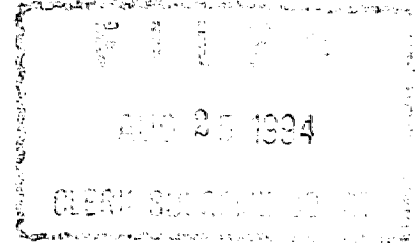


IN THE COURT OF APPEALS OF IOWA

No. 4-271 / 94-0044



IN RE THE MARRIAGE OF JAMES E. McGUIRE
AND LORAINA A. McGUIRE

Upon the Petition of
JAMES E. McGUIRE,

Petitioner-Appellee,

And Concerning
LORAINA A. McGUIRE,

Respondent-Appellant.

Appeal from the Iowa District Court for Carroll County,
Louie F. Beisser, Judge.

Former wife appeals from the custody provisions of the
parties' dissolution decree. **AFFIRMED.**

William W. Ranniger of the Ranniger Law Office,
Manning, for appellant.

Arthur A. Neu of Neu, Minnich, Comito & Hall, P.C.,
Carroll, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink,
JJ.

HABHAB, J.

Former wife, Loraine McGuire appeals from the custody provisions of the parties' dissolution decree. We affirm.

James and Loraine McGuire were married on May 18, 1991, after the birth of their son, Patrick, on October 4, 1990. Both James and Loraine worked at New Hope Village. Loraine earns a net monthly income of \$1357. James earns a net monthly income of \$1285. At the time of the marriage, Loraine owned a pickup worth \$4500 and had very little debt. James owed approximately \$8500 in credit card debt and \$2000 in student loans.

Loraine filed a petition for dissolution of marriage on July 21, 1993. James, Loraine, Patrick and Megan, Loraine's daughter from a previous marriage, have lived in the same home during the dissolution proceedings.

At trial, Loraine argued that despite their financial difficulties, James continued to spend money they did not have on drinking, golf, and a dart league. Loraine stated she was responsible for the household duties and care of Patrick. Loraine introduced testimony from her former husband, who testified that Loraine was a good mother. Loraine also noted there was a close bond between Patrick and Megan, her child from her first marriage.

James testified that Loraine was manic-depressive and was taking Prozac to control this behavior. He also claimed Loraine was having an extramarital affair. James testified he quit drinking. He also testified he had read

numerous books relating to the health and stability of children, and had enrolled in a course in developmental psychology at Des Moines Area Community College. James also stated he had prepared most of Patrick's meals, even during the marriage. James testified that Loraine's behavior with the children was mixed, being nice one minute and impatient the next. James maintained he was calm and smooth in disciplining the children.

The district court noted James had a drinking problem, which hurt the family financially and left him little time to be home with the family. However, the court acknowledged he had "made a complete aboutface since the dissolution was started." The district court awarded James and Loraine joint custody of Patrick, with James being awarded physical care. Loraine was ordered to pay \$305 per month in child support. Loraine appeals.

Our review in this matter is de novo. Iowa R. App. P. 4. 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), in In re Marriage of Weidner, 338 N.W.2d 351, 355-56 (Iowa 1983), and in In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration"--the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrbn, 359 N.W.2d 420, 424 (Iowa 1984). 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).

James contends it would be inappropriate to give Loraine physical custody of Patrick because she had an adulterous relationship during the marriage. Loraine denies she had an affair. While moral misconduct is a factor to be accorded weight in a child custody determination, it has been weighed most heavily only in those cases where the misconduct occurred in the presence of the children. In re Marriage of Grandinetti, 342 N.W.2d 876, 879 (Iowa App. 1983). There is no evidence that either party engaged in moral misconduct in the presence of the children.

James also claims Loraine has a history of depression. Loraine admits she suffered from a single episode of depression brought on by marital stress. Dr. Liebert, Loraine's physician, and Dr. Liataud, her psychiatrist, testified Loraine responded to medication and that her condition should not affect her ability to parent.

In In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986), our supreme court examined the issue of how much weight should be given to the preference for keeping siblings together in the case of half siblings. The court

found the general principles governing the separation of siblings should govern, regardless of the advantage given to the parent of the half sibling. Id. The court found, in order to depart from the preference for keeping siblings together, "it must appear that separation 'may better promote the long range interests of the children.'" Id. (quoting In re Marriage of Jones, 309 N.W.2d 457, 461 (Iowa 1981)).

We find this case to be a close call. We find both Loraine and James are capable of caring for Patrick. In difficult custody decisions such as this, our preference is to follow the trial court. We determine it is in Patrick's best interest to give James primary physical care. In doing so, we are not ignoring the importance of Loraine's contact with her son or the obvious love she has for him. We also strongly urge James to continue to refrain from consuming alcohol. We affirm the district court.

Costs of this appeal are assessed to appellant.

AFFIRMED.

HUITINK, J. (dissenting)

I respectfully dissent. In custody decisions we are guided by the principle that siblings including half siblings should not be separated absent compelling reasons showing separation will promote the best interest of the children. In re Marriage of Orte, 389 N.W.2d 373, 374 (Iowa 1986). This principle applies regardless of the resulting advantage to the parent of the half sibling. Id.

I disagree with the conclusion that Patrick's best interests are served by separating him from Megan. There is substantial evidence indicating that there is a close relationship between them. I do not believe the consequences of their separation have been fully considered by the majority.

I also disagree with the trial court's assessment of Lori as a parent. The trial court's references to Lori's "moral misconduct" are not supported by the facts. Even if the allegations of infidelity are true, there is no evidence this activity has occurred in the children's presence or that Lori's relationship with the children has suffered as a result.

I find no compelling reasons warranting separation of these children. Patrick's best interests require placement with Lori and the decision of the district court should be modified accordingly.

Cady, J., joins this dissent.