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NOV 19 1979
IOWA SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE MARRIAGE OF CHERYL LOU NETTLETON & DAVID SAMUEL NETTLETON

Upon the Petition of)
CHERYL LOU NETTLETON,) Filed November 19, 1979
Petitioner-Appellant,)
And Concerning)
DAVID SAMUEL NETTLETON,) 215
3-62368
Respondent-Appellee.)

Appeal from Woodbury District Court - D. M. Pendleton, Judge.

Petitioner-wife appeals from dissolution decree awarding custody of children to respondent-husband. - Affirmed in part; reversed in part; vacated in part; modified in part.

N. Richard Willia, of Margolin, Goldblatt, Stienstra, Ryan & Gildemeister, of Sioux City, for Petitioner-Appellant.

Richard Rhinehart, of Wilson, Rhinehart & Bikakis, Sioux City, for Respondent-Appellee.

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

PER CURIAM

Petitioner-wife Cheryl Lou Nettleton appeals from a dissolution decree awarding custody of the children of the marriage to respondent-husband David Samuel Nettleton. We believe the long-range best interests of the children require that they be placed in the custody of Cheryl. Therefore, we reverse the trial court's award of custody to David.

Our review is de novo. In re Marriage of Meier, 267 N.W.2d 46, 47 (Iowa 1978); In re Hobson, 248 N.W.2d 137, 139 (Iowa 1976); Iowa R. App. P. 4. We accord weight to the trial court's findings of fact, especially regarding the credibility of witnesses, but that deference does not relieve us of the responsibility to review the whole record and adjudicate anew rights on the issues properly presented. Boyes v. Boyes, 247 N.W.2d 265, 267 (Iowa 1976); In re Marriage of Moorhead, 224 N.W.2d 242, 244 (Iowa 1974); Iowa R. App. P. 14(f)(7). While the precedent of prior cases may serve as guidance in reaching a proper child custody determination, each case must be ultimately decided on its own facts. Boyes, 247 N.W.2d at 267; In re Marriage of Peterson, 227 N.W.2d 139, 141 (Iowa 1975).

I. This case is unfortunately typical of most child custody cases we are called on to review, in that the record is replete with reciprocated accusations and allegations concerning each parent's unfitness to properly care for the children. We are called on to sift through this verbal cacophony to reach the quintessential determination of which parent will best provide for the long-range best interests of the children. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975); Moorhead, 224 N.W.2d at 244; Iowa R. App. P. 14(f)(15). We are assisted to some extent by the criteria elucidated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), some of which are particularly pertinent to the case at bar.

Two of the Winter criteria that the trial court apparently found to have determinative applicability to this case were: the characteristics of each parent, including age, character, stability, mental and physical health; and the nature of the proposed environment, including its stability and wholesomeness. Cheryl accused David of engaging in deviant sexual practices which David denied. David accused Cheryl of sexual intimacy with at least two men prior to the dissolution which Cheryl denied. The

trial court found David's testimony to be the more credible and based its award of custody to David on the conclusion that he would provide a more stable and wholesome environment for the children.

One possible means of ascertaining the truth among the character assassinations between David and Cheryl would be to remand this case to the trial court for the taking of testimony from the minor children, who did not testify at the trial, and who allegedly witnessed the conduct of both parents that serves as the basis for their conflicting allegations. We are more than hesitant to subject these children, presently ages nine, seven, and five, to the likely traumatic effects of being required to testify in court about the possible immoral conduct of their parents. See Marshall v. Stefanides, 17 Md. App. 364, 369, 302 A.2d 682, 685 (1973) ("We recognize that a child, particularly of young and tender years, could be subjected to severe psychological trauma because of a custody case."); Lincoln v. Lincoln, 24 N.Y.2d 270, 272, 247 N.E.2d 659, 660, 299 N.Y.S.2d 842, 843 (1969) ("It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them. . . ."); Siegel & Hurley, The Role of the Child's Preference in Custody Proceedings, 11 Fam. L.Q.1, 43 (1977), reprinted in The Youngest Minority II 258 (S. Katz ed. 1977) ("The atmosphere of the divorce or custody arena itself may be deemed to pose a threat to the well-being of the child.") We are also concerned about the likelihood of deriving the truth from these children of tender years, who are subject to undue influence by their parents regarding their testimony. See Siegel & Hurley, supra at 10-15, reprinted in The Youngest Minority II at 225-30. Consequently, we conclude that the trial court acted appropriately in refusing to grant the request of David's counsel that the eldest child be allowed to testify and that such a refusal is appropriate with regard to the other children as well.

The trial court also refused to conduct an in camera interview of the eldest child. While in camera interviews are clearly less likely to be as psychologically damaging as open court testimony, Parker v. Parker, 467 S.W.2d 595, 597 (Ky. App. 1971); Lincoln v. Lincoln, 24 N.Y.2d at 272, 247 N.E.2d at 660, 299 N.Y.S.2d at 843; Siegel & Hurley, supra at 47, reprinted in The Youngest Minority II at 262, we believe the trial court

acted appropriately by declining to conduct such an interview, and, under the circumstances, we think that remanding this case for such a purpose would also be inappropriate. When the motion was originally made at trial to conduct such an interview, both Cheryl's attorney and the attorney for the children objected. Requiring an in camera interview of the children over those objections might present due process problems. See Raper v. Barrier, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957); Siegel & Hurley, supra at 32, 48-49, 51-53, reprinted in The Youngest Minority II at 247, 263-64, 266-68; Annot., 99 A.L.R.2d 954, 961-62 (1965). See generally Tschappat v. Kluver, 193 N.W.2d 79, 80 (Iowa 1971); Conkling v. Conkling, 185 N.W.2d 777, 785 (Iowa 1971). Furthermore, when asked how the children would probably react to an interview by the trial court, the attorney for the children testified as follows:

> I don't know that they appreciate exactly what's going on. As it affects them. The boys have repeatedly asked, "When is this going to be over?" It is my opinion that, to them, at this point, they fully do not appreciate it, it is somewhat of a game. They are confused by the process we are involved in here.

Whether children should be interviewed by the court is a matter within the discretion of the trial court. Parker, 467 S.W.2d at 597; Marshall, 17 Md. App. at 369, 302 A.2d at 685; Siegel & Hurley, supra at 58, reprinted in The Youngest Minority II at 273. We believe the trial court appropriately acted within its discretion by refusing to conduct an in camera interview of the children, and, under the circumstances, we believe it would be contrary to the best interests of the children to override that exercise of discretion by remanding to the trial court for any form of questioning of the children. "The elementary principles of humanitarianism are so strongly against the placing of a child between its parents that we feel a trial court should have a wide latitude in protecting the child." Parker, 467 S.W.2d at 597.

We recognize the superior position of the trial court to judge the credibility of witnesses. Accordingly, we accept the trial court's findings that David probably did not engage in the sexual deviances Cheryl accused him of, and that Cheryl's relationship with the two men prior to the dissolution were probably not purely platonic. However, we do not believe it appropriate to end our review at this point. Moral misconduct by one parent is merely one factor to be considered in determining a parent's fitness to have custody; it will not, by itself, preclude awarding custody to the erring parent. In

re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976); In re Marriage of Ballinger, 222 N.W.2d 738, 739 (Iowa 1974); In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974).

In addition to accepting the allegations of Cheryl's moral misconduct as true, to be consistent with our acceptance of the trial court's determination of credibility we must also reach the conclusion that since the trial court found that Cheryl's testimony overstepped the bounds of judicial credulity, Cheryl's disregard for the truth and the sanctity of the oath must also reflect adversely on her fitness to have custody of the children. Dawson, 214 N.W.2d at 133. Again, however, that is still only one factor to be considered out of the whole record.

Another factor to be considered, as enunciated in Winter, is the capacity and interest of each parent to provide for the emotional, social, moral, material, and educational needs of the children. Beyond the adverse comments on Cheryl's character and ability to provide a wholesome environment, the record is resplendent with favorable testimony concerning her ability and prior performance in providing for the basic needs of the children. On the other hand, there is a significant lack of testimony concerning David's ability to provide and care for the children's basic needs. Furthermore, the record shows that during the marriage, David's enthusiasm and participation in attending to the basic daily needs of the children was basically limited to bringing home his paycheck. It is not without reservation, in light of Cheryl's apparent moral misconduct and disregard for the truth, that we conclude that in spite of Cheryl's moral defects, she has expressed by her actions and conduct as a parent, a sincere and active concern in the development of the children.

We are mindful of another of the Winter criteria of particular importance — the recommendation of the attorney for the children. Without attaching any degree of expertise to that recommendation, we recognize its significance by reason of its impartial observations. Here, the attorney for the children initially recommended that custody be awarded to Cheryl. Subsequently after learning more about Cheryl's relationships with the two other men, he retracted that recommendation. Further deliberation led him to the conclusion, however, that despite her improper behavior, Cheryl was still better qualified to serve the best interests of the children. We find his testimony to be most persuasive in directing us to the conclusion that the long-range best interests of the children will be better served by awarding their custody to Cheryl.

> Q. And, at this time, who is it, your opinion, these children should be with?
> A. . . . It is my opinion that the father would do everything within his power to provide for the needs of the children, if the court would award the children to him. However, it's my impression that, even during the course of these two years, approximately, we have been involved here, that the children have been consistently in the home of his parents, and, I think, they have, in a great way, significant way, provided the types of things the children would need, and I have no evidence that David is as qualified as Cheryl to provide for their basic needs. The result of my investigation was that, basically, prior to Cheri taking these courses at W.I.T. in nurse's aide, David paid—did little around the house except to criticize Cheri for the way it was done, and she was still primary for the various wants and needs of the children. It was, up until this time, her responsibility to raise the children and to basically support the children, and, I think, that I have basically no evidence to support the fact that David is as qualified to care for their kids. . . . [I]t's my opinion that perhaps I really have no choice, David will do everything in his power to care for the needs of the children, but I have observed the children, and they are developing what I would consider in a very normal and healthy manner, and can one attribute this primarily to Cheri, and therefore, it would be my opinion that she is better qualified to serve their long-range best interests.

In deciding that Cheryl is better suited to have custody of the children, we are not adhering to an inference that the best interests of children of tender years are served by placing them in their mother's custody—an inference that has been abandoned in Iowa. Meier, 267 N.W.2d at 47; In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974). We merely conclude that the long-range best interests of the children are served by placing them in the custody of the parent who has demonstrated by prior conduct a superior ability to care for the children's basic needs. The record speaks for itself.

While we determine the result of this child custody case ultimately on its own facts, we are not unmindful of prior cases in which it was concluded that based on one parent's superior ability to care for the basic needs of the children, and on the recommendation of the attorney for the children that that parent would better provide for the best interests of the children, that parent should be given custody of the children, despite strong evidence of that parent's moral misconduct. In re Marriage of Kehrli, 241 N.W.2d 923, 924-25 (Iowa 1976); Dawson, 214 N.W.2d at 132-33. Consequently, we conclude that the best interests of the children require that their custody be placed with Cheryl and reverse the trial court's decree awarding custody to David.

II. Cheryl contends that if she is awarded custody on appeal, she should be awarded the residence that she and David occupied until the initiation of the dissolution proceedings, as well as the contents of the residence. Since the trial court apparently determined that David would need the residence and its contends to provide for the care of the minor children, we conclude that since we award custody of the children to Cheryl, Cheryl should also be awarded the residence and its contents. Consequently, we award all right, title, and interest in and to the property located at 4901 Morningside Avenue, Sioux City, and all the household goods, furnishings, furniture, and appliances owned by the parties at the time of their separation, plus the personal property of the children, to Cheryl. The lump sum property settlement award of $3,750 to Cheryl is hereby vacated in light of the award of the residence and its contents to her. An equitable division of the parties' assets accumulated through their joint efforts requires the payment of $3750 to David. This sum with interest at nine percent per annum shall be a lien on the residence awarded to Cheryl and shall be paid when the youngest child reaches eighteen or at such earlier time as the residence is sold. David should have the same visitation rights as were provided for Cheryl in the trial court's decree, unless on remand, it is determined that David cannot accommodate his schedule to the visitation times presently set out therein.

III. Cheryl did not specifically raise the issue of child support on appeal. However, this does not preclude us from addressing that issue in light of our disposition of the child custody issue, since the issues of child custody and child support are so interdependent that a change of custody ordinarily requires a re-evaluation of the child support issue. In re Fenchel, 268 N.W.2d 207, 209 (Iowa 1978).

In determining a proper child support allowance, a number of factors must be considered, including: parties' age, health, present earning capacity, future prospects, amount of resources owned by each or both parties, contributions of each to the joint accumulations, the children involved, duration of the marriage, indebtedness of each or both, and any other relevant factors that may aid in reaching a just and equitable decision. In re Marriage of Zoellner, 219 N.W.2d 517, 525 (Iowa 1974). The record reveals that Cheryl's net monthly income is approximately $200, while David's net monthly income is approximately $800. The residence that we now order should be

awarded to Cheryl is encumbered by a mortgage with monthly mortgage payments of $214.60. In light of the applicable Zoellner criteria, we conclude that a just and equitable disposition of this issue mandates that David be required to pay child support to Cheryl in the amount of $300 per month, to be decreased by $100 per month each time a child reaches age eighteen, subject to the provisions of section 598.1(2), The Code 1979.

IV. Cheryl contends that the trial court erred in requiring her to pay her own attorney fees with the exception of $150 to be paid by David, as well as one-third of the court costs. Attorney fees are not recoverable as a matter of right in a dissolution proceeding. Locke v. Locke, 263 N.W.2d 694, 696 (Iowa 1978); In re Marriage of Peterson, 227 N.W.2d 139, 142 (Iowa 1975). The determinative factors are need and ability to pay. Locke, 263 N.W.2d at 696; In re Marriage of Willcoxson, 250 N.W.2d 425, 427 (Iowa 1977). The trial court has considerable discretion in the allowance of attorney fees. Locke, 263 N.W.2d at 696; In re Marriage of Winegard, 257 N.W.2d 609, 618 (Iowa 1977). From our review of the record, we cannot conclude that the trial court abused its discretion in requiring Cheryl to pay her own attorney fees, or in requiring her to pay one-third of the costs.

V. Cheryl has also applied for attorney fees incurred in this appeal. Factors to be considered in evaluating a request for attorney fees incurred on appeal include: the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. In re Marriage of Stom, 226 N.W.2d 797, 800 (Iowa 1975). Applying those factors to the facts of this case, we conclude that David should be required to pay $750 to Cheryl for her attorney fees incurred by this appeal. Costs on appeal are taxed one-fourth to Cheryl and three-fourths to David.

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; MODIFIED IN PART.

Donielson, J., dissents.

DONIELSON, J. (dissenting)

I am compelled to dissent from the majority's disposition of this case because of the particular facts present here. My disagreement stems from the majority's failure to adequately deal with the charges made by Cheryl concerning David's deviant sexual practices. The existence of these charges should require further investigation by the trial court to determine their validity; the best interests of the children can only be served by requiring such an action. The majority appears to realize the seriousness of this situation, but refuses to meet it squarely.

The majority accepts the trial court's findings that David probably did not engage in the sexual deviances alleged by Cheryl. If this is truly the case, I have even more serious reservations regarding Cheryl's fitness as a parent than does the majority. The allegations made by Cheryl were so defamatory and maligning that if they are indeed untrue, I question her judgment and sense of values. The desire to obtain the custody of her children does not excuse behavior that could wreck David's employment prospects, social contacts, and community reputation. A parent's disregard for truthfulness and the sanctity of an oath reflects adversely on a parent's custodial fitness. In re Marriage of Dawson, 214 N.W.2d 131, 133 (Iowa 1974); Utter v. Utter, 261 Iowa 683, 688, 155 N.W.2d 419, 422 (1968). While this may be only one factor to be considered, the seriousness of the charges and ease with which they were made does not bode well for Cheryl's ability to provide the children with moral training and modeling.

If, however, there is a scintilla of truth in her charges, then not only should David not have custody, he should also be denied visitation. The harm to the children that would result from subjecting them to the type of activities alleged is clear and serious. The best interests of the children's well-being would require a complete severing of all contact with their father. Iowa R. App. P. 14(f)(15).

It is for these reasons that I find the majority's disposition of this case incomplete and inadequate. I would remand this case to the trial court for in camera interviews with the children. The possible traumatic effect of such interviews is clearly outweighed by the need to be absolutely certain as to the truth of the charges; any short-term harm is outweighed by the possible long-term harm. If the claims are indeed found to be baseless, I would then award custody of the children to David because of

Cheryl's capacity to formulate such an outlandish fabrication, which indicates such bad judgment and immaturity so as to disqualify her as a parent.

The majority opinion, while a solution, is simply not adequate to meet the minimal demands of justice due the parties or to protect the best interests of the children.