FILED
JUN 28 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF CHRIS ALLEN ATKINSON AND RUBY FRANCES ATKINSON

Upon the Petition of)
CHRIS ALLEN ATKINSON,)
Petitioner-Appellant,) Filed June 28, 1983
And Concerning)
RUBY FRANCES ATKINSON,) 3-123 / 3-69514
Respondent-Appellee.)

Appeal from Cedar District Court - Margaret S. Briles, Judge.

Petitioner father appeals on an expedited basis from custody provisions of the parties' dissolution decree, asserting that he should have been awarded custody of the two minor children. AFFIRMED.

J. Michael Metcalf of Metcalf & Conlon, Muscatine, for petitioner-appellant.

Marie Prince Cohen and J. W. Conway of Allbee, Conway, Allison & Denning, Muscatine, for respondent-appellee.

Heard en banc.

PER CURIAM

Petitioner father appeals on an expedited basis from custody provisions of the parties' dissolution decree, asserting that he should have been awarded custody of the two minor children. We affirm.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. It is our responsibility to review the facts as well as the law to determine rights anew from the credible evidence on issues properly presented and preserved. In re Marriage of Full, 255 N.W.2d 153, 158 (Iowa 1977). While we give weight to the findings of the trial court, especially where 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 Guardianship of Sams, 256 N.W.2d 570, 573 (Iowa 1977).

I.

Petitioner, Chris Atkinson, and respondent, Ruby Atkinson, were married in 1977. They had two children, Jane and Joe. The children were ages five and two respectively when the parties separated in 1982. From May, 1982, until November, 1982, the children remained in the care and custody of Chris, the father, pursuant to a court order awarding him temporary custody. Permanent custody was awarded to Ruby, the mother, in the final decree of dissolution filed November 15, 1982. Chris now appeals the final custody award on an expedited basis.

II.

Chris argues that the best interests of the children necessitates the placement of custody with him. The central question governing consideration of the courts in a proceeding which concerns the custody of minor children is what is in the best interests of those children. See, e.g., Davis v. Davis, 237 N.W.2d 455, 457 (Iowa 1976). The numerous factors we must consider in deciding custody issues are set out in Iowa Code § 598.41 (1983) which codified many aspects of our prior

case law. See In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). Additionally, we note that the "status of children should be quickly fixed and thereafter, little disturbed . . . ." In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974).

It is evident from the trial testimony that neither party is clearly deficient in parenting ability. Chris lives in an older trailer home which is located on a lot owned by his father. He works for his father in his father's vehicle repair business which is operated out of the father's home. When Chris had temporary custody of Jane and Joe, the children went to work with Chris and played around the yard and work place until Chris was finished working. Chris' stepmother takes little responsibility for the children while they are at Chris' father's home during work hours. They are, therefore, relatively unattended other than the brief attention their father pays to them while working. We must agree with the trial court that this situation is not ideal and that the attorney for the minor children placed too much emphasis on the fact that the father's work situation would allow the children to be near their father during the workdays. Witnesses for the mother also testified concerning the father's alcohol abuse, violent behavior, and ill-will and animosity toward Ruby. He refused to allow Ruby to exercise the court-ordered visitation while he had temporary custody of the children and was cited for contempt as a result.

Ruby now lives in a modern three-bedroom apartment located in a low-rent housing complex in Muscatine. She is employed as a letter insert operator for Charter Data Services in Wilton. Ruby's work hours depend upon whether she works the day shift—from 7:00 a.m. to 3:00 p.m.—or the night shift—from 3:00 p.m. to 11:00 p.m. It appears as though Ruby has obtained the day shift position which she was seeking during the trial. Ruby's mother babysits for the children during the hours that Ruby is at work. There is a concern that her mother will

make negative remarks to the children about their father, but we do not find this to be a problem. Ruby is responsible for making sure this does not happen and has taken steps to assure the court that it will not. It is evident that Ruby does not bear the same resentment toward Chris as he does toward her. We believe she is better able to support and encourage the father's parent-child relationship than he would be able to do if Ruby were the non-custodial parent.

Chris testified that the five-year-old child informed him that Ruby had engaged in acts of sexual misconduct. Other witnesses testifying on Chris' behalf testified concerning Ruby's poor housekeeping habits and lack of attention toward the children. There was, however, no other evidence that the mother engaged in any moral misconduct and we must agree with the trial court that this adverse testimony against Ruby was without substantial foundation in fact and, most likely, a product of the ill-will and animosity Chris feels toward Ruby.

A social worker recommended that custody be awarded to the mother while the attorney for the children recommended that the father be awarded custody. Based on our de novo review, we believe custody of Jane and Joe should remain with Ruby.

In affirming the court's custody award to Ruby, we do not mean to intimate that Chris does not love the children or that he would not be a competent parent. However, even where there are two competent, loving parents, and where the operative facts under the Winter criteria are equal, the scales are tipped in Ruby's favor by the rule that we give weight to the findings of the trial court. See In re Marriage of McDowell, 244 N.W.2d 238, 239 (Iowa 1976). We recognize that the best interest of a child requires a continuing association with a non-custodial parent. In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976). We believe the grant of liberal visitation rights will afford Chris every opportunity to develop a loving parent-child relationship with Jane and Joe. We are confident that the

parties will work together to implement the visitation schedule to this end. Accordingly, we affirm the award of custody of the minor children to Ruby.

AFFIRMED.