

IN THE COURT OF APPEALS OF MARYLAND

No. 30

September Term, 1997

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JAMES M. GIFFIN

v.

DONNA L. (VALTRI) CRANE

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Bell, C.J.  
Eldridge  
Rodowsky  
Chasanow  
Raker  
McAuliffe, John F.,  
(Retired, specially assigned),  
Karwacki, Robert L.,  
(Retired, specially assigned)  
JJ.

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Dissenting opinion by McAuliffe, J., in which  
Raker and Karwacki, JJ. join

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Filed: September 8, 1998

McAuliffe, J., dissenting.

I cannot agree that the record in this case discloses an impermissible use of gender by the chancellor in the determination of this custody dispute. I would agree that the oral opinion of the chancellor, delivered from the bench after six days of trial, is perhaps inelegant and lacking in as complete a discussion of the rationale for the decision as may have been desired, but viewed in the context of the testimony and of prior statements of the chancellor, it is clear to me that the references to gender related to appropriate considerations.

I do not understand the majority to hold that consideration of gender is always inappropriate in a custody case. One of the significant issues in this case was the ability of the older daughter, Emily, to communicate effectively with one parent or the other. There was testimony that Emily had difficulty communicating with her father regarding certain matters of importance to her, but communicated readily with her mother on those matters, and that this was a strong reason for her stated desire to live with her mother. It was an expert witness who testified that it is not at all uncommon for children of Emily's age to closely identify with, and more effectively communicate with, a same-sex parent. Dr. Sarah Donahue, who testified on behalf of the mother, referred to "more a psychological issue and the need to bond with her mother psychologically based on where she was in the development issues" and "a major emotional need to be with her mom." Dr. Joseph Poirier, who testified on behalf of the father, referred to "a natural or expected bonding of a teenage . . . a young adolescent girl with her own same-sex parent;" . . . "that mother/daughter attachment thing . . .;" and, "that specialized relationship she has with her mother."

What is important to understand in this case is that the witnesses were not saying that an adolescent daughter is always better able to communicate with her mother than father, or that

there is always an emotional need of a daughter to be with her mother. What was said was in the context of *this mother* and *this daughter*, and not some stereotypical figures. In discussing the particular need that existed in this case, the witnesses simply noted that the situation was hardly atypical, and often occurred between a child and the same-sex parent. This is a far cry from establishing a preference or presumption based on gender.

*Elza v. Elza*, 300 Md. 51, 475 A.2d 1180 (1984) does not hold that the sex of the child and the sex of the parent may never be considered or mentioned. The holding in that case is clearly stated:

Therefore, we hold that the maternal preference doctrine is abolished in this State because it permits an award of custody to be made solely on the basis of the mother's sex.

*Id.*, 300 Md. at 59.

Judges should be precluded from concluding that a special relationship, bonding, or ability to communicate between a parent and a child exists solely on the basis that the parent and child are of the same sex; judges should not be precluded from finding the existence of such a relationship from the facts of the case, even though that relationship may have resulted in part from the reality that the parent and child are of the same sex.

In his brief oral opinion, the chancellor referred to an earlier statement he had made following his interview of the children. At that earlier time, the chancellor said:

The only reason that Emily gave for wanting to go to Kentucky was the same reason that you have expressed that she expressed — that was expressed from the stand, that she finds it . . . the things she likes to talk to her mother about, she finds it easier

to talk to her mother.

One problem she has with dad is that when there is a disagreement of sorts, it requires a total examination and exhaustive study as to what is happening and so on. . . .

There was testimony that when Emily was concerned about the conduct of students at her school she turned only to her mother to discuss those concerns. Dr. Poirier characterized Emily's description of her father as being more emotionally aloof than her mother, who was much warmer. Dr. Donahue testified that "it's clear from the conversation she's had with me that she talks with her mother about a variety of things that are important to her, and I do not believe she shares those same things with her dad." Dr. Donahue felt that was significant "because I think it's in a child's best interest to be with the parent with whom they feel most comfortable sharing their lives, the problems in their lives, or whatever are the things that are going on day to day." Thus, when the chancellor in his opinion referred to the testimony of Emily that she was better able to communicate with her mother and said, "The court gleans from this and the testimony from at least one expert in this case relative to a girl child having a particular need for her mother has seemed to come to the fore and is a necessary factor in my determinations in this case" he was speaking specifically of this daughter and this mother. He went on to say that

the court feels that the best interests of the children and the material change of circumstances, as exemplified by the reaching [of] an age where Emily at the very least exemplifies the need for a female hand, causes the court to come to the conclusion that the children should reside with their mother.

Again, the chancellor was speaking specifically of Emily and of her needs and, while it would have been preferable for him to refer to "her mother's hand" instead of "a female hand," I believe that in the context of this case, it is clear the chancellor was not utilizing stereotypical values of gender

to decide the issue of custody.

In addition to my disagreement with the interpretation the majority gives to the chancellor's remarks, I dissent because I am concerned that the tone of the majority's opinion may cause trial judges to shy away from perfectly valid and important case-specific findings merely because those findings reflect relationships and needs that are consistent with a particular parent and child being of the same sex.

Judges Raker and Karwacki join in this dissent.

