**IN THE COURT OF APPEALS OF IOWA**

**IN RE THE MARRIAGE OF KIM S. KIES AND EUGENE C. KIES**

Upon the Petition of )
**KIM S. KIES,** )
Petitioner-Appellant, )
And Concerning )
**EUGENE C. KIES,** )
Respondent-Appellee. )

8-408
88-424

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Appeal from the Iowa District Court for Dubuque County (5953), Thomas H. Nelson, Judge.

Petitioner wife appeals from the district court's decision granting physical custody of the parties' minor son to respondent husband. **AFFIRMED.**

Mary M. Schumacher of Roth & Schmacher, Dubuque, for petitioner-appellant.

James G. Schilling, Dubuque, for respondent-appellee.

Considered by Schlegel, P.J., and Hayden and Sackett, JJ., but decided en banc.

**HAYDEN, J.**

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Petitioner wife appeals from the district court's decision granting physical custody of the parties' minor son to respondent husband. We affirm.

Our review of the record is de novo. Iowa R. App. P. 4.

Kim S. and Eugene C. Kies were married in 1983. Their child, Ben E. Kies, was born April 15, 1984. At the time of the hearing Kim was twenty-nine and Eugene was thirty. Both parents are high school graduates and are in good health.

Both parties are employed. Kim is a school bus driver and works approximately twenty-eight hours per week during the school year. She has been a school bus driver for approximately nine years and has an average annual income of $8,600. Kim's normal workday is from 6:00 a.m. to 9:00 or 9:30 a.m. and in the afternoon, from 1:00 or 2:00 p.m. until 4:00 p.m. During the marriage she did not work during the summer months, but stated at trial that she intends to do so in the future. Eugene is a mechanic and earns approximately $19,000 a year. His normal workday is from 7:30 a.m. to 5:00 p.m., Mondays through Fridays, and Saturday mornings until noon. He commutes to work in Farley, Iowa, which is twenty-four miles from his home. This constitutes about a forty-minute drive. Eugene's employer is very good about giving him time off to

accommodate his family. His employment does not require he be away from home at any time overnight. The record further shows when Kim left for work early, Eugene got Ben up, dressed him, prepared breakfast for him, and took him to the sitter. Eugene utilizes a child care facility when he was is work and Ben is not in school. On Saturdays and Sundays Eugene spends approximately six hours each weekend working at the airport. During this time he takes Ben with him whenever he can. Kim would need someone to care for Ben also during the time she works.

Ben enjoys the time he gets to spend with his dad when he goes with him to Eugene's parents and brother's in the country. Eugene has provided for the general care of his son, including feeding, bathing, diaper changing, and providing for his daily needs. Kim is capable of providing for Ben's care also.

Kim takes Ben with her when she travels to visit her male friend overnight. It is a two-hour drive one way for her and Ben. Kim was evasive and non-responsive when questioned about this.

The trial court made the following finding and determined:

> Respondent dwells in a home with which the child, Ben, is familiar and in a neighborhood suitable for the raising of a minor child while Petitioner's living plans are presently unstable and uncertain so that weighing the considerations on both sides, the Court finds that the best interests of the child, Ben, lie with remaining in the physical care of his father subject to joint custody in both parents.

We do not decide here whether Kim's overnight visits with her boyfriend while the parties were separated constitutes moral misconduct.

This is one of those fortunate situations where both Eugene and Kim are equally capable of caring for their minor child and either would do well for Ben by being awarded his physical custody. Both parties are loving and caring parents and are capable of taking care of their son, Ben.

The trial court's reason for placing physical custody of Ben with Eugene is a good and valid reason in addition to all of the other reasons for either parent.

The first and foremost consideration in this case is the best interest of Ben. See In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the trial court, but is not bound by them. Iowa R. App. P. 14(f)(7).

> There is good reason for us to pay very close attention to the trial court's assessment of the credibility of witnesses. A trial court deciding dissolution cases is greatly helped in making a wise decision about the parties by listening to them and watching them in person. . . . In contrast, appellate courts must rely on the printed record in evaluating the evidence. We are denied the impression created by the demeanor of each and every witness as the testimony is presented. (citations omitted)

In re Marriage of Vrban, 359 N.W.2d 420, 423 (Iowa 1984).

In deciding the controversy now before us, we conclude the trial court should be affirmed. The trial court has always been accorded considerable discretion in matters of this kind, and we should reverse only when that discretion has been abused, even though we still review the case de novo. In re Marriage of Dawson, 214 N.W.2d 131, 132 (Iowa 1974). There was no abuse of discretion here.

The parties shall pay their own appellate attorney fees.

**AFFIRMED.**

Donielson, Sackett and Habhab, JJ., concur; Schlegel, J., and Oxberger, C.J., dissents.

**SCHLEGEL, J.** (dissenting)

I respectfully dissent.

In affirming the district court's decision granting physical custody of the parties' minor son to respondent husband Eugene Kies, the majority fails to recognize the fact that Eugene's jobs leave him little time to spend with his son. According to Eugene's work schedule, he is guaranteed only one afternoon off a week. Although Eugene testified at trial that he takes Ben to his weekend job whenever possible, I believe Ben's time would be better spent in the care of the parent better able to provide more quality time and attention to Ben. The record bears out the conclusion that Kim Kies would provide such care. I see no reason why Kim, who is a caring and responsible parent and is available to take care of Ben, should be denied the physical custody of her son.

Oxberger, C.J., joins this dissent.