in Mechanicsville with Mr. Albaugh and moving your six-year-old son into this apartment that's occupied by you and Mr. Albaugh, is that in your judgment, getting yourself straightened out? A. I see nothing wrong with it, and Randy is perfectly happy.

Valerie apparently deems her relationship with Mr. Albaugh to be proper. We do not.

David has physically abused Valerie. We strongly disapprove of abusing one's spouse and consider it a defect in David's conduct. We are also very critical of David for his failure to pay child support. While we recognize that he was obviously disappointed by a fixing of temporary custody on affidavit and before he had retained an attorney to represent him, this is certainly no justification for failure to pay support. While we recognize the short-comings in summary temporary custody proceedings, we are also aware that sufficient judicial time is not always available for full-fledged hearings. We find, that David was prejudiced with respect to the custody issue because of the proceedings. He was summarily cut off from a child with whom he had maintained a close relationship. We cannot help but believe that the child was also hurt by the termination of this relationship.

We have considered, too, Valerie's attitude toward visitation. Her unlisted telephone number and her immediate action in taking child care privileges from David once she was granted temporary custody were improper. The best interests of children require the continuing association with their father unless the contrary is clearly shown. In re Marriage of Morton, 244 N.W. 2d 819, 822 (Iowa 1976). In Morton the court concluded that a custodial parent was ill-advised to have an unlisted number. We agree. With the advent of joint custody more emphasis is being placed, and rightly so, on the necessity of both parents to maintain access to their children. Non-custodial parents should have access to their children.

After considering all relevant factors we reverse the trial court's award of custody to Valerie. We award custody of the parties' minor son to David. We remand the matter to the trial court for a determination regarding Valerie's visitation rights and child support obligations, if any.

II. Property Division

David contends that the property division was not equitable. We have reviewed the property division in accordance with the dictates of Schantz v. Schantz, 163 N.W. 2d 398 (Iowa 1968), and Iowa Code section 598.21, and find the trial court's decision dividing the property to be fair and equitable. We therefore affirm the property division made by the trial court.

III. Attorney Fees

Valerie has requested attorney fees. Attorney fees on appeal are not awarded as a matter of right. In re Marriage of Erickson, 228 N.W. 2d 57, 59 (Iowa ;975). After considering the relative financial condition of the parties, we find that Valerie is not entitled to attorney fees on this appeal.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.