

IN THE SUPREME COURT OF GUAM

MARIA ANNIE FLORES,)
)
 Plaintiff-Appellee,)
 vs.)
)
 HAROLD J. CRUZ,)
)
 Defendant-Appellant.)
 _____)

Supreme Court Case No. **CVA97-018**
 Superior Court Case Nos. **DM0694-94**
 CS0872-94

OPINION

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Appeal from the Superior Court of Guam.

Argued and Submitted on 17 February 1998

Hagåtña, Guam

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BEFORE: PETER SIGUENZA, Chief Justice; JOSE I. LEON GUERRERO, and EDUARDO A. CALVO, Associate Justices.

Siguenza, C.J.:

[1] This appeal arises out of the Superior Court's determination that sole legal custody of a child should be awarded to the Appellee, Maria Annie Flores. The trial court based its determination on a finding that the Appellant, Harold J. Cruz, lacks the maturity to share legal custody of the minor child and that parties are unable to communicate. Mr. Cruz contends otherwise asserting the Superior Court's decision regarding his immaturity was based on events occurring prior to the birth of his son. He also argues that inadequate consideration was given to his behavior as a father when determining his custodial rights. He further contends that the communication and cooperation difficulties are principally on the side of the mother, Ms. Flores.

[2] We agree. The trial court when considering Mr. Cruz's sexual behavior, did not analyze how his past conduct adversely affected the welfare of the child. Nor was an examination conducted weighing his past sexual affairs before the birth of his child against his more recent behavior as a father. We further decide that the communication difficulties, largely attributable to Ms. Flores, were not considered and that the trial court failed to weigh this factor in its analysis. Accordingly, we reverse and remand this matter back to the trial court for consideration consistent with this opinion.

PROCEDURAL AND FACTUAL BACKGROUND

[3] Harold J. Cruz and Maria Annie Flores were engaged to be married over an eight-month

period. The engagement subsequently ended when Ms. Flores discovered that Mr. Cruz had several sexual relationships with other partners, resulting in several pregnancies. At the end of her relationship with Mr. Cruz, Ms. Flores was also pregnant. She eventually gave birth to Tyler Jose Flores on June 20, 1994.¹

[4] On July 28, 1994, Ms. Flores filed a complaint in which she sought sole custody of the child as well as a restraining order against Mr. Cruz based on allegations that he physically abused her in March of 1994.² In his answer and counterclaim, Mr. Cruz prayed for joint legal custody with physical custody to be awarded to mother, reasonable visitation rights to the father, and child support of \$150 per month.

[5] On August 5, 1994, an Order to Show Cause hearing was conducted based on harassment allegations of Ms. Flores³. Consequently, on August 12, 1994, mutual restraining orders were issued to keep the parties from “molesting, annoying, or disturbing the peace of each other.” On September 27, 1994, a hearing was held at which time Mr. Cruz’s visitation hours were increased. At a subsequent hearing held on February 1, 1995, the court ordered pendente lite joint custody and further increased Mr. Cruz’s visitation. Mr. Cruz and Ms. Flores have since shared joint legal

¹Mr. Cruz attempted to be present when the child was born, but was removed from the labor room by hospital security per Ms. Flores’s request.

²Despite allegations of physical abuse in March, 1994, such allegations were not made until July 28, 1994. These allegations were never substantiated. Accordingly, the trial court’s reference to the allegations should not have had any bearing on the proceeding.

³During trial, Ms. Flores illustrated Mr. Cruz’s harassment prior to the restraining order as follows: she stated “but prior to that (the restraining order) Every little thing, whether it be a bag or the clothes or the food or-everything, where my child was going, what I was doing, uhm...if he had trouble finding a sitter for Tyler, he would call me up.” By Ms. Flores’s own accounts, the harassment was predominately in relation to the child. Transcript at 13 (February 12, 1997).

custody of Tyler for approximately two years.

[6] During the period of temporary joint legal custody, Ms. Flores alleges three incidents that were cumbersome when dealing with Mr. Cruz, indicating an inability to cooperate.⁴ Ms. Flores and Mr. Cruz were apparently able to solve these issues and otherwise cooperate as to issues surrounding Tyler. For instance, the record indicates Mr. Cruz and Ms. Flores agreed, without court supervision, to alter visitation times to better accommodate each other's schedules. In another instance, they cooperatively held a party for Tyler's second birthday in spite of Ms. Flores' recollections surrounding Tyler's first birthday.

[7] The trial court conducted a custody hearing on February 12, 1997. After taking testimony from both parties and hearing argument, the court awarded sole legal custody to Ms. Flores. Consequently, a timely Notice of Appeal was filed.

ANALYSIS

[8] This court has jurisdiction over this matter pursuant to 48 U.S.C. § 1424-3(d) (1984) and 7 GCA § 3107(b) (1994). The court reviews custody matters keeping in mind the best interest of the child. 19 GCA § 8404 (1994). The factual findings of the trial court are reviewed for an

⁴One incident related to the child's birthday party. During the party, Mr. Cruz failed to tell Ms. Flores that he was aware that the police were planning to call her in reference to one of the previous harassment incidents. Ms. Flores felt that he should have notified her and that perhaps his motives for participating in the party were questionable as he may have attended just to gain her good graces before the police called. Another incident occurred when Mr. Cruz attempted to trade visitation days with Ms. Flores as he thought that he was scheduled to have Tyler on Mother's day. Ms. Flores regarded the incident as harassment because she misunderstood what Mr. Cruz was attempting to do. Transcript at 27 (February 12, 1997). The final incident occurred when Mr. Cruz returned Tyler after his visitation, wearing a girl's t-shirt because Tyler was not sent with extra clothes. Transcript at 24 (February 12, 1997).

abuse of discretion. *Farrell v. Farrell*, 819 P.2d 896, 898 (Alaska 1991).

I.

[9] Although case authority does not appear to fix a standard definition of joint custody, it is generally understood as a custody arrangement that places both legal and physical custody of a child in the hands of both parents. *See In Re Marriage of Lampton*, 704 P.2d 847, 849 (Colo. 1985)(en banc); *See also In Re Marriage of Burham*, 283 N.W. 2d 269, 271 (Iowa 1979). This custody arrangement permits both parents to participate in reaching major decisions affecting the child's welfare. *See Vitauts M. Gulbis, Annotation, Propriety of Awarding Joint Custody of Children*, 17 ALR 4th 1013, 1016 (1981). Although this is a generally recognized arrangement, the court must initially decide whether a trial court has within its authority the discretion to award joint custody if deemed appropriate.

[10] The principal custody statute, 19 GCA § 8404 states in pertinent part:

In actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court may, during the minority of the child, make such order for the custody of such minor child as may seem necessary or proper. In awarding the custody, the court is to be guided by the following standards, considerations and procedures:

(a) Custody should be awarded to either parent according to the best interest of the child.

(b) Custody may be awarded to persons other than the father or mother whenever such award serves the best interest of the child. Any person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall prima facie be entitled to an award of custody.

While 19 GCA § 8404 does not expressly provide for the issuance of joint legal custody, the language of the statute reflects the legislature's intent to accord the trial court broad discretion in

determining custody. The legislature gave the trial court discretion to “make such order for the custody of such minor child as may seem necessary or proper.” *Id.* The inclusion of statutory factors for the trial court’s consideration in no way diminishes its authority in deciding which custodial relationship is in the child’s best interest. See *In Re Marriage of Neil*, 92 Cal. App. 3d 834, 839, 155 Cal.Rptr. 157, 160 (1979). Moreover, Guam’s statute is devoid of language requiring the trial court to decide between two parents. Instead, 19 GCA § 8404 allows the trial court to consider a broad range of facts and circumstances when deciding the best interests of a child and determining a child’s custodial status.

[11] Not only is joint custody permitted by Guam statute, there appears a preference for such custodial arrangements. Title 19 of the Guam Code Annotated, read as a whole, reflects the legislature’s underlying policy that whenever possible, the sanctity of family life should be preserved by the inclusion of both parents in the lives of their children. For instance, 19 GCA § 4106 (1994) provides:

The father and the mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either the father or mother be dead or unable or refuse to take the custody or has abandoned his or her family, the other is entitled to its custody, services and earnings.

Other sections of Title 19 further support this preference for joint custody. 19 GCA § 4107 (1994) states “[t]he husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other.” Likewise, the legislature’s stated purpose in the series of statutes that address the Termination of the Parent-Child Relationship, provides in pertinent part “[i]mplicit in this Article is the philosophy that wherever possible family life should

be strengthened and preserved and that the issue of severing the parent-child relationship is of such vital importance as to require a judicial determination. . . .” 19 GCA § 4301 (1994).

[12] Given the trial court’s latitude granted through the broad discretionary language of 19 GCA § 8404 and the legislature’s preference toward inclusion of both parents in the lives of their children, this court determines that not only can an award of joint legal custody be granted by Guam’s trial courts, it is preferred. This preference, however, is always secondary to the best interest of the child.

II.

[13] In ruling upon this matter, the trial court stated that Cruz’s past was “not determinative in this custody issue.” *Flores v. Cruz*, DM 0694-94 (Super. Ct. Guam April 10, 1997). However, the trial court clearly placed great weight upon Cruz’s past sexual behavior and the resulting pregnancies. Moreover, the trial court concluded Cruz was not a responsible parent as his past indiscretions were indicative of a lack of maturity.

[14] We agree that trial courts may look to the sexual behavior of a party for purposes of determining custody. *See Bialac v. Bialac*, 240 Cal. App. 2d 940, 50 Cal. Rptr. 12 (1966); *Montgomery v. Marcantel*, 591 So.2d 1272 (La. 1991); *Smith v. Smith*, 586 So.2d 916 (Alaska 1991). However, in order for such behavior to be relevant to a custody determination, it must be shown to have directly affected the child in an adverse manner. *Bialac*, 240 Cal. App. 2d at 947, 50 Cal. Rptr. at 16; *Montgomery*, 591 So.2d at 1273; *Smith*, 586 So.2d 918. Similarly, in order to have a bearing on the case, prior misconduct must be shown to presently affect the interests of the child. *Santens v. Santens*, 180 Cal. App. 2d 809, 819, 4 Cal. Rptr. 635, 641 (1960). Otherwise, if not linked to the

child's interest, the matter should not be considered.

[15] It is uncontested that Harold Cruz's past behavior as a fiancé is both egregious and immature. However, in the context of determining custody, we cannot characterize this behavior in the same manner. Our review of the trial court's order indicates that Cruz's conduct was never reviewed in context as it pertains to the child's welfare. Further, the record reveals that no evidence was presented indicating that Cruz's sexual behavior which occurred before the birth of Tyler, has had any bearing on Mr. Cruz's abilities to be a father for purposes of joint legal custody. During the period of temporary joint legal custody, nothing presented shows that he has made decisions endangering his child, placing him at risk or otherwise making inappropriate choices adversely affecting Tyler's welfare. More importantly, the record reveals that Ms. Flores admits Mr. Cruz is a good father. Consequently, based on the record now before us, we cannot reconcile the trial court's finding that his past sexual conduct rendered him irresponsible and therefore immature to such a degree that his legal rights are terminated.

[16] Assuming Cruz's past behavior was shown to have an adverse effect on the child's welfare, the analysis as presented would not be acceptable to this court. We are disturbed by the absence of consideration of Cruz's level of maturity since the birth of his son and during the period of temporary joint custody. We believe such an examination would be a more accurate and important assessment of his ability to raise his son.

[17] Maturation is a process of development that occurs over time. While Cruz's sexual behavior may have demonstrated a want of maturity in the eyes of the trial court, this conduct was representative of a period of time prior to the child's birth. As to the time period after the child's

birth, the record, although quite sparse, provides some indication of growing maturity on Cruz's part. For instance, contention has occurred because the child was dressed in girl's clothing. Mr. Cruz explained that due to the visitation schedules, clothing he had provided for his son was not returned. Instead of arguing over a matter which he considered petty, he solved the issue by taking steps ensuring that he always has proper clothes on hand for his son and resolved a source of discord between the parties. Such action of avoiding conflict shows good judgment and maturity.

[18] As stated earlier, the record is limited as to affirmative examples of Mr. Cruz's maturity. The record is also silent as to whether Mr. Cruz's sexual promiscuity has continued since the birth of his son. As these issues directly pertain to the best interests of raising Tyler, they should have been extensively explored.

[19] In sum, the trial court erred by finding Mr. Cruz's past sexual behavior was indicative of his maturity. Likewise, the trial court's characterization of Mr. Cruz, again based on his sexual conduct, as the least responsible of the parties cannot be supported by the record. None of these findings has been shown to adversely affect the welfare of the child. In addition, the court's consideration of this behavior appears to be incomplete as no consideration was given to Cruz's maturity after the child's birth.

III

[20] Generally, agreement and cooperation between the parties are the foundations upon which any joint custody arrangement rests. *In Re Marriage of Lampton*, 704 P.2d 847, 849 (Colo. 1985) (en banc); *In Re Marriage of Burham*, 283 N.W. 2d 269, 275 (Iowa 1979); *In Re Marriage of Neal*,

92 Cal. App. 3d 834, 843, 155 Cal. Rptr. 157, 162 (1979). The absence of such makes decisions affecting the welfare of the child difficult and will inevitably require recurring court intervention. *Lampton*, 704 P.2d at 849. Moreover, in situations where parents are embattled and embittered, a joint custody arrangement would only enhance familial chaos. *Burnham*, 283 N.W.2d at 275 (citation omitted). Clearly, a joint custody arrangement absent minimal cooperation would not be in the best interest of a child. *Id.*

[21] However, “[t]he ability to cooperate does not require the absence of tension or hostility. . . .” 1 Jeff Atkinson, *Modern Child Custody Practice* §6.09 (1986). Instead, it requires “that the parents put the interest of the child before their own interests (or anger).” *Id.* If the parties have demonstrated that they are reasonable and willing to give priority to the child’s best interest, courts can determine whether the parents can separate and put aside their differences to cooperate for the benefit of their child. *Beck v. Beck*, 432 A.2d 63, 71-72 (N.J. 1981) (citation omitted). If the potential for cooperation exists, a successful joint custody arrangement can be achieved by instructing parents on what is expected and by setting ground rules of conduct. *Id.*

[22] Whether the parties could cooperate and communicate was the factor that the trial court considered when it awarded sole custody to Ms. Flores. The court specifically found that the relationship between the parents was neither open nor free. The Superior Court also stated in its ruling that “[t]he parties have difficulty communicating and cooperating, and their relationship is less than amicable.” *Flores v. Cruz*, DM 0694-94 (Super. Ct. Guam April 10, 1997). Thus, the court concluded that sole custody was the appropriate custody arrangement and in the best interest of the child. *Id.*

[23] Our review of the record leads to a different conclusion. While it is clear that Ms. Flores does not wish to continue to collaborate with Mr. Cruz in raising their child, the custody hearing was held to determine the best interests of the child and not that of the parents. She contends that “because of the past problems in the adult interpersonal relationship of Appellant Cruz and Appellee Flores, that chances for good and open communication are not present because of continuing negative feelings between the parties.” Appellee Brief, Pg. 9. However, her actions belie her words. Notwithstanding her feelings that Mr. Cruz is untrustworthy and manipulative, the parents managed to cooperate, in limited instances, throughout the duration of the pendente lite joint custody period without court intervention.

[24] Mr. Cruz and Ms. Flores have demonstrated the ability to cooperate with one another in matters regarding their son when the lines of communication have been opened. This court is generally not concerned with how the parties feel about one another. What is of consequence is that the parties are able to put their personal differences aside and work for the benefit of their son. The record reflects such an ability, despite the fact that it may be personally disagreeable to Ms. Flores. For example, both parties testified that visitation schedules were modified in order to accommodate each others work and travel schedules. Significantly, successful modification of their schedules occurred without attorney or court involvement.

[25] In Appellee’s brief, it was stated “[a]s a result of this mistrust, she does not want to be forced to sit down and make decisions with a person who has so manipulated her.” Appellee Brief, Pg. 4. The record is clear that Ms. Flores’ has acted consistent with this statement by trying to avoid contact with Mr. Cruz. Her own testimony reveals Ms. Flores did not provide her address or phone number to Mr. Cruz during the year preceding the hearing. Transcript at 28-29 (February 12, 1997). This

was at a time when temporary joint custody was in effect and both parents had decision making responsibilities for the child and communication was essential to his welfare. We believe it is fortunate that an emergency affecting Tyler did not occur. Mr. Cruz's options would have been to act without Ms. Flores' input or wait until contact was established through third parties.

[26] Obviously, meaningful communication could not have taken place under such conditions. Under any type of custodial relationship, let alone joint custody, parents must engage each other in order to cooperate for the best interests of the child. It is quite apparent that when the lines of communication have been silent, it has been the result of Ms. Flores' refusal to open them.

[27] Alternatively, it is undisputed that Mr. Cruz "attempted to reconcile the differences between himself and Plaintiff, but she was not receptive to such efforts." *Flores v. Cruz*, DM 0694-94 (Super. Ct. Guam April 10, 1997). Mr. Cruz also testified that despite the fact that they still had their differences "I have put them aside a long time ago." Transcript at 51 (February 12, 1997). It is within Tyler's best interests for Ms. Flores to also put the past aside and continue to work with Mr. Cruz in raising their son. Despite any ill will, the parties have shown that they can and did make decisions for the benefit of their son. We would observe that "[p]roblems are likely to develop under any custodial arrangement. The adults must have the maturity to put their personal antagonisms aside and attempt to resolve the problems." *In Re Marriage of Bolin*, 336 N.W. 2d. 441, 447 (Iowa 1983).

[28] The tension between Mr. Cruz and Ms. Flores is predicated on their failed relationship. In Appellee's brief, it was contended "[a]nd it is the destruction of the relationship and the complete lack of trust it created that is the foundation of Appellee Flores's inability to feel comfortable in sitting down with Appellant Cruz and trying to make major decisions regarding Tyler." Appellee Brief, Pg.3. While the memories of past indiscretions may make Ms. Flores uncomfortable in dealing with Mr. Cruz, absent any contemporaneous problems that relate to the welfare of the child,

the memories and their attendant discomfort are problems Ms. Flores will need to come to terms with for the benefit of Tyler. Although Ms. Flores may not want to be forced to work with Mr. Cruz, the child's interests must be given priority over her own. It is true that this arrangement may require effort to overcome the discomfort and strained communications, but history between these particular parents has shown that the joint custody arrangement was successful during the period of temporary joint custody and there is no indication whatsoever that the arrangement will not succeed in the future.

CONCLUSION

[29] As noted in the trial decision, “[i]t is well settled that joint legal custody of a minor child is a desirable arrangement and is very effective in some cases.” *Flores v. Cruz*, DM 0694-94 (Super. Ct. Guam April 10, 1997). Nowhere is it postulated that a joint custody relationship does not require the maturity to set aside personal animosities and a desire to do what is truly best for the child. Based on his performance as a father, we find that the revocation of Mr. Cruz's custodial rights is unwarranted under the circumstances. Therefore, we **REVERSE** and **REMAND** this matter to the trial court for proceedings consistent with this opinion.

Nunc pro tunc to 17 February 1998.

EDUARDO A. CALVO
Associate Justice

JOSE I. LEON GUERRERO
Associate Justice

PETER C. SIGUENZA
Chief Justice