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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF EDNA L. IRVIN AND JAMES A. IRVIN

Upon the Petition of)
EDNA L. IRVIN,) Filed October 21, 1980
Petitioner-Appellant,)
And Concerning)
JAMES A. IRVIN,) 0-254
2-63668
Respondent-Appellee.)

Appeal from Mills District Court - Leroy H. Johnson, Judge.

Petitioner-wife appeals child custody and property division provisions of dissolution decree. - Affirmed as Modified.

Richard D. Crotty, Council Bluffs, for petitioner-appellant.

Clarold E. Rogers, Glenwood, for respondent-appellee.

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

PER CURIAM

Petitioner-wife Edna Irvin appeals the child custody provision of the dissolution of marriage decree awarding custody of two minor children to respondent-father James Irvin. Edna also appeals an amendment to the dissolution decree awarding James 9.6 acres of realty. We affirm the custody award and modify the realty award.

Edna and James were married October 3, 1959, and their marriage was dissolved May 11, 1979. Their three children — Arlene, Lynda, and Keith — were ages 18, 11 and 7 respectively as of the time of trial. The custody of only Lynda and Keith is at issue.

Our review is de novo. Iowa R. App. P. 4. We are not bound by the trial court's findings of fact, but we give them weight, especially with regard to the credibility of witnesses. Iowa R. App. P. 14(f)(7). In reviewing a child custody determination, we apply the criteria set out in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Our primary concern is the best interest of the children. Iowa R. App. P. 14(f)(15). In reviewing the property provisions of a dissolution decree, we consider the factors articulated in Schantz v. Schantz, 163 N.W.2d 398, 405 (Iowa 1968), except fault. In re Marriage of Williams, 199 N.W.2d 339, 345 (Iowa 1972).

The evidence discloses that both Edna and James had provided adequate care for their children and were good parents. However, prior to their separation, their bitterness toward each other caused the older daughter, Arlene, to leave the home and live elsewhere. Since their separation, the two youngest children have remained in the home and been raised by James. Arlene has now returned to the home.

James has been faulted for critizing Edna in the presence of the children. Edna now lives with an unmarried man, who was charged with lewd and lascivious acts with a minor ten years before and allegedly engaged in improper sexual advances toward other minor girls. Although much of this testimony was hearsay, it was unrefuted.

The testimony of Arlene, who presently lives with James and the other two children, reveals that James provides the minor children with good meals, keeps them clean, well-clothed, and is a good housekeeper. Arlene furthermore states that James gives the children good attention and care generally and that the children are contented living with him. Arlene testifies that her siblings are often afraid to visit Edna because of her association with the unmarried man. There is no indication in the record that

Edna has any intention of discontinuing relations with the unmarried man. In her testimony Donna Carlstedt, a longtime friend of and babysitter for the Irvins stated the opinion that James is a good parent. Donna also testified that the minor children are afraid of the unmarried man with whom Edna is living. Julia McGrew, James' sister, testifies that the Irvin home has been kept much cleaner since Edna left it, that James keeps the children well-fed and well-clothed, that the children are contented in their relationship with James, and that James is the better parent for the children. Edna testifies that James is a good father, that she feels safe leaving them in James' company, that James is attentive to their wants, that James spends time with them in their play and other activities, and that James is interested in hearing reports of their educational progress. The children appear to have gotten along well in the custody of James and would face an uncertain welfare with Edna given her present living situation. For these reasons and with deference to the trial court's vantage point, we find custody of the children is better placed with James. In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). We therefore affirm the award of custody to James.

In an amendment to the dissolution decree the trial court awarded James 9.6 acres of land valued at $10,000 that was inherited by both Edna and James as tenants in common from Columbus Reed Fender, a relative of Edna's. The test for an acceptable division of assets under a dissolution decree is to ask what would constitute an equitable and just award under the circumstances. Locke v. Locke, 246 N.W.2d 246, 251 (Iowa 1976). After considering the circumstances of the case at bar in light of the criteria articulated in Schantz, we conclude that the trial court's award of the entire 9.6 acres to James was unjust. We accordingly modify the trial court's realty award, and hereby declare that Edna and James each have a one-half undivided interest as tenants in common in the 9.6 acres of realty inherited from Columbus Reed Fender.

Costs are assessed against Edna.

AFFIRMED IN PART; MODIFIED IN PART.

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

OXBERGER, C.J. (dissenting)

I dissent. Mr. Irvin testified he had no problem with Mrs. Irvin having custody of the children--"It is simply Harold Woodard." The majority finds Mr. Woodard would be a bad influence on the children based on testimony they characterize as follows: "Although much of this testimony was hearsay it was unrefuted." I would find that unrefuted hearsay like other hearsay is inadmissible. I consider Mrs. Irvin's judgment as a concerned parent to be adequate protection for the minor daughter if there is any substance to the allegations against Harold Woodard.

I further find that the record sheds little light on Mr. Irvin's parenting capabilities. However, there is substantial evidence of Mrs. Irvin's parenting skills. I believe the best interest of the children would be served by awarding Mrs. Irvin custody of the children.

Johnson, J., joins in this dissent.