FILED
DEC 18 1985
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

**IN RE THE MARRIAGE OF JACK L. STEINHOFF AND JULIE A. STEINHOFF**

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| **Upon the Petition of** | ) | 498 |
| **JACK L. STEINHOFF,** | ) | Filed December 18, 1985 |
| Petitioner-Appellee, | ) | |
| **And Concerning** | ) | 5-350<br>84-2002 |
| **JULIE A. STEINHOFF,** | ) | |
| Respondent-Appellant. | ) | |

Appeal from the Iowa District Court for Woodbury County - James P. Kelley, Judge.

Respondent wife appeals the child custody provisions and the property division set out in the divorce decree of the district court. **AFFIRMED AS MODIFIED.**

Daryl L. Hecht of Crary, Huff, Clem, Raby & Inkster, Sioux City, Iowa, for respondent-appellant.

Thomas A. Vakulskas, Sioux City, Iowa, for petitioner-appellee.

Heard by Donielson, P.J., Schlegel, and Hayden, JJ.

Respondent wife appeals the child custody provisions and the property division set out in the divorce decree of the district court. We modify the trial court's decree.

Respondent Julie Steinhoff and petitioner Jack Steinhoff were married in 1974, and lived on a farm near Sloan, Iowa. During their marriage they adopted two children, Nicholas and Amanda, who, at the time of the divorce proceedings, were both under five years old.

Marital relations had broken down to the point that on August 23, 1983, Julie decided to take the children and leave their home without telling Jack. She later returned the children to Jack after she decided that Jack could provide a more suitable home environment because she was unemployed at the time and did not have a permanent residence.

By the time of the separation, Julie was involved in a relationship with Larry Forney, a neighbor of the Steinhoffs, who had jointly farmed approximately 300 acres with the Steinhoffs for the previous five or six years. After she left Jack, Julie went to live with Mr. Forney.

Within two days of the separation, Jack and Julie met in the office of Jack's lawyer, where Julie signed a stipulation that called for Jack to have the permanent care, custody, and control of the children. Since that time Jack has had sole custody of Nick and Amanda, and he has allowed Julie to periodically visit the children. Eventually Julie retained her own counsel, who rescinded the custody stipulation. It was not until after Julie filed an application for temporary care, custody, and control of the children that Jack became more congenial in working toward more amicable visitation conditions.

On April 5, 1984, the trial court ordered that a parental evaluation be conducted by a representative of the Catholic Charities Agency in Sioux City,

Iowa. After six sessions with Julie, Jack, and the children, the court-appointed family therapist, Mr. Parrinello, recommended that joint custody be ordered and that Julie have primary physical care and custody. Janet Klusak, a child psychologist and psychiatric social worker, testified on behalf of Julie after having extensive contact with Julie, Jack, the children, and Mr. Forney. She stated that, in her opinion, Julie had more ability than Jack to be sensitive to the children's needs and that the children appear to be more relaxed around her and enjoy their interaction with Mr. Forney. Dr. Patricia Petretic-Jackson, a clinical psychologist and assistant professor at the University of South Dakota, also testified on behalf of Julie. After administering several tests that examined Julie on her personality and her ability to handle stress encountered by parents, Dr. Jackson reported that Julie was a "highly competent and skilled parent" who is "sensitive . . . highly creative and adaptive in her interaction with the children." Dr. Jackson concluded that the children relate well to their mother and clearly show a high positive attachment to her, and that Julie had the unusual capacity to keep both of the children occupied and attentive simultaneously.

Jack called an expert with a masters degree and Ph.D. in education and counseling psychology, to testify in his behalf. After conducting personality tests on Jack and the children, the expert concluded that Jack's parental profile was valid and normal, and that Jack had a good relationship with the children.

Aside from the above experts, lay witnesses' testimony can be summarized as indicating that both parents love and could take care of their children. The trial court awarded permanent care and custody of the children to Jack. Julie appeals this order and also contends that the property division the of the decree was also inequitable.

**I. Custody.** Our review is de novo. In re Marriage of Deck, 342 N.W.2d 892, 894 (Iowa Ct. App. 1983). We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

The supreme court interpreted Iowa's joint custody criteria of Iowa Code section 598.41 (1983), in In re Marriage of Bolin, 336 N.W.2d 441, 443-44 (Iowa 1983), said:

> The legislature, however, requires a custody award, "insofar as reasonable and in the best interest of the child, . . ., including liberal visitation rights where appropriate, which will assure a minor child frequent and continuing contact with both parents after the parties have separated or dissolved the marriage and which will encourage parents to share the rights and responsibilities of raising the child." § 598.41(1). Joint custody is intended to foster that objective, leaving each parent with the "rights and responsibilities associated with parenthood in lieu of reducing a non-custodial parent's role to that of a favorite, visiting relative." In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa Ct. App. 1981) (Johnson, J., concurring).

It is apparent that the court placed some emphasis on Julie's affair with Mr. Forney in deciding who should have physical custody of the children. Despite acknowledging the joint custody criteria set out in In re Marriage of Bolin, 336 N.W.2d 441 (Iowa 1983), the court concluded that Julie abandoned her marriage and her children which demonstrated her inability to be the better custodial parent.

The Iowa Supreme Court has previously held that a mother's participation in an adulterous relationship does not necessarily disqualify her from being a proper custodian for her children. In re Marriage of Dawson, 214 N.W.2d 131 (Iowa 1974). Alleged moral misconduct is only one of several factors to be considered in evaluating parental fitness. In re Marriage of Grandinetti, 342 N.W.2d 876 (Iowa Ct. App. 1983). Furthermore, moral misconduct has been weighed most heavily in those cases where the misconduct occurred in

the presence of the children. In re Marriage of Stom, 226 N.W.2d 797 (Iowa 1975); In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa Ct. App. 1983).

Discounting the impact of Julie's affair, Julie still has not shown she would be a better parent than Jack. Julie, not Jack, left the children because she felt Jack could provide a more suitable environment, which he has done for 25 months. Since then Jack has demonstrated that he is an excellent parent. Jack's psychologist considered him to be the better parent; Julie's expert testified she was the better parent. The district court awarded Jack sole custody. Jack has taken care of the children since August of 1983. Jack has provided a stable environment for the children over this 25-month period. He is a farmer and has a flexible schedule which enables him to meet the children's needs. The children have lived on this 200-acre farm all their lives. Jack has been a loving and caring parent and the children are well-adjusted.

We hold that it was error to award sole custody to Jack. We modify the trial court's decree so as to provide joint custody in both parents and primary physical custody in Jack. Julie is awarded visitation with the children no less than every other weekend from Saturday at 9:00 a.m. until Sunday at 7:00 p.m. and on holidays in alternate years as follows: Thanksgiving Day, Christmas Day, New Year's Day, Easter, Memorial Day, 4th of July, Labor Day, and on alternate years on the birthday anniversary of the children. The trial court did not order Julie to pay child support due to the property settlement. We will not disturb that portion of the decree.

**II. Property Division.** The trial court awarded the farm land worth $134,000, the machinery and equipment worth $38,580, and household furnishing and goods worth $3,060, to Jack; for a total of $175,840 in assets. It also ordered Jack liable for debts and liabilities worth $189,618. The court awarded Julie approximately $8,000 of assets and made her responsible for approximately

$7,300 in debts. It ordered Jack to pay Julie $15,000 as a property settlement. Julie seeks an increase in the payments from $15,000 to at least $50,000. Jack has not cross-appealed to reduce any portion of the property settlement including the $15,000 payments.

The property division and alimony provisions of a dissolution decree must be equitable to both parties. In re Marriage of Callenius, 309 N.W.2d 520, 524 (Iowa 1981). Our de novo review of the evidence causes us to conclude that the property division of the trial court should be affirmed. Although Jack may have contributed more financially to the marital assets, the contributions of the wife, housemaker, and mother are substantial. In re Marriage of Ralston, 242 N.W.2d 269, 271 (Iowa 1976). We therefore affirm the trial court's property division of the $15,000 payments of $5,000 annually over three years, as a property settlement to Julie.

We modify the trial court's decree and hold that joint custody shall be provided to both parents with primary physical custody in Jack. The remaining portions of the trial court's award is affirmed.

**AFFIRMED AS MODIFIED.**

Donielson, P.J., and Hayden, J., concur; Schlegel, J., dissents.

**SCHLEGEL, J.** (dissenting)

I respectfully dissent.

I cannot agree that Jack will be the better parent to have primary physical custody of the children in this case. It is clear that he demonstrates a lack of sensitivity to the importance of a close relationship between children and both parents.

Both the trial court and the majority of this court have relied in their decisions upon the concept of Julie's fault, as a result of her relationship with Mr. Forney. The court's finding that Julie "abandoned her marriage and her children" is not supported by the evidence. Rather, her return of the children to the family home after initially taking them with her, shows a strong desire to assure their protection and stability during the rocky course of separation and dissolution that was ahead.

The majority cites the evidence of Jack's expert in support of a finding that Jack's parental profile was valid and normal, and that Jack had a good relationship with the children. The majority has left out any reference to his opinion that Julie is "emotionally unstable . . . and a rejecting parent" all without having met her. The majority further neglects to take note of the trial court's rejection of that expert's testimony. AT the same time, the majority refuses, as apparently did the trial court, to permit the opinion of the court-appointed family therapist or that of the child psychologist and psychiatric social worker who testified on behalf of Julie to overcome the obvious reliance upon Julie's misconduct in deciding the issue of primary physical custody.

I would modify the decree in this case by awarding joint custody and awarding primary physical custody to Julie.