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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF STEVEN MICHAEL VRBAN AND MARY JO VRBAN

Upon the Petition of)
STEVEN MICHAEL VRBAN,)
Petitioner-Appellant,) Filed May 22, 1984
And Concerning)
MARY JO VRBAN,) 4-123 / 83-1392
Respondent-Appellee.)

Appeal from the Iowa District Court for Jasper County - Van Wifvat, Judge.

Petitioner appeals from the award of child custody and property provisions of the decree dissolving his marriage. AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED WITH DIRECTIONS.

Gail E. Boliver of Boliver Law Office, Marshalltown, for petitioner-appellant.

Mark A. Otto and Ennis McCall of Brierly, McCall, Girdner & Chalupa, Newton, for respondent-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

SACKETT, J.

Petitioner, Steven Michael Vrban (Mike), appeals from the decree dissolving the parties' marriage. He contends that he should have been awarded custody of the parties' two children, and that Mary Jo should have been ordered to pay child support. He further alleges that the child support ordered was excessive and that the property award was inequitable. Mike also challenges the trial court's award of attorney fees to Mary Jo. Mary Jo requests attorney fees on appeal.

Mike and Mary Jo were married in 1970. They have two children: Derek, born in 1971; and Joslyn, born in 1974. At the time of trial Mike and Mary Jo were both 32 years of age. They are both high school graduates. Mike and Mary Jo were married in Colorado. Mary Jo was a native of Colorado and her parents and four brothers still live there. Mike's parents lived in Grinnell, Iowa, where Mike graduated from high school. Mike and Mary Jo lived in Colorado following their marriage. In 1972, Mike, Mary Jo, and Derek moved to Grinnell and took up residence in an apartment in Mike's parents' home. They lived there until 1980, when they moved to their own home.

Mike is a mason by trade and has held various jobs during the course of the marriage. He currently has a good job as a maintenance engineer and nets approximately $1,000 per month. Mary Jo has been employed during much of the marriage, although she did remain at home during pregnancy and to care for the children as infants. At the time of trial she was working for a window manufacturing firm netting approximately $700 per month.

Mike is an only child. He has maintained a close relationship with his parents. During the course of the marriage his parents loaned or gave him approximately $46,000. Both parties acknowledge that a portion of the money went into their personal residence. No notes were given Mike's parents. Mary Jo's parents loaned the couple $3,000 which is evidenced by a written document. That money also went into the personal residence. The personal residence, which

represents the major asset of the parties, was constructed primarily by Mike. It was not totally completed at time of trial.

During the marriage, Mike's parents did not have a close relationship with Mary Jo. They had, however, assisted the couple with child care to a large degree. The children went to their grandparents' home every day after school, as well as during school holidays, while their parents worked. The children had a close, comfortable relationship with their paternal grandparents.

I. Child Custody. Mike contends that the award of custody to Mary Jo was improper. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, we do give weight to them, expecially when the credibility of witnesses is involved. Iowa R. App. P. 14(f)(7).

Our careful review of the record convinces us that both parties did an adequate job of parenting prior to their separation and we find, as did the trial court, that either parent is capable of assuming custody of these children. We must therefore determine where the children will have superior care. The ultimate question is, which parent will do better. In re Marriage of Callahan, 214 N.W.2d 133, 136 (Iowa 1974).

Mike claims that Mary Jo has attempted to isolate and alienate the children from their father's love and affection. The record supports these allegations. The parties separated in December of 1982. A decree of dissolution issued in August of 1983. At the time of separation, Mike left the family home but continued to have visitation with the minor children. Mary Jo learned of some allegations that Mike was seeing another woman and subsequently refused visitation. Mike was not allowed to see the children for a three-week period and sought court intervention to obtain visitation. Even after visitation was ordered, however, Mary Jo embarked on a course of conduct which made it difficult for Mike to maintain an ongoing relationship with the children. Mary Jo was totally inflexible with

visitation, and the intervention of the parties' lawyers was necessary to allow the children to see their paternal grandfather when he was in the hospital and critically ill. Mary Jo encouraged the children not to wave when they met their father on the road. When Joslyn made her first communion in the Catholic Church, Mary Jo told Derek that he could not sit in church with his paternal grandparents and also sought to keep Joslyn from her father and his parents after the mass. Mike, on the other hand, respected the terms of the court-ordered visitation. Mary Jo indicated that she would move with the children to Colorado despite the court's holding regarding child custody.

Mary Jo told her son, Derek, that his father had bruised and raped her[1] just prior to their separation. Mary Jo testified at trial that the rape had taken place, but she was not bruised. There are inconsistencies between the factual situation of the alleged rape which Mary Jo related at trial and the factual situation her psychologist testified she related to him. Mike testified that the intercourse was voluntary. We note that the facts as alleged by Mary Jo, taken as true, would not constitute a crime in Iowa. We cannot determine from the record whether the incident actually occurred. We therefore have not given weight to Mary Jo's

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[1] At common law a man could not rape his wife.

> It is usual today to trace the origin of the marital rape exemption rule to the English judge, Sir Matthew Hale (1609-1676), but with the injunction that Hale cannot be said to have created it; he was merely delcaring the law as it had for centuries generally believed to be. His statement in Historia Placetorum Coranae (published posthumously in 1936) would nevertheless remain important, for his formulation purports to offer justification for the immunity: "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contact, the wife hath given up herself in this kind unto her husband which she cannot retract . . . ."

Iowa has legislatively modified the common law rule and provides a spouse can be convicted of sexual abuse of his wife if, during the attack, he causes her serious injury, threatens her with a deadly weapon, creates a substantial risk of death or injury, or is assisted by a third person. Iowa Code §§ 709.2, 709.3 (1983).

allegations in our determination of which parent is the better custodial parent. Even if Mary Jo's allegations are true, we believe that she acted improperly in burdening Derek with her account of the alleged rape.

Mary Jo told the children, during the course of the separation, that she would "curl up and die" or "end up in a mental ward" if she did not obtain their custody. She later denied making these statements. We find ample evidence in the testimony of the children and the psychologist who interviewed them that Mary Jo did make the statements. The professional testimony indicates that the remarks had an affect on the children.

The Iowa courts have been firm and clear in holding that children need continued contact with both parents and that parents should put their personal feelings aside to assist the children in continuing such relationships. In In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979), the court found that the mother had prevented or made visitation more difficult. Custody was awarded to the father because of the likelihood that, under his custody, the children would have substantial contacts with both parents. In Petition of Ferguson, 244 N.W.2d 817, 819 (Iowa 1976), the custody balance was tipped toward the father because with him as custodian the child would have a better chance to enjoy substantial contact with both parents. In In re Marriage of Morton, 244 N.W.2d 819, 822 (Iowa 1976), the court expressed its disapproval of the mother's conduct in denying the father his visitation rights. The court held that children require continuing association with the non-custodial parent unless the contrary is clearly shown. In Spotts v. Spotts, 197 N.W.2d 370, 372 (Iowa 1972), the court found the mother's conduct in depriving the children of the right to see and know their father was a serious reflection on her capacity to act as a custodial parent.

On the other hand, in In re Marriage of Bolin, 336 N.W.2d 441, 447 (Iowa 1983), the fact that the mother demonstrated an ability to put her personal feelings aside to permit her son to continue his relationship with his father and

paternal grandparents was one of the factors considered in awarding the mother the physical care of her son. See also In re Marriage of Bevers, 326 N.W.2d 896, 901 (Iowa 1982) (father held in contempt for psychological warfare in seeking to persuade mother to drop custody fight despite court order that neither party should alienate child during appeal); and In re Marriage of Winter, 223 N.W.2d 165, 168 (Iowa 1974) (father's unreasonableness regarding visitation held to signify serious flaws in character).

We find that Mary Jo's statements and actions have affected the children's relationship with their father. The psychologist's testimony supports this conclusion, as does Derek's testimony at trial. Derek testified:

> DEREK: We, my dad, he raped my mom and —
>
> THE COURT: Did she tell you about that?
>
> DEREK: Un-huh. It's hard to live with. That's one thing I hate my dad for. My sister doesn't know about it.

Mary Jo argues that her actions were triggered by the anger, frustration, and despair of the divorce. We recognize that dissolution proceedings frequently are emotionally draining, and we consider this fact. We are concerned, however, that the record in this case contains no assurances that Mary Jo will strive to allow Mike to maintain a healthy relationship with the children in the future.

Custody is a matter far too important to be used as a device to reward or punish a parent. In re Marriage of Bauder, 316 N.W.2d 697, 700 (Iowa Ct. App. 1981). In deciding the custody issue we seek neither to reward one parent nor punish the other. In re Marriage of Castle, 312 N.W.2d 147, 149 (Iowa Ct. App. 1981). Justice McCormick said in In re Marriage of Bowen, 219 N.W.2d 683, 688 (Iowa 1974);

> It is wrong to treat a parental custody decision as merely an adjudication of parental rights. Children are innocent victims of marital bankruptcy. Their welfare is paramount. Custodial claims of contending parents are subservient to the rights of their children to grow to maturity in a proper environment.

Despite our strong disapproval of Mary Jo's conduct, we consider her conduct in the total spectrum of the issues.

Mary Jo plans to move to Colorado. She has promised the children an improved life and they profess to be excited about the move. Mike claims that the record is void of evidence to support her move. Mary Jo testified that a friend has offered her a job cleaning homes for building contractors. She plans to live in a home which her father purchased. Her father is a retired postal employee living in Aurora, Colorado. The record does not indicate whether Mary Jo's proposed residence is in Aurora, Colorado. There is no evidence regarding the schools which the children will attend. We have no knowledge of the security of Mary Jo's job nor the hours she will work. There was no testimony regarding her plans for child care while she works. The record is void of suggested arrangements to assure Steven's continued contact with the children should they move to Colorado.

We live in a mobile society and the Iowa courts have adopted a liberal attitude with respect to moving children away from Iowa. The courts have been clear in their position, however, of requiring an examination of the motivation for such a move and the custodial parent's plans for the children in their new home. A mother's dissatisfaction with life in Iowa and her belief that life in another state will be better have not and should not, by themselves, support such a change. See Brown v. Brown, 261 Iowa 591, 155 N.W.2d 426 (1968) (mother's expressed distaste for life in Muscatine and desire to return to Oregon where she had spent her early life was not sufficient to modify decree to allow move where mother failed to show financial possibilities of proposed business venture and to produce evidence of benefit to children).

The Louisiana Court of Appeals noted in Pattison v. Pattison, 208 So.2d 395, 396 (La. 1968) (quoted in In re Marriage of Lower, 269 N.W.2d 822, 826 (Iowa 1978):

> In our highly mobile society, it is usually unrealistic to demand that a parent granted custody of the children be confined in a certain geographical area during their minority. We take judicial cognizance of the fact that men and women are readily subject to job transfer in our society and equity demands that they should be free to go where their best opportunities lie.

The Iowa Supreme Court in Lower refused to restrain a mother, who was the custodial parent, from moving to Minnesota because of a job transfer where the mother made a showing that proper arrangements had been made to assure child care and continued visitation by the father.

In In re Marriage of Frederici, 338 N.W.2d 156, 160 (Iowa 1983), a modification case, the court held:

> In determining whether removal should be prevented, the trial court must consider all of the surrounding circumstances. They include the reason for removal, location, distance, comparative advantages and disadvantages of the new environment, impact on the children, and impact on the joint custodial and access rights of the other parent.

It is significant that in Lower and Frederici, where the parent seeking to leave Iowa had already been awarded custody or physical care and was seeking a modification, there was a showing that the parent had good reason for moving and had adequately considered the required factors. The courts concluded in both instances that the burden of proof was on the parent seeking to prevent the move. Lower, 269 N.W.2d at 826; Frederici, 338 N.W.2d at 160.

In this case, Mary Jo is seeking custody of the children in an original dissolution proceeding. She has the burden of showing an ability to provide better care for the children than does Mike. She must therefore present convincing evidence from which we can find the move is in the best interest of the children. Mary Jo's evidence falls short of the evidence presented in Frederici and Lower, and is little more than that presented in Brown, where the court refused to modify the decree to allow the children to move with the mother to Oregon.

Mary Jo places considerable emphasis on the children's preferences. Both

indicated a desire to remain in the custody of their mother. Children's expressed preferences are entitled to consideration but are not controlling; deciding custody is more complicated than merely asking the children which parent they want to live with. In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981). "When we speak of what is best for the child we do not mean that which the child wants." Wooley v. Schoop, 234 Iowa 658, 688, 12 N.W.2d 597, 602 (1944) (emphasis added). The preferences of minor children, while not controlling, are relevant and cannot be ignored. In re Marriage of Burham, 283 N.W.2d 269, 276 (Iowa 1979).

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 court 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.

Ex rel. Shaw v. Nachtwey, 43 Iowa 653, 657 (1876). See In re Marriage of Nickelson, 299 N.W.2d 670, 674 (Iowa 1980) (preferences of children aged ten and eleven given little weight because of age, parental influences and ambiguity of evidence); and In re Marriage of Bowen, 219 N.W.2d 683, 689 (Iowa 1974) (fact that ten and eleven-year-olds stated preference to be in father's custody considered relevant, but not controlling or given much weight).

While children's wishes cannot be ignored, and while we realize the difficulty in a child's relationship with a parent he or she wishes to be with, we give little weight to the children's stated preferences in this case because of Mary Jo's actions in seeking to alienate the children from their father. Derek's testimony indicates that he has been strongly influenced by things told him by his mother during the separation.

Mary Jo argues that she should have custody because she was the primary caretaker during marriage. Gerald H. Sawin, Director of the Jasper County office of the Iowa Department of Social Services, was asked to investigate for the court. He concluded that both parties were adequate parents and went on to say:

> On a relative scale, Michael may have a greater potential to be a better parent than Mary Jo. However, historically she has been the primary caretaker of the children. More importantly, in my opinion, is the fact that she is perceived as the primary caretaker by the children. I also feel the children see their father as a significant person in their lives, even though he may not be perceived as being the primary caretaker. To a lesser degree but also seen as being significant in their lives, are the paternal grandparents.

We give considerable weight to the role Mary Jo assumed as caretaker. See In re Marriage of McFarland, 239 N.W.2d 175, 178 (Iowa 1976) (fact wife attended to routine needs of children one factor considered in awarding her custody). Mary Jo expresses concern that, if Steven is given custody, the children will spend most of their time with the paternal grandparents and that they will raise the children. The record does support the fact that Mike will utilize his parents for child care during the period he works in much the same way that the parents jointly utilized the grandparents for child care during their marriage. Both parties here will be employed outside the home and will find it necessary to utilize others for child care purposes. Grandparents are to be preferred over the ministrations of strangers. In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982). This is particularly true here where the record demonstrates an extremely close relationship between the children and the paternal grandparents.

The record does not support Mary Jo's allegations that the paternal grandparents will raise the children. There is ample evidence of Mike's interest in and attention to the needs of the children prior to the separation of the parties.

Mary Jo further argues that Mike should not have the children because he has seen another woman during the separation, while she has not been unfaithful.

There are scattered references in the record, mainly from Mary Jo, that Mike may have had a relationship with someone else during the separation. There is no evidence of immoral conduct, and the record is clear that the children have not even met this person. While the courts do consider moral misconduct along with other circumstances in custody cases, In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982), the evidence in this case does not support a finding of moral misconduct.

After considering all relevant factors, we determine that the custody of the children should be awarded to Mike. We remand the matter to the district court to make appropriate provisions to assure Mary Jo liberal visitation rights.

II. Child Support. Because custody has been awarded to Mike, his challenge to the amount of child support is rendered moot.

Mike has asked that if he be awarded custody, Mary Jo be ordered to pay a modest and reasonable child support. We remand to the trial court to determine said support.

III. Property Division. The major asset of the parties is the personal residence constructed by the parties, primarily Mike. The home was appraised at $80,000 with an indebtedness of $35,000. The trial court ordered that the home be sold and that $3,000 plus interest be paid to Mary Jo's parents and the remaining proceeds divided between the parties. The trial court found $46,000 in checks from Mike's parents. Mike contends that the payments received from his parents were loans and should be repaid. Mary Jo and Mike both signed an evidence of indebtedness to Mary Jo's parents when they loaned the couple $3,000. Mary Jo alleges that she was not a party to the loans/gifts from Mike's parents. She admits that a portion of the money went into the home, but she argues that these amounts should be totally disregarded because to do otherwise would punish her for Mike's lack of maturity as head of the family and lack of concern about financial matters. The trial court chastized him for his failure to support his family.

There is no dual standard, nor are we aware of any requirement under the law, that makes Mike solely responsible for the family's financial well-being. Such a view assumes that a woman is worth less financially to a marriage than a man. While we recognize that women have not yet achieved economic equality in all job markets with men, some have surpassed them. The concept of the male as being solely responsible for the family's economic status does not and should not exist. Other than the role of child-bearing starting at conception and terminating following a reasonable recovery from birth and/or nursing, most roles in the family home can and are assumed by both spouses. While some family units do in fact elect to have one person assume full responsibility for the income brought into the family unit, such a situation did not occur in this marriage. Both spouses generated income; they both paid bills and they both assumed family responsibility. The $46,000 which came into the family from Mike's parents should be treated no differently than that received from Mary Jo's parents solely because he is a male. Whether the money from Mike's parents was a loan or a gift is not particularly relevant. Mike's parents made substantial contributions to Mike and at least part of the contributions went to the home. Joint obligation on an account is not necessary for a debt to be considered in a dissolution. We therefore modify the trial court's award to provide for the payment to Mike's parents of $10,000 from the proceeds of the parties' residence, with the balance to be divided between the parties. The $10,000 represents those amounts received from Mike's parents which were directly applied to the cost of the home. The $3,000 payment to Mary Jo's parents shall not be disturbed.

IV. Attorney Fees. Mary Jo has her own income and is receiving property of the marriage. We therefore reverse the trial court's award of attorney fees to her.

We deny Mary Jo's request for attorney fees on appeal. Costs are taxed one-half to each party.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED WITH DIRECTIONS.