FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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JUDI GAIL FLOWERS,
On Behalf of the Minor Child,
BRADLEY J. ROSS,

Petitioner-Appellant,

vs.

ROY O. ROSS,

Respondent-Appellee.

) Filed August 30, 1983

) 3-111
3-69161

Appeal from Buchanan District Court, L. John Degnan, Judge.

Petitioner, the natural mother of a child born out of wedlock, appeals from an adverse trial court judgment on her habeas corpus action to regain custody from the child's father. AFFIRMED.

Larry F. Woods, Oelwein, for petitioner-appellant.

Phillip E. Havens of Roberts, Vander Hart & Havens, Independence, for respondent-appellee until his withdrawal, and then respondent-appellee pro se.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

PER CURIAM

Judi Gail Flowers and Roy O. Ross lived together from 1974 to 1980, but never married. Their child, Bradley, was born in 1978. In 1980, when the couple separated, the child stayed with his mother. She soon moved to Seattle, taking Bradley with her. Roy went to Seattle in 1981 to visit Bradley, took him from Judi on the pretense of taking him to a family reunion for two weeks, and never returned Bradley to her. Roy brought Bradley to Iowa and since then they have been living with Roy's new wife, Peggy, and Peggy's daughter from a previous marriage. Judi brought a habeas corpus action to gain legal custody; there had been no prior legal determination of custody. The trial court awarded custody to Roy. Judi appeals. We affirm.

Our scope of review in this proceeding is de novo. Iowa R. App. P. 4. We review the entire record and adjudicate the rights of the parties anew on issues properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 156(Iowa 1977). While we accord weight to the findings of the trial court, particularly when the credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7); In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974).

The criteria used in making a custody determination are the same whether the parents are married or not. Heyer v. Peterson, 307 N.W.2d 1, 7 (Iowa 1981). Thus, we review the trial court's order in light of the factors enumerated in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974), bearing on the determination as to which parent will better provide for the child's needs. As always, the paramount consideration in any custody dispute is the long-term best interests of the child. Iowa R. App. P. 14(f)(15); In re Marriage of Sparks, 323 N.W.2d 264, 266 (Iowa 1982); Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa

1975). We are not guided by any predisposition that minor children should be awarded to one parent or the other, nor do we utilize custody decisions to penalize either party for prior moral indiscretions. Each party's past incidents of indiscretion interest us only to the extent that they bear on that party's respective fitness to provide for the children's needs.

Therefore we cannot penalize Roy for procuring Bradley from Judi through deception by awarding custody to Judi if we feel that Bradley's best interests would be served by staying with Roy. Neither can we take into account Judi's inability to have other children. Granting custody to Roy seems inequitable to Judi under the facts as they appear on the record. However, we must consider the best interests of the child. Our review of the record indicates that the decision is indeed a close one. Roy appears to be in stable employment. He and Bradley do things together and seem to have a good relationship. Granting custody to Roy gives Bradley the advantage of a more extended family, including the parents of Roy's current wife to serve in the grandparent role, and Roy's wife's daughters, one of which is close to Bradley's age. On the negative side is the criminal record of Roy's wife, which bears on the suitability of Roy's home for the moral upbringing of Bradley. However, there is evidence that Judi has a history of extensive drinking and that periodically she decided to give custody of Bradley to Roy, only to change her mind when Roy attempted to carry out her desire. The trial court can judge best the credibility of the witnesses. We assume it took into account Roy's inconsistent testimony, the conflicting testimonies of Roy and Judi, and the criminal record of Roy's wife in its assessment of the witnesses' credibility.

Applying the operative facts under the Winter criteria leads us to believe that it is in Bradley's best interests that his custody be with his father. Our belief is bolstered by our rule giving weight to trial court's findings. In re Marriage of

McDowell, 244 N.W.2d 238, 239 (Iowa 1976); In re Marriage of Ringus, 266 N.W.2d 805, 807 (Iowa 1975); In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974). Furthermore, the child is currently in respondent's custody and has been for some time. There is no evidence in the record that Bradley is not normal, healthy, well adjusted, and being well cared for. "[W]hen it appears children are happy, well adjusted, adequately disciplined, and receiving proper care in a suitable home they should not be removed therefrom other than for the most persuasive causes." Schoonover at 34. The causes presented by petitioner are not sufficiently persuasive. We affirm the trial court's resolution of the custody issue.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

The child who is the subject of this opinion is a child who was born out of wedlock. Up until this time, there had been no legal proceedings to determine the custody of the child. However, the following is not in dispute: Judi is the natural mother of Bradley, having given birth to him in April 1978; Judi has had custody of Bradley per agreement of the parties continuously until the "family reunion" incident; Judi granted Roy a two-week summer visitation with Bradley, in agreement that the child was to be returned after that period of time. I believe the foregoing actions of the parties created a presumption that Judi was to have custody of Bradley. Furthermore, there has been no indication that Judi could not effectively minister to Bradley's long-term best interests.

What the court has done today is to condone a parental self-help process. I do not believe that because one party feels as though he can minister more effectively to the child's interests that he has the right to "snatch" the child away from the present custodial parent. Judi and Bradley had a good and stable home life. The fact that Roy is able to equally provide for Bradley after the "snatching" incident should not enhance his track record. I do not believe we should differentiate between the case at bar and one where the court has established the custodial home. There is a strong policy rationale behind not condoning this sort of parental self-help, the policy being protection of the stability and security of vulnerable children. The legislature has acknowledged this policy by adopting the Uniform Child Custody Jurisdiction Act and by making violations of custodial orders criminal. We as a court should do no less.

Therefore, I must respectfully dissent from the majority opinion for the foregoing reasons.