

FILED
AUG 31 1978

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

JOHN H. DRIVER,

)

Petitioner-Appellant,
Cross-appellee,

)

Filed August 31, 1978

)

vs.

)

SANDRA M. DRIVER,

626

3-61672

)

Respondent-Appellee,
Cross-Appellant.

)

Appeal from Clinton District Court - Nathan Grant, Judge.

Petitioner and respondent both appeal from split custody provision in their dissolution of marriage decree. - Affirmed.

Arthur L. Buzzell, of Newport, Buzzell, Liebke & Fortini, Davenport, for
Petitioner-Appellant.

Donald G. Senneff, of Shaff, Farwell & Senneff, Clinton, for Respondent-Appellee.

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

PER CURIAM

Petitioner John H. Driver appeals and respondent Sandra M. Driver cross-appeals the custody provisions of their dissolution of marriage decree. The trial court awarded custody of the parties' daughter Bridget, age 9, to John and custody of their daughter Jesse, age 5, to Sandra. On appeal, both John and Sandra contend the trial court erred in splitting custody of the parties' daughter between the two parents. Each argues that he or she should have been awarded custody of both children.

Our review is de novo. In re Marriage of Bowen, infra; rule 14(f)(1), Rules of Appellate Procedure. However, we give weight to the trial court's findings of fact, especially when considering credibility of witnesses. "As difficult as it is to assess credibility of live testimony, it is more difficult to assess credibility from a cold transcript." Woodward, infra; Zaerr v. Zaerr, 222 N.W.2d 476, 477 (Iowa 1974).

In resolving custody disputes, we are guided by the criteria set forth in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974) and in In re Marriage of Bowen, 219 N.W.2d 683, 687-88 (Iowa 1974). The status of children should be fixed as soon as possible and thereafter seldom disturbed and then, only for the most cogent reasons. Schoonover v. Schoonover, 228 N.W.2d 31, 34 (Iowa 1975). Our primary concern is for the best interest of the children, rule 14(f)(15), R. App. P. and we must determine which parent can minister more effectively to that long range best interest of those children. Winter, supra.

The general rule in this jurisdiction is that siblings should not be separated and lose the benefit of constant association with one another without showing good and compelling reasons. Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517 (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, 75-6 (Iowa 1975). The trial court found Sandra had been suffering from some emotional and mental problems which resulted from the treatment received by her on the part of John. It also found John's life style was not the most exemplary. As a result, the trial court found it was in the best interests of the children for custody to be split.

Our review of the evidence leads us to the same conclusions reached by the

trial court. Although Sandra had been suffering from emotional and mental problems for over two and one-half years, at the time of trial a clinical psychologist and a psychiatrist testified she appeared normal, had made marked improvement and her illness was in a state of remission. The evidence shows Bridget has matured greatly since her separation from Sandra and her school work has improved dramatically. Jesse appears to be very attached to her mother, although there was testimony she also emotionally matured while out of her mother's care and custody. The psychiatrist, Grey Woodman, after taking a history of Sandra's problems and examining her, recommended that she be given custody of both children. The court, however, determined that custody should be split. Disregarding letters from B. Grimmer, psychiatrist, which were not admitted in evidence, we nevertheless conclude the trial court correctly found from the evidence there were good and compelling reasons for splitting custody. Doan Thi, supra. See also *In re Marriage of Wahl*, 246 N.W.2d 268, 270-71 (Iowa 1976).

The other contention raised by John on appeal is that the trial court erred in not establishing the final custodial status of the children when it provided that Sandra should be entitled to make application for change in custody of Bridget, at such time as her mental and emotional health stabilized. We interpret this provision as emphasizing the court's continuing jurisdiction to redetermine custody upon proper application and the required change in circumstances. See *Betzel v. Betzel*, 163 N.W.2d 551, 554-55 (Iowa 1968); § 598.21, The Code. There is no error.

Without fixing the extent of Sandra's obligation to her attorney, we order that John pay the sum of \$750 to apply upon her attorney fees incurred on this appeal. Costs on appeal are assessed one half to each party.

AFFIRMED.

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

OXBERGER, J. (dissenting)

The trial court recognized in its decree that Sandra's emotional and mental problems were the results of John's treatment of her. The psychiatrist and the clinical psychologist who had both treated Sandra testified she should have the children. They said she could handle them and that it was unlikely she would become sick again since she was no longer subjected to the severe stress of John's lifestyle. John acknowledged Sandra had been the caring parent throughout the marriage. During the marriage John was satisfied to provide his family with frequent moves and a substandard of living. He left the family for extended periods of time to go on the road to sell his leatherworks and to fulfill his desire to live in a commune. He took the A.F.D.C. funds provided for Sandra and the children to support his communal living needs and marijuana habit. While Sandra was confined at Mount Pleasant, John spirited the children away to Wisconsin. By his own testimony, he acknowledged he never contacted Sandra to inform her of the children's safety or whereabouts. The record gives no indication that he is the parent best able to deal with the older daughter Bridget's long range best interest as she approaches puberty and adolescent years. I would award custody of both children to Sandra.