FILED
AUG 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-241 / 88-1561

IN RE THE MARRIAGE OF WANDA ARLENE MANSARAY AND MOHAMED SORIE MANSARAY

Upon the Petition of

419

WANDA ARLENE MANSARAY,

Petitioner-Appellant,

And Concerning

MOHAMED SORIE MANSARAY,

Respondent-Appellee.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Petitioner appeals the decision of the district court in a decree of dissolution which awarded respondent sole custody of one of the parties' two children. She claims: (1) the best interests of the children would be served by awarding her primary physical care of their son; and (2) the district court erred in ordering sole rather than joint custody. **REVERSED AND REMANDED.**

Tyler C. Johnston of Joe Johnston Law Firm, P.C., Iowa City, for petitioner-appellant.

Dennis S. Clark, Iowa City, for respondent-appellee.

Heard by Donielson, P.J., and Schlegel and Habhab, JJ.

DONIELSON, P.J. 129

Petitioner Wanda Arlene Mansaray and respondent Mohamed Sorie Mansaray were married on July 30, 1977. Their first child, a daughter, Isatu Mansaray (April 28, 1980), was born while Mohamed was completing his education at the University of Iowa in Iowa City, Iowa. Mohamed received his degree in electrical engineering in December of 1980. He obtained a job with Control Data in Minneapolis and the family moved to Minnesota in early 1981. Later in 1981, Karim, Mohamed's son from a prior relationship, joined the family in Minneapolis.[1] The couple's second child, a son, Gibril, was born on December 22, 1982. The marriage of Wanda and Mohamed was marked by frequent financial difficulties, several separations, and physical abuse. Wanda left the family home in May of 1986, taking the three children with her to Muscatine, Iowa.

Mohamed's job in Minneapolis was eliminated at about the time Wanda had left their home. Mohamed sought other employment. He accepted a position in Newark, New Jersey, and he moved there to begin his employment and to establish a home. Mohamed visited the family in Muscatine over Thanksgiving that year, and he took Karim with him when he returned to Newark. Mohamed visited again over Father's Day in June of 1987. Wanda consented to allowing Isatu and Gibril to return with their father to Newark for a visit.

---

1. Custody of Karim is not at issue in this case.

Wanda went to Newark in July to obtain the return of the children. Isatu came home with Wanda, but it was Wanda's understanding that she would allow Gibril to extend his visit until December and that he would return home in December in time for his birthday.

Wanda testified that Mohamed refused to return Gibril to her and that he indicated that Gibril would be allowed to visit his mother over spring break or in the summer of 1988. Neither of these promises was ever realized.

Wanda filed her petition for dissolution in February of 1988. She sought custody of both children. Trial on the matter was held September 19, 20, and 21, 1988. On October 10, 1988, the district court awarded Wanda sole custody of Isatu and awarded Mohamed sole custody of Gibril. The court noted that the children had lived apart for fourteen months and neither had suffered emotionally. The court concluded in making its custody determination, that continued separation of the siblings would have the least negative emotional and physical impact upon the children.

Wanda appeals the decision of the district court. She claims that the physical care of Gibril should have been awarded to her and that the court should have ordered joint legal custody of the children because nothing in the record demonstrated that such an arrangement would not work. Although he did not file an appeal, it appears from

Mohamed's brief that he would like sole custody of both children.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. Our responsibility is to review the facts as well as the law and to determine rights anew from the credible evidence on properly presented and preserved issues. 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. In re Marriage of Novak, 220 N.W.2d 592, 597 (Iowa 1974); Iowa R. App. P. 14(f)(7). As in all cases of this type, precedent is of little value and our decision must ultimately depend on the particular facts of this case. In re Marriage of Kehrli, 241 N.W.2d 923, 926 (Iowa 1976).

I. **Separate Custody.** The trial court correctly recognized the principle that siblings should not be separated and lose the benefit of constant association with one another without a showing of good and compelling reasons. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517 (Iowa 1976). The trial court erred in this case in finding that the circumstances warranted separate custody for Isatu and Gibril. At the time of trial Isatu was eight years old and Gibril was not quite six. Testimony revealed that the children had a close relationship and that they missed one another. The trial court indicated in its ruling that

there was no evidence that the separation of the children from each other for over a year had caused psychological or emotional damage to either child. The court concluded that removing either child from his or her present environment would be very disruptive, and apparently the trial court felt that the consequences of separate custody were preferable to such disruption. This court cannot agree. The trial court found that both petitioner and respondent had sufficient parenting skills to care for Isatu and Gibril and that either parent would be a suitable custodian for the children. No compelling reasons are evident from the record as to why separate custody is preferable in this case. Isatu and Gibril are now the products of a broken home. The stresses and burdens they will bear because their parents chose to dissolve their marriage should not be compounded by condemning them to a childhood in which they are denied daily contact with one another.

> In attempting to foster children's best interests, the court ordinarily attempts to keep children of broken homes together. The underlying rationale is that split custody deprives children of the benefit of constant association with each other which, as innocent victims of marital bankruptcy, they should not be lightly subjected to.

In re Marriage of Grandinetti, 342 N.W.2d 876, 878-79 (Iowa App. 1983).

The fact that the children had been living exclusively with one parent for approximately fourteen months prior to the rendering of the trial court's decision is not

sufficient to constitute a compelling reason for separate custody. The children were allowed to communicate by phone with each other and with their noncustodial parents. Testimony from petitioner reflects her perseverance in insuring that her son and daughter continued to have contact with one another even if their father blocked any opportunities they had to reunite or visit. The circumstances of this case do not warrant separate custody arrangements for these young children.

II. **Custody.** Having determined that separate custody was not justified in this case, the court must now determine which parent should have custody of Isatu and Gibril. In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983) and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). The critical issue in determining the best interests of the child is which parent will do better in raising the child; gender is irrelevant and neither parent should have a greater burden than the other in attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

In deciding the custody issue, we seek neither to punish one parent nor reward the other. In re Marriage of

Castle, 312 N.W.2d 147, 149 (Iowa App. 1981). The ultimate question for this court is which parent, based on a review of the entire record, can minister more effectively to the long-range best interests of the children. Id.

Custody determinations are never easy. All parents have strengths and weaknesses. The courts are not privy to the interaction between parents and children behind the closed doors of the family home. We must instead make our determination based on the evidence presented. In re Marriage of Gravatt, 371 N.W.2d 836, 839-40 (Iowa App. 1985). The record reveals that both Wanda and Mohamed love their children and are able to provide a stable home for them. However, several aspects of their lives deserve special attention from this court.

This court recognizes the large discrepancy in the financial means available to Wanda and Mohamed. Wanda's sole source of revenue appears to be A.D.C. benefits. She has started many post-high school education programs, but has not completed any of them, nor has she held steady employment for any significant length of time. At the time of trial she was attending a community college under a program sponsored by the government. In contrast, Mohamed has a college degree, steady employment, and an income in excess of $30,000 a year. When making a custody determination, one factor the court is to consider is the capacity of each parent to provide for the material needs

of his or her children. Winter, 223 N.W.2d at 166. However, poverty alone has never been accepted as a sound basis for declining to give either parent the custody and control of the issue of the marriage, providing they are otherwise equipped and the child's welfare would not be jeopardized. Gravatt, 371 N.W.2d at 840.

Another aspect of this case which the court cannot ignore is the physical abuse Mohamed inflicted upon Wanda throughout their marriage. He admitted at trial that he beat Wanda and that the children witnessed some of this abuse. Mohamed also admitted to using excessive force with regard to a disciplinary incident involving Isatu. While Mohamed testified that he regrets these past incidents, they cannot be easily dismissed by this court. Past physical abuse of a spouse is relevant to a court's child custody determination. See In re Marriage of Ballinger, 222 N.W.2d 738, 739 (Iowa 1974) (husband's abuse of wife was a factor considered by court in determining that the wife should have custody of their children). Moreover, parental misconduct which occurs in the presence of the children weighs more heavily in making custody determinations than misconduct not witnessed by the children. Grandinetti, 342 N.W.2d at 879.

Despite the superior financial status of Mohamed, this court concludes that the best interests of the children will be served by giving physical custody of the children

to Wanda. Until Gibril's visit to his father's home in June of 1987, Wanda had been the primary caretaker for Isatu's and Gibril's needs. She provided the bulk of their day-to-day supervision and physical care.[2] This fact is pertinent to our custody determination. See Grandinetti, 342 N.W.2d at 880 (that mother was main nurturing agent of children was factor in determining custody). Furthermore, the record reveals that Wanda has a large family and many of her relatives live in or near Iowa City. While Wanda attends classes at a community college, her sister cares for Isatu. In In re Marriage of Welbes, 327 N.W.2d 756, 758 (Iowa 1982), it was recognized that child care provided by family is preferred to that provided by strangers. The familial support available to Wanda weighs in her favor in this custody determination.

Finally, this court concludes that Wanda's willingness to allow Mohamed to visit the children after their final separation in May of 1986 reflects strongly in her favor in her request for custody. Ordinarily the best interests of children require a continuing association with a noncustodial parent unless the contrary is clearly shown. Metallo v. Misengo, 353 N.W.2d 872, 875 (Iowa App. 1984). The court is ordered by statute to regard the denial by one parent of a child's opportunity for maximum continuing

---

2. Wanda's role as primary caregiver continued throughout each of the couple's numerous separations.

contact with the other parent, without just cause, as a significant factor in determining custody. Iowa Code § 598.41(1).

Mohamed admitted that Wanda accommodated his requests to visit the children after they permanently separated in May of 1986. Yet after she consented to Gibril's extended visit from July until December 1987, Mohamed did not cooperate with her requests to return Gibril to her or to arrange for visitation with Gibril.[3] Despite the fact that this conduct occurred prior to entry of the divorce decree, it offers the court insight as to how each party will behave in the future. Placing custody with the mother is more likely to ensure that each child will be encouraged to maintain maximum continuing contact with the noncustodial parent.

III. Joint Custody. The Iowa Code provides that upon the application of either parent, the court shall consider granting joint custody where the parents do not agree to joint custody. Iowa Code § 598.41(2). If the court does not grant joint custody, the court shall cite clear and convincing evidence that joint custody is unreasonable and not in the best interest of the child. Id. The petitioner, in her petition, and respondent in his answer

---

3. Mohamed did not even bring Gibril to Iowa City during the trial despite the fact that his mother and sister had not seen him in over a year.

both stated that they were fit and proper persons to have temporary and permanent joint custody of the children.

The transcript from the trial does not reveal that the parties were ever questioned with regard to their attitudes toward joint custody. The trial court determined however, that there was no agreement that the parties would consent to joint custody of Isatu and Gibril, and that in fact both the parents were opposed to joint custody. The trial court concluded that because of the great geographical distance between the parties, the parties' inability to communicate effectively regarding the children, and because of the differences in the educational and cultural background of the parties, joint custody would not be in the best interests of the children. On appeal, Wanda claims that nothing in the record indicates that either party was opposed to joint custody. Mohamed argues that the record supports the trial court's decision on this issue.

In order to assure a child maximum continuing physical and emotional contact with both parents, joint custody is favored whenever reasonable and in the child's best interests. Ullerich, 367 N.W.2d at 299. Section 598.41(3) of the Iowa Code sets forth nine factors to be considered when making joint custody determinations. No single one of the factors listed in section 598.41(3) is a condition precedent to allowing joint custody, nor is there a certain number of factors which, when satisfied, will either

mandate or prohibit a joint custody award. In re Marriage of Short, 373 N.W.2d 158, 160 (Iowa App. 1985).

The trial court based its denial of joint custody upon the geographic distance that separates the parties and a perceived inability between the parents to communicate effectively with regard to their children's needs. Whether parents can communicate with each other regarding the children's needs is an important factor to be considered by the trial court in determining whether joint custody is in the children's best interest. In re Marriage of Garvis, 411 N.W.2d 703, 706 (Iowa App. 1987). The parties need not be in agreement at all times in order to justify joint custody; it is enough that they can communicate with regard to their children's needs and support each other's relationships with them. Short, 373 N.W.2d at 160. In order to justify a demand to deny joint custody, a lack of ability to communicate must be something more than the usual acrimony which accompanies a divorce. Garvis, 411 N.W.2d at 706.

The record in this case reveals that each parent expressed a willingness to encourage their children to have a continuing relationship with the other parent. Mohamed specifically testified that he had regular phone contact with Wanda and that he kept her informed of Gibril's medical condition and his educational progress. Despite

any animosity or suspicion that may have previously existed between the parties, and despite the geographic distance that exists in this case, this court cannot find that clear and convincing evidence exists for denial of joint custody in this case.

In conclusion, physical care of Isatu and Gibril is placed with Wanda. She and Mohamed will have joint custody of the children. This case is remanded to the district court for a modification of child support and visitation consistent with this decision. Costs of this action are assessed to respondent.

REVERSED AND REMANDED.