FILED
MAR 31 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF NEDRA JEAN HECKETHORN & HENRY EDWARD HECKETHORN

Upon the petition of)

NEDRA JEAN HECKETHORN,) Filed March 31, 1980

Petitioner-Appellant,)

And Concerning,)

HENRY EDWARD HECKETHORN,) 0-17
3-63620

Respondent-Appellee.)

Appeal from Des Moines District Court - William S. Cahill, Judge.

Petitioner-wife appeals child custody provision of dissolution decree. - Affirmed.

David Arthur Adams, Des Moines County Legal Aid Service, Burlington, for petitioner-appellant.

T. K. Ford, of T. K. Ford Law Offices, Burlington, for respondent-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Petitioner-wife appeals the child custody provision of the dissolution decree contending that the best interests of the parties' minor son require that she rather than respondent-husband be awarded custody. We affirm.

Petitioner and respondent were married on June 6, 1972, the third marriage for each. The only minor child of the marriage is currently six years old. Petitioner is currently unemployed, with a recent history of different jobs of short duration. Respondent is a truck driver whose job takes him out of town approximately four days a week. Both parties admitted having adulterous relationships during their marriage, however, respondent attributed his exploits to his obsession with alcohol, a vice that he asserts he has abandoned for at least four years. Both parties are currently living with a member of the opposite sex to whom each contemplates marriage. In awarding the custody of Eddie, the minor child, the trial court found that petitioner "evidenced characteristics of instability which tip the scales towards the respondent sufficiently to justify awarding custody to him in this matter."

Our review is de novo. Iowa R. App. P. 4. Although we will not abdicate our responsibility to make determinations anew as triers de novo on appeal, we give weight to the fact findings of the trial court, especially with regard to 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).

Applying the applicable Winter criteria, we conclude, as did the trial court, that this is a close and difficult case. Either party would serve as a satisfactory custodial parent and neither has demonstrated a superior ability to minister more effectively to the child's best interests. We believe that our rule giving weight to the trial court's findings tips the scales in favor of respondent. In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). We therefore affirm the award of custody to respondent.

AFFIRMED.

Oxberger, C.J., dissents.

OXBERGER, C.J. (dissenting)

I would grant custody of the child to petitioner. She has provided Eddie the bulk of parental care during the marriage.

Respondent is away from home four to five days and nights per week. Thus, the bulk of care will be given by respondent's live-in girl friend, about whom we know nothing.