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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF DONALD WILLIAM CUNNINGHAM AND FRANCIS MARIE CUNNINGHAM

UPON THE PETITION OF	)	
DONALD WILLIAM CUNNINGHAM,	)	Filed February 28, 1978
Appellee,	)	
AND CONCERNING	)	
FRANCIS MARIE CUNNINGHAM,	)	423 3-60933
Appellant.	)	

Appeal from Polk District Court - Harry Perkins, Judge.

Appeal from the child custody provisions of a dissolution decree. AFFIRMED.

Robert L. Fanter, of Whitfield, Musgrave, Selvy, Kelly & Eddy, of Des Moines, counsel for appellant.

Dennis G. Day, of Ankeny, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Respondent-Francis Marie Cunningham appeals the child custody provisions of a dissolution decree which awarded custody of the parties' three-year-old son, Michael, to petitioner-Donald William Cunningham. The parties were married in 1972. This was the third marriage for Donald, his first ending with the death of his wife and the second ending in divorce. It was also the second marriage for Francis, her first ending in divorce. Donald had three children by his second marriage, all of whom were in the custody of their mother at the time Donald entered into the present marriage. However, in 1973, Donald obtained custody of two of these children, Kevin and Mark, ages 11 and 10 respectively at the time the petition for dissolution was filed. Michael was born in 1974.

While in Donald's custody, Mark was placed in a residential facility for psychologically disturbed children in late 1975. At that time, he was diagnosed as schizophrenic, and counseling sessions were begun. Mark returned home in December, 1976. Although Francis expressed some concern that Mark might harm Michael, the court found that the persons diagnosing Mark did not consider him to be a violent child and doubted that he would harm Michael.

The parties discussed the possibility of divorce as early as August, 1975, and they became separated in November, 1975, when Francis entered a hospital on Donald's request because of emotional problems she had been having. The record reflects that Donald's request was precipitated by certain acts of violence Francis had carried out during the marriage and threats she had made to kill herself. Francis remained in the hospital until the end of December, 1975, but she did not return to the family home in Ankeny upon her release. During Francis' hospital stay, Michael, Mark and Kevin resided with Donald in the family home and Donald was completely responsible for all aspects of the children's care.

Shortly after her release from the hospital, Francis took a job in Des Moines as a typist. She currently works there for the federal government, and her job requires her to be away from home from 7:00 a.m. until 5:00 p.m. Monday through Friday. Although Francis took a sleeping room in Des Moines upon her release from the hospital, she currently resides in an apartment in Ankeny. Since Francis has been working in Des Moines, she has been able to visit Michael almost every weekend and Donald has fully

cooperated with Francis in her desire to see Michael as often as possible. Considering these unfortunate circumstances, the high degree of cooperation between the parties is laudable, indeed.

Donald has been employed in a factory for 12 years and works an eight hour day, Monday through Friday. Since April, 1976, he has been required to do some weekend work. He has also been given the opportunity to work additional hours during the week, but has declined because of his family situation at home. When Donald is at work, Michael stays with the same babysitter that the parties have employed since Michael was six months old, who has worked continuously since Francis left the home.

On June 21, 1976, Donald filed a petition for dissolution at the request of Francis. Both parties sought custody of Michael and the district court ordered the Department of Social Services to investigate the home environment of both parties and submit its findings and recommendations regarding child custody to the court. A report was filed by the social worker assigned to the case on April 13, 1977. However, in view of the complexities of the case, the thoughtful and sensitive social worker indicated that she was unable to make any recommendation regarding custody. In her report, the social worker did indicate that she favored Francis to have custody if only Michael was involved, but had second thoughts when considering Mark and Kevin. [1]

A hearing was held on this matter on June 21, 1977, and in its ruling filed July 20, the court awarded custody of Michael to Donald. In explaining its decision, the court stated:

> "Both petitioner and respondent are fit and proper persons to have custody of the minor child, Michael. The relationship that exists between Michael and his brothers, Mark and Kevin, is a close relationship that portends many positive benefits for Michael. The separation of his parents leaves a natural void. The presence and companionship of his two brothers helps to fill that void and is in this case an important factor in the Court's decision."

[1] "Q. [By Mr. Day] So then are you saying today then you would still not make an absolute recommendation as to where or who should have custody of Michael, given the full circumstances surrounding this particular case? A. [By Mrs. Samson] I think the Court needs to weigh that out and decide. I don't have to decide.

Our review in this matter is de novo. Rule 4, Rules of Appellate Procedure. We give weight to the findings of fact of the trial court, but are not bound by them. Rule 14(f)(7), R. App. P. In all child custody cases, our first and governing consideration is the best interest of the child. Rule 14(f)(15), R. App. P. In In re Marriage of Bowen, 219 N.W.2d 683, 687 (Iowa 1974), the supreme court set forth the principles governing our analysis of child custody issues:

> "... The status of children should be quickly fixed and, thereafter, little disturbed. Siblings should not usually be separated. No hard and fast rule governs which parent should have custody. It is not a matter of reward or punishment. The issue is ultimately decided by determining under the whole record which parent can minister more effectively to the long-range best interests of the children." See In re Marriage of Winter, 223 N.W.2d 165, 166-167 (Iowa 1974).

After reviewing the trial court's ruling, it is apparent that a major factor influencing the custody decision was the consideration that siblings should not be separated from one another without good and compelling reasons. [2] The separation of siblings results in the loss of the benefits of constant association with each other, and should not be ordered unless the circumstances so require. In re Marriage of Wahl, 246 N.W.2d 268, 270 (Iowa 1976); In re Marriage of Hagge, 234 N.W.2d 138, 139 (Iowa 1975); In re Marriage of Woodward, 228 N.W.2d 74, 75-76 (Iowa 1975).

The record clearly reflects that Michael is reaping the benefits of constant association with his two stepbrothers. The three children play together regularly and the social worker testified that both Kevin and Mark had become extremely depressed

[2] "Q. [By Mr. Day] You mentioned visiting at Don's home and seen some concern by Kevin and Mark as to losing the brother? A. [By Mrs. Samson] Yes. They were really depressed about that.
Q. Didn't you, in fact, when you were there that time assure them that you would not remove Michael from their home? A. I didn't assure them that. I did, after I talked to Fran and Fran--I was--I was very concerned about the boys and I shouldn't have done that. I will take full responsibility for that. I was so--I was so upset at looking at the pain in these children's faces and just--they were about to burst into tears half the time I was there, and I went to Fran and I told her, and I really told her that I was worried about what would happen to them. Fran's a very feeling person and unfortunately she--she's easily impressionable, but anyway she--she said go tell the boys that she wouldn't fight for custody, and that's when I went back, and I really wish I hadn't done that, because as it turned out Fran decided that she had to fight for Michael and that she may lose Michael. I still think that can be handled all right buy yeah, that concerned me. Those two boys, I just--it's always hard when there's other children involved in a custody situation." (X. 134-135). (emphasis added)

at the thought of not being able to continue living with Michael. As was the trial court, we are greatly influenced by the close relationship the children have developed and are aware of no special circumstances in this case justifying a change of custody or separation of the children. Francis has received liberal visitation privileges, including three weekends per month. She has ample opportunity to contribute to Michael's well-being and physical and mental development.

In reaching our decision, we are also impressed with Donald's argument that we should affirm the judgment below because we should refrain from disturbing a custodial arrangement that has existed for almost two years. At age 1 1/2, Michael lost the constant companionship of his mother when she entered the hospital and failed to return to the family home to live. Michael continued in Donald's custody and care throughout the pendency of the dissolution action and at the time of trial.

In making our decision, we feel compelled to consider the effect on the child of continuing or disrupting an existing custodial status. In re Marriage of Winter, supra, at 166. In the context of modification proceedings, the court has stated that where an individual has provided a child with proper care and has adequately attended to his needs for a substantial period of time and that child has become attached to his environment, we are not justified in transferring custody to another except for the most cogent reasons. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517-518 (Iowa 1976); In re Marriage of Woodward, supra, at 76; Jones v. Jones, 175 N.W.2d 389, 391 (Iowa 1970). We believe that the foregoing concepts are just as applicable in the instant case as in those involving modifications of previous custody orders.

The record establishes beyond doubt that Donald has admirably provided for Michael's needs and that Michael has become attached to his present environment and is well-adjusted to his present routine. Further, Francis testified that, should she be awarded custody, Michael's environment and babysitting arrangement to which he has become accustomed would be altered substantially. The possibility of just such changes led the supreme court to refuse to order a change in custody in In re Marriage of Guyer, 238 N.W.2d 794, 796-797 (Iowa 1976). After reviewing the entire record, we find no compelling or cogent reason to disturb the existing custody arrangement approved by the district court. The trial judge was in the best position to observe the witnesses and evaluate the parties and evidence on a first-hand basis. The record amply supports the difficult choice the trial court was forced to make.

AFFIRMED.

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

OXBERGER, J. (dissenting)

I dissent. The trial court appointed Jean K. Samson, a social worker with the Department of Social Services, with a master's degree in social work and considerable experience with emotionally disturbed children, to make a child custody study on Michael Cunningham. She testified Michael's relationship with his father (Donald)

> . . . really alarmed me and scares me tremendously. Don . . . didn't talk about Michael as an individual in his own right . . . and I realize that there was one child (Mark) in this home who had been diagnosed as a childhood schizophrenic by a child psychiatrist . . . What I saw happening in Don Cunningham's home was that he could not—that he and Michael were almost in a symbiotic relationship. . . . it's—a psychiatrist can explain this much better than me, but the child does not grow to be an independent individual, a child becomes a part of the parent. . . the child does not get a sense of himself, being separate from a parent, and what I saw happening, and I—because of the short-term nature, I think that a clinic evaluation would show it much more, but what I saw happening was that Michael was starting not to be himself but to be a part of his father. . . .

Samson also testified that a part of the diagnosis of Mark's childhood schizophrenia was that he had a symbiotic relationship with Donald. Donald refused to cooperate with Samson's recommendations for further evaluation in a clinical setting at the Child Guidance Center. Mark and Kevin were children of a prior marriage of Donald. After living two years and four months in Donald's home, Mark was committed to a child mental health facility and foster care where the diagnoses which Samson referred to were made.

In addition to her alarm regarding the developing relationship between Michael and Donald, Samson was also alarmed with the tremendous amount of responsibility placed upon eleven-year-old Kevin. He was, she found, in effect raising his ten-year-old brother, Mark.

In contrast, Samson reported Fran's relationship with Michael was very positive and that Francis was a stimulating but firm parent. Samson found a marked difference between the two home environments and ". . . in terms of Michael's future development, total, until he's an adult it's my opinion Fran offers him the better home. She offers him the better chance to grow up."

I would place Michael in his mother's custody.