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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF JAMES OWEN BARR AND CONNIE LOU BARR

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Upon the Petition of)
JAMES OWEN BARR,)
Petitioner-Appellant,)
And Concerning)
CONNIE LOU BARR,)
Respondent-Appellee.)

Filed February 21, 1984

3-448
83-910

Appeal from the Iowa District Court for Jasper County - Jack D. Levin, Judge.

Husband appeals from the trial court's refusal to modify the decree dissolving the parties' marriage. AFFIRMED.

Lee M . Walker, Walker & Neighbor, Newton, Iowa, for petitioner-appellant.

Ed Skinner, Skinner, Beattie & Wilson, Altoona, Iowa, for respondent-appellee.

Considered by Donielson, P.J., Hayden and Sackett, J.

SACKETT, J.

Petitioner, James Barr, appeals from the trial court's refusal to modify the parties' dissolution decree. He asserts that the trial court should have transferred custody of the three daughters of the marriage to him.

James and Connie Barr were married in 1963. Four children were born to the union: Shawn, a son, born July 27, 1964; Kimberly, born September 27, 1966; Rebecca, born March 18, 1970; and Jennifer, born March 30, 1975. At the time of the initial decree, December 1, 1981, Shawn was 17 1/2. The court considered Shawn's wishes and his custody was placed with James. The court felt that it was in the children's best interest that the custody of the other three children be with Connie. James was to have reasonable visitation privileges.

In April of 1982 James filed a petition for modification of the decree, indicating that circumstances had changed and that custody of all the children should be awarded to him. Prior to the hearing on the modification petition, Kimberly left Connie's home of her own volition. She was residing with James at the time of hearing. Because Kimberly was sixteen at the time of the modification and indicated a desire to live with James, Connie did not question the change of her custody at the modification proceedings.

The trial court heard evidence regarding modification of custody of Rebecca and Jennifer and determined that their custody should remain with Connie. The judge also ordered family counseling. James appeals the trial court's order, asking that custody of Rebecca and Jennifer be transferred to him.

The first and governing consideration is the best interests of the children. In a modification proceeding, the noncustodial parent seeking custody must prove an ability to minister more effectively than the custodial parent to their well-being. In re Marriage of Morton, 244 N.W. 2d 819, 821 (Iowa 1976). Although our review is de novo, we give weight to the trial court's findings of fact, especially when considering the credibility of witnesses. Zaerr v. Zaerr, 222 N.W. 2d 476, 477 (Iowa 1974).

The dissolution decree recites that Connie was a full-time homemaker during the marriage. It would be difficult to believe that she did not provide numerous services for her children. The dissolution throws her into a difficult situation. Unlike James, she had not sharpened her employment skills. She was married at 17; divorced at 35. During the marriage James completed his college education. He advanced in the business world. At the termination of the marriage Connie was forced by her financial circumstances to seek full-time employment. She is working hard to provide needed financial support for her family. Connie's employment understandably allowed her less time to perform the homemaking and child care functions her children had come to expect. The children complained that she came home tired and that she expected additional household help from them.

Connie also needs the male and adult companionship she no longer had as a single parent. Her children were resentful and probably jealous of the attention her male companions were taking from them. Three of the four children were left in the marital home. Connie was forced to seek employment and face the problems of a single parent with little support from the three children in her custody.

James remarried within a month of the decree. The children were impressed with his new wife and her homemaking skills. James had the responsibility of only the oldest child. The second child subsequently joined his household. The children became very critical of Connie and unhappy with the life-style she was providing. They thought things looked better in James' home. The children's alleged unhappiness in their mother's home was the precipitating factor which caused James to seek a custody modification.

The record in this case clearly indicates that the minor children, Kimberly and Rebecca, have a strong preference toward living with their father. They related that they felt as they did because their mother gave them too many

responsibilities and they were not allowed to see their father often enough. Furthermore, they didn't like their mother's boyfriend and the fact that she was spending considerable time with him. This testimony came from the children themselves when interviewed by the trial judge, and from the testimony of the therapist who interviewed the girls.

The children here possess an uncanny amount of maturity. They are all above-average students, active in school activities and apparently have good relations with their peers. Connie has admittedly spent the night in her home in bed with a married man. The children were aware of this fact and disapproved. Connie has recognized the impropriety of her actions and has ceased this type of behavior. She has indicated that she will avoid these situations in the future. Connie does frequently spend evenings with her current boyfriend away from the children.

Despite the fact that Connie and James live only seven blocks apart, there has been no effort by the parents to allow the children freedom of movement between homes. There is evidence that Connie has thwarted visitation attempts.

James' present wife, Pam, did not testify at trial. The children's testimony indicates that they are fond of Pam. We don't know what prompted her absence at trial and recognize that she may have sought to avoid aggravating Connie by her presence at the hearing. The unfortunate result is that her failure to testify leaves a large void in the evidence. A stepparent plays an enormous role when children are brought into the home, and the stepparent's background, experience and attitude toward the children are vital to a proper evaluation of a custody change. James has argued numerous grounds for reversal and contends that he has met his burden. Reiterating our belief that the record is extremely incomplete because of the absence of Pam's testimony, we determine the arguments raised by James to be as follows: Connie should lose custody because of her immoral

conduct; because the children feel that she is not doing a good job of parenting; because the children want to live with their father; and because the children wish to remain together.

Connie has admittly slept with a married man in her home with her children present. She testified that she will not do so in the future.

The Iowa courts have long recognized that moral misconduct is a factor to be considered in child custody cases. In re Marriage of Welbes, 327 N.W. 2d 756, 758 (Iowa 1982); In re Marriage of Dawson, 214 N.W. 2d 131, 132 (Iowa 1974); Utter v. Utter, 155 N.W. 2d 419, 422 (Iowa 1968); Fritz v. Fritz, 260 Iowa 409, 419, 148 N.W. 2d 392, 397 (1967). Custody has been changed where the custodial parent has been guilty of moral misconduct obvious to the children. Jones v. Jones, 175 N.W. 2d 389 (Iowa 1970). This conduct alone is not determinative, but will be considered with other facts. Since a child's learning process involves considerable imitation of his parents, the parents' characteristics are important. 20 Drake Law Review 386, quoting E. Simmel, R. Hobbe and G. Milton, Social Facilitation and Imitative Behavior (1968).

Connie was not setting a proper role model for her children when she engaged in such behavior. We cannot, in this instance, view Connie's behavior as an isolated event but must consider it in the total spectrum of the role models established by both mother and father. We must remember that the children here are obviously aware that their father was dating his current wife prior to his separation from Connie and the dissolution of the marriage. Justice McCormick said, in In re Marriage of Mikelson, 299 N.W. 2d 670, 673 (Iowa 1980):

> Her alleged misconduct is not materially different from conduct he engaged in and advocated during the marriage. Any changes since that time which were not contemplated by the court are not substantial enough to support modification of the custody award. Even though we do not condone Gay's [the mother's] leaving the children unattended and her sexual indiscretions, these circumstances do not alone justify changing custody.

It is difficult to criticize Connie when the role model which James provided was questionable.

The most difficult issue for this court is to determine the weight to be given to the children's testimony about living conditions and, more particularly, the weight to be given their strong preference for their father.

A child's preference is given less weight in modification than in an original hearing on custody. Herron v. Herron, 258 Iowa 1052, 1059, 141 N.W. 2d 562, 566 (1966). In Slidell v. Valentine, 298 N.W. 2d 599 (Iowa 1980), a 14-year-old boy who had been in his mother's custody expressed a desire to live with his father. The court said that, while the child's wishes should be considered, they are not to be accorded great weight, especially in a proceeding to modify as opposed to an initial custody determination. Id. at 605.

In some jurisdictions, the effect to be given a child's wishes in determining who shall have custody is governed by statute. Several jurisdictions have adopted statutes which provide, in effect, that the child whose custody is at issue must be allowed to choose his custodian unless the person so selected is unfit to take charge. Annot., 4 A.L.R. 3d 1396, 1400 (1965). In one instance, however, the Ohio Supreme Court found that such a statute was not dispositive, even where both parents were morally fit to have custody, concluding that the best interest of the child would not be served by changing custody. Watson v. Watson, 76 Ohio L. Abs. 348, 146 N.E. 2d 443 (Ohio Ct. App. 1956).

The prevailing views discourage putting too great a burden on the children once custody has been established. The Iowa Supreme Court gave us guidelines to use in evaluating a minor's testimony when they said in Lursen v. Henrichs, 239 Iowa 1009, 1015, 33 N.W. 2d 383, 386 (1948):

> This court has stated that in cases involving the custody of a minor, the desire of the minor was to be considered. In considering such matter, however, various factors are not to be lost sight of — the age of the minor; the length of time the minor has lived in the home for which preference is stated; the nature of the associations

> therein; the contacts with the one seeking a change of custody; the relationships and past associations; the natural and legal rights of the contending parties and any other matters throwing light thereon.

Speaking of a child's expressed preference in a custody matter, the Iowa Supreme Court, Mulroney, J., said in Wooley v. Schoop, 234 Iowa 658, 668, 12 N.W. 2d 597, 602 (1944), "When we speak of what is best for the child we do not mean that which the child wants." [emphasis added]

As is often the case in situations such as this, the law is well established but its application is difficult. The following reasoning of Justice Day remains applicable today:

> Hence the wishes of the child are consulted, not because it has a legal right to demand it, but because it is material for the courts to understand them, that it may be the better prepared to exercise its discretion wisely. It is not the whim or caprice of the child which the court respects, but its feelings, its attachments, its reasonable preferences, and its probable contentment. Such being the nature and ground of this practice, it is impossible to prescribe the precise weight which should be given to these wishes when ascertained. [emphasis added]

Ex. Rel. Shaw v. Nachtwey, 43 Iowa 653, 657 (1876).

We are faced with the extremely strong testimony of two intelligent and articulate young ladies. We doubt that they would possess these qualities had both their mother and father not provided good parenting during their formative years. We must remember, however, that they are not all-knowing, and despite the fact that the dissolution of their parents' marriage has propelled them at a rapid rate toward adulthood, they still have less experience in the realities of life than those of us called upon to make a decision regarding their custody. We are saddened by their inability to recognize the additional burdens their mother has been forced by the dissolution to accept and their failure to appreciate the responsibilities she has assumed to substantially contribute to their financial security. It is unfortunate that they do not have the maturity to recognize her need for adult and male companionship. They exhibit instead a selfish concern

because they are being asked to assume family responsibilities which probably were foreign to them when they lived in a two-parent home with a full-time mother. We are mindful, too, that they may not be aware of the burden the addition of two more siblings would place on their father and step-mother's home, and the strain step-children can place on a new marriage. Children of this age and this generation are sophisticated. We are reluctant to allegedly "force" a child to live in a home when they claim they will be happier elsewhere. We have already seen Kimberly resort to what we could define as self-help to move to the home of her father.

Two of the children are now living with their father. We note that brothers and sisters should not be separated without good and compelling reasons. In re Marriage of Woodward, 228 N.W. 2d 74, 75-76 (Iowa 1975), In re Marriage of Winter, 223 N.W. 2d 165, 168 (Iowa 1974). The custody of children of this marriage was originally split. We find that the need to have the four children together is not sufficient to support modification in this instance.

After careful consideration, we determine that James has failed to meet the burden required for a custody modification. The order of the trial court is therefore affirmed.

We have made our decision, but we recognize that we have not solved the problem. The parents must recognize that their problem will not be solved in the courts. It will only be solved by their communication and cooperation. In In re Marriage of Woodward, 228 N.W. 2d 74, 76 (Iowa 1975), the court said:

> We are not unmindful of the fact, even in the happiest of marriages, children tend where possible to play the love of either parent against the discipline of the other. Parenthood calls for married persons to be alert for such a natural tendency and adjustments for it are common. When marriage is terminated the propensity of a child to play one parent against the other can become a force strong enough to bring considerable anguish alike on parents and child.

Such has been the case here.

It appears from the record that counseling was encouraged by the parties' attorneys. It was recommended by the social worker. It was ordered by the trial court and we, in affirming his order, affirm the ordered counseling.

AFFIRMED.

DONIELSON, J. (dissenting)

I believe James has satisfied his burden of proof regarding his application to modify the custody decree. Therefore, I respectfully dissent.

Our focus in cases like this is to determine what is in the long-range best interests of the children. Iowa R. App. P. 14(f)(15). Although I certainly sympathize with Connie and her situation as carefully set out by the majority, I believe the record clearly demonstrates that James is much better capable of ministering to the children's best interests and that is, of course, the sole criterion. James is much more willing to and in fact shows more interest in the girls and their school work and other activities than is Connie. Rebecca has exhibited a strong preference to live with her father; given her age (13) and undisputed maturity, I would accord more weight to her stated preference than does the majority. There can be little if any doubt that James and his new wife, with whom the children get along well, can provide a more stable home and family environment than can Connie on her own. The facts as partially set out by the majority need no further amplification in order to show that Connie cannot provide as sound and sensible a home environment as is and can be provided by James. This is in no way intended to disparage Connie's professed love for her children or her admirable attempts to maintain a familial household; it is mentioned only to aid in determining what is in the children's best interests. Finally, and perhaps foremost, I find no good reason to separate these four children. The rule of not separating siblings is clearly applicable in this instance. No one disputes that James is to have custody of Shawn and Kimberly. I believe the record clearly demonstrates that these four children should be together and in James' custody. He has shown that, since the decree, conditions have changed in such a substantial fashion that he should have custody of the four children.