

McCLAREN v. McCLAREN was a 1974 Kansas Supreme Court decision. David McClaren and Sandra Bratcher were each reared on farms near Lewis, Kansas. Each was a member of a highly respected family in that community. David McClaren farmed with his father, and upon completion of high school devoted full time to that occupation. Sandra was a Methodist, David a Jehovah's Witness. After David McClaren graduated from high school, he started dating Sandra when she entered high school, and they continued to date intermittently for about two years. Sandra became pregnant by David and, although Sandra was reluctant to enter into that which she considered a forced marriage, the couple was wed in September 1960. They had two children, a son born in 1961, and a daughter born in 1963.

Difficulties based on religious differences between Sandra's Methodist Church upbringing and the WatchTower Society surfaced early in the marriage. Sandra testified that despite her best efforts to do so she was unable to adjust to the 5 weekly meetings at the Kingdom Hall of Jehovah's Witnesses, and the door-to-door recruiting required by the WatchTower Society, and she never converted to that faith. The religious differences, plus the fact David McClaren worked long hours in carrying on large-scale farming operations so as to limit their mutual activities, appear to have been focal points in the eventual marriage breakdown. For some time prior to the divorce Sandra McClaren acknowledged she had had adulterous relations with two different men; the latest of which she married after the divorce.

In May 1972, the trial court found each party was in equal fault for the marriage failure, that they were incompatible and each was granted a divorce from the other because of their equal fault. The court awarded custody of both children to Sandra McClaren with liberal visitation rights given David McClaren.

David McClaren appealed, asserting the trial court erred in awarding to Sandra custody of the two children in view of her admitted misconduct and the stated preference of the son to be with his father. This Supreme Court disagreed, stating in part:

"Marital misconduct such as adultery is a pertinent factor to be considered in a divorce proceeding in determining which parent should be awarded custody of the parties' children but it is not in and of itself the controlling factor.

"In Greene this court also stated: 'A child's preference in custody matters may, of course, be considered as an aid to the court in making a proper order. ... Such preference, however, is always subordinate to the over-all best interests and welfare of the child. Thus, when there are objective factors affecting the child's welfare that are contrary to his wishes, the latter must yield to the former.'

"The trial court heard much testimony by knowledgeable persons respecting custody and its memorandum reveals careful consideration of the issue. The weight of that evidence, including the testimony of some witnesses called by David, was that Sandra, despite her indiscretions, had devoted much time and attention to the children and had provided them with good care. It is true that one psychologist recommended David be given the boy's custody, this based principally on psychological tests given to the boy and upon his expressed preference. The trial court was not bound to base its decision upon this testimony. It did consider this evidence. This expert had no factual background on the two parents nor had he made any testing of them. Another psychologist recommended that custody of the daughter be granted Sandra. The trial court expressed concern that divided custody would add to the emotional instability of the children resulting from the breakup of their home. Award of custody of the children in David would have resulted in his sister, who was in ill health, and his seventy-seven year old mother having the principal daily responsibility for looking after the children.

"The trial court made no finding of unfitness on the part of Sandra. It specifically found the best interests of the children would be served by awarding her their custody. It clearly appears religious beliefs were not a factor in the findings made. Everything considered, we cannot say the trial court abused sound discretion in this respect.