

IN THE COURT OF APPEALS OF IOWA

FILED MAY 30 1990 88

CLERK SUPREME COURT

PAMELA McCLAIN,)

Petitioner-Appellee,)

Cross-Appellant,)

Filed May 30, 1980

vs.)

STEVEN RAYMOND McCLAIN,)

Respondent-Appellant,)

Cross-Appellee.)

0-87

3-63584

Appeal from Dubuque District Court - William G. Klotzbach, Judge.

Respondent-father appeals child custody provisions of marriage dissolution decree.
Petitioner-mother cross-appeals, challenging child support award and property division.
AFFIRMED AS MODIFIED.

Laura Hahn and Stephen J. Juergens of Fuerste, Carew, Coyle, Juergens & Sudmeier, Dubuque, Iowa, for petitioner-appellee, cross-appellant.

Robert L. Day, Jr., and Joseph J. Bittner of Dubuque, Iowa, for respondent-appellant, cross-appellee.

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

Respondent, Steven McClain, appeals child custody provisions of decree dissolving his marriage to petitioner, Pamela McClain. Pamela cross-appeals, challenging the child support award and property division contained in the decree. We consider these issues separately.

I. Child Custody. The trial court awarded custody of the only minor child of the parties, Ryan, born June 5, 1978, to Pamela. On appeal, Steven urges that the evidence establishes that he is the parent entitled to custody under the criteria enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974).

Our review of the record convinces us that both of Ryan's parents are acceptable, competent, loving parents. Steven suggests that he should be given the edge because he enjoys a more stable lifestyle than Pamela. Such claim is posited on two principle assertions: (1) that Pamela is less inclined to favor strong interpersonal relationships among family members than is Steven; and (2) that Steven is more stable in terms of job security and established domicile. While both of these claims find some support in the record, we cannot conclude that they are necessarily determinative of Steven's claim to custody. The record shows that absence from the home on Pamela's part prior to the separation of the parties was job related. As the marriage soured, Pamela extended the length of such absences beyond that required by her employment. Such extended absences involved, for a time, a nonrecurrent extramarital affair¹ and, on other occasions, rap sessions with a female confidant. Significantly, however, the record does not establish that these occurrences, motivated primarily by Pamela's unhappiness with her marriage, detracted from her efforts to care for Ryan or her interpersonal relationship with Ryan.

With respect to Steven's claim of established domicile and job superiority, we note that it was he who remained in the family home while Pamela moved out. He continues to reside in the community where he is employed and is likely to remain employed. This is the community where his parents and married brothers and sisters also reside. Pamela, on the other hand, moved in order to be nearer to her place of employment and members of her own family. In balance, we cannot conclude that these circumstances demonstrate that Steven is the more stable parent.

¹ In re Marriage of Kehrli, 241 N.W.2d 923, 924 (Iowa 1976).

We conclude that while the trial court might properly have awarded custody of Ryan to Steven, the operative factors significant in applying Winter are evenly balanced as between the competing parents in the present case. We therefore affirm the trial court in accordance with the rule applied in In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976).

II. Child Support. Under the criteria set forth in Schantz v. Schantz, 163 N.W.2d 398 (Iowa 1968), and disregarding fault, we find merit in Pamela's cross-appeal asserting that the child support award of \$35 per week is inadequate. We modify the trial court's decree so as to provide for child support payments by Steven in the amount of \$50 per week.

III. Property Division. Pamela also contends on her cross-appeal that Steven should be required to pay a \$1,892 debt incident to an automobile awarded to her by the trial court. In view of the total property award contained in the trial court's decree, we conclude that this debt should remain that of Pamela, but that Steven should compensate therefor by paying to her the sum of \$400 within sixty days of issuance of the procedendo.

Costs of appeal are assessed to Steven, provided, however, that each party shall pay his or her own attorney fees. the decree of the trial court is affirmed as herein modified.

AFFIRMED AS MODIFIED.

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

DONIELSON, J. (dissenting in part, concurring in part)

I dissent from division I of the majority opinion. The operative factors significant in determining custody are not evenly balanced between these two parents. Steven established his superior ability to care for the child and provide for the child's best interests. See In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1976); Iowa R. App. P. 14(f)(15).

Steven exhibits stability in his work record and home life. Pamela has had a number of jobs and a less permanent nature to her living arrangements. Steven has a day job; Pamela works as a waitress that requires her to be gone four to five nights a week. Steven also appears to be able to provide better arrangements for the care of Ryan when he is at work than Pamela. We note that during Pamela's absences from the home Steven took good care of Ryan. Also, during the period of time Steven had custody under the temporary order, he provided for the child in his parents' home; a period of time during which Pamela exercised visitation with decreasing frequency. Steven's family has exhibited a willingness to help him in any way possible. Pamela's connections to her family do not appear to be as strong. These items and the remainder of the record support the awarding of custody of Ryan to Steven as being in Ryan's best interests. I would accordingly reverse the trial court on this issue.

I join in divisions II and III of the majority opinion.