

IN THE COURT OF APPEALS OF IOWA

No. 8-461 / 07-1690
Filed August 13, 2008

**IN RE THE MARRIAGE OF GADA HAMODA
AND SAADILDIN SHAKSHAK**

**Upon the Petition of
GADA HAMODA,**
Petitioner-Appellant,

**And Concerning
SAADILDIN SHAKSHAK,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla Schemmel,
Judge.

Gada appeals from the custody provisions of the decree dissolving her
marriage to Saadildin Shakshak. **AFFIRMED AS MODIFIED.**

Sally Frank of Drake University Legal Clinic, Des Moines, for appellant.

Saadildin Shakshak, Des Moines, appellee pro se.

Considered by Sackett, C.J., and Vogel and Zimmer, JJ.

VOGEL, J.

Gada Hamoda appeals from the custody provisions of the decree dissolving her marriage to Saadildin Shakshak. She claims the court should have granted her sole legal custody of the parties' two children due to Saadildin's history of domestic abuse. She also asserts the court erred in refusing to take judicial notice of a criminal file in which Saadildin plead guilty to assault causing injury. We conclude that, due to Saadildin's history of domestic abuse, Gada should have been awarded sole legal custody of the parties' children, and therefore affirm as modified.

Background Facts and Proceedings.

Gada and Saadildin, both natives of Sudan, were married in 1999 in Khartoum, Sudan. Gada has little education, does not speak English, and is employed in housekeeping at a hotel, earning approximately \$9000 per year. Saadildin has a master's degree in engineering from Khartoum University but cannot work as an engineer in the United States until he fulfills certain certification requirements. He speaks English and earns approximately \$19,000 per year at EMCO in Des Moines.

Two children were born to the parties: Ibrahim in 2000 and Azarie in 2001. The family moved to the United States in January of 2004, and Gada and Saadildin separated shortly thereafter. On October 11, 2005, Gada filed a petition seeking to dissolve her marriage to Saadildin. She later amended her petition asking that any visitation of Saadildin with the children be supervised. She then filed an affidavit detailing allegations of serial physical abuse and at

least two occasions in which Saadildin tried to run over her and the children with his vehicle.

Following a trial, the court entered a decree dissolving the marriage. It granted the parties joint legal custody of their two children, granted Gada their physical care and Saadildin reasonable visitation. Gada appeals from the decree, seeking sole legal custody of the children.

Scope of Review.

Dissolution actions, as equitable proceedings, are reviewed de novo. Iowa R. App. P. 6.4; *In re Marriage of Benson*, 545 N.W.2d 252, 253 (Iowa 1996). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but these findings do not bind us. *In re Marriage of Duggan*, 659 N.W.2d 556, 559 (Iowa 2003). Prior cases have little precedential value with respect to custodial issues, and this court must make its decision on the particular circumstances unique to each case. *In re Marriage of Rierson*, 537 N.W.2d 806, 807 (Iowa Ct. App. 1995).

Legal Custody.

As noted, Gada seeks the children's sole legal custody. "The legislature and judiciary of this State have adopted a strong policy in favor of joint custody from which courts should deviate only under the most compelling circumstances." *In re Marriage of Winnike*, 497 N.W.2d 170, 173 (Iowa Ct. App. 1992). If either parent requests joint custody the court must order joint custody unless it cites clear and convincing evidence, pursuant to the factors in Iowa Code section 598.41(3) (Supp. 2005), that joint custody is unreasonable and not in the best interests of the children to the extent that the legal custodial relationship between

the children and a parent should be severed. Iowa Code § 598.41(2)(b). Included in the factors set forth in section 598.41(3) for the court to consider in determining the best custody arrangement are whether the parents can communicate with each other regarding the children's needs and whether a history of domestic abuse exists. Iowa Code §§ 598.41(3)(c), (j).

Notwithstanding our preference for joint legal custody, "if the court finds that a history of domestic abuse exists, a rebuttable presumption against the awarding of joint custody exists." *Id.* § 598.41(1)(b). An un rebutted finding of a history of domestic abuse outweighs consideration of any other section 598.41(3) factor. *Id.* § 598.41(2)(c). In determining whether a history of domestic abuse exists, we may consider, among other things, the issuance of a protective order, the response of a police officer to the scene of an alleged domestic abuse incident, the arrest of an individual in response to a report of alleged domestic abuse, or a conviction for domestic abuse assault. Iowa Code § 598.41(3)(j). As we have previously stated, domestic abuse is in every respect dramatically opposed to a child's best interests. *In re Marriage of Daniels*, 568 N.W.2d 51, 55 (Iowa Ct. App. 1997).

Merits.

In granting the parties joint legal custody of their children, the district court cited the need for the children to have contact with their father because he could teach them English and better aid in their adjustment to American life. It found that Saadildin posed no threat to the children and discounted Gada's allegations that Saadildin had tried to run over her and one of the children, stating "the court believes he was only making an attempt to see his child during the period she

refused to let him see the children.” The court also found that Gada’s prior actions interfered with Saadildin’s “ability to be a father to the children.”

However, other than a short recitation that “[c]ustody determinations, by statute, are influenced by a domestic abuse finding,” the court did not address whether a history of domestic abuse existed sufficient to form a rebuttable presumption against joint legal custody. Upon our de novo review of the record, we conclude a history of domestic abuse was established in the record.

The entirety of Gada’s testimony was focused on the serial mental and physical abuse inflicted upon her by Saadildin throughout the course of their marriage. Gada claimed the beatings began early in the parties’ relationship, happening at least on a weekly basis, and that Saadildin would verbally assault her, punch her, and slap her. While she was seven-months pregnant with Azarie and living in Egypt, Saadildin beat her with a stick, but in spite of her wounds, would not allow her to see a doctor afterwards. She also claimed he beat her in front of the children “many times,” frightening them and causing them to run to their rooms and close the doors.

She also recounted several specific incidents of abuse that happened while living in America. One incident occurred in a laundromat, where Saadildin grabbed her and hit her, only to be stopped by two other Sudanese individuals who called the police. Saadildin fled the scene before police arrived. In another incident, while visiting or upon returning from the Department of Human Services, Gada claimed Saadildin tried to back his car into her and the children after a disagreement. Again, police were called but Saadildin had already left the scene when they arrived. No charges were filed based on this incident.

Finally, Gada testified regarding another incident in which she believed Saadildin tried to hit her with his vehicle. While she and Azarie were crossing the street near their apartment, Saadildin drove by and attempted to talk to Azarie. After Gada refused to bring Azarie to Saadildin's vehicle, he accelerated and attempted to hit her. Instead, he struck and injured two other children who happened to be in the area. Witnesses to the incident called police and Saadildin was later charged with assault causing injury.¹ Also, a no-contact order was entered, preventing Saadildin from contacting Gada and the children.

During his cross-examination, Saadildin admitted that he pled guilty to assault causing injury based on this incident. He further admitted that in his guilty plea he affirmed having "intentionally frightened his wife and caused her mental stress and injury." He also testified that a no-contact order issued as a result of this incident. However, he claimed he pleaded guilty merely to avoid jail and to stop all the "drama" Gada was causing. As a factual matter, Saadildin claimed at trial that he did not hit the two young children, but rather it was they who simply walked into his stopped car and injured themselves. Specifically, he testified that while driving down the road, he encountered Gada and Azarie and merely wanted to kiss Azarie. When Gada refused, he drove closer to them and while stopped, two young children were passing by when "they came and hit the front of the car, and they fell down."

¹ At trial, Gada's attorney asked the court to take judicial notice of the criminal court file involving this incident. The court denied the request after Saadildin's attorney informed the court that following the entry of a deferred judgment, the record had been expunged. Gada now claims on appeal the court erred in refusing this request. However, even without the criminal file the record contains sufficient evidence regarding the facts of this incident as well as Saadildin's admission of his guilty plea. We therefore need not address whether the district court erred in refusing to take judicial notice of the criminal file.

As for other abuse, Saadildin freely admitted to having hit Gada “once or twice,” both times while still living in Africa. He testified “truly, in Africa this hitting is normal for us,” but denied ever having hit Gada while in the United States. In light of Saadildin’s admissions regarding the regularity and normalcy of striking his wife during the early years of their marriage in Africa, we find it unlikely Saadildin suddenly changed his behavior upon arriving in America. Rather, this admission would tend to buttress Gada’s claims of the continuing abuse, and the life-threatening encounters.

Based on the foregoing, we find the record supports Gada’s claims of a history of domestic abuse and that a statutory presumption against joint legal custody thereby arises. The question therefore becomes whether any other facts in the record serve to rebut that presumption. Upon our de novo review, we find the presumption should stand. Significantly, Saadildin presented a conflicting paternal role. He testified that in October 2006 he informed the court that he no longer wanted visitation, stating “I don’t want these kids anymore; take the kids so that I can be at peace.” In addition, Saadildin rarely took advantage of his visitation rights, both when a family friend supervised and later when the visits were professionally supervised. Finally, the district court’s primary stated reason for granting joint legal custody—that Saadildin speaks English and could better help the children adjust to life in America—simply is insufficient to outweigh his lengthy history of domestic abuse. Because the record clearly establishes Saadildin’s history of violence, pursuant to Iowa code section 598.41(2)(c), this history out-weighs other considerations.

In conclusion, the best interests of the children are served by granting their sole legal custody to Gada. Saadildin's history of domestic abuse is inconsistent with him serving as a legal custodian of the parties' children. We therefore modify the decree accordingly.² Costs of this appeal are assessed to Saadildin.

AFFIRMED AS MODIFIED.

Vogel and Zimmer, JJ. concur. Sackett, C.J., concurs specially.

² We decline Gada's request to modify the decree to provide that Saadildin shall only have visitation on a professionally-supervised basis.

SACKETT, C.J. (Concurs specially)

I concur specially.

I give greater credence to the credibility findings made by the district court than does the majority. I particularly note the district court's finding that Gada failed to show Saadildin presented any risk to the children and that Gada has interfered with Saadildin's ability to be a father to his children. For that reason and the fact that Saadildin's English is substantially better than Gada's, I believe that Saadildin should have legal access to information concerning the children, including but not limited to medical, educational and law enforcement records and I would so hold. In all other respects I concur with the majority's result.