

IN THE COURT OF APPEALS OF IOWA

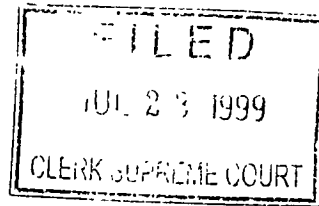
No. 1999-60 (9-215) / 98-1613

Filed July 23, 1999

**IN RE THE MARRIAGE OF KRISTAN KLEPZIG
AND GREGORY DEAN KLEPZIG**

**Upon the Petition of
KRISTAN KLEPZIG,**
Petitioner-Appellee,

**And Concerning
GREGORY DEAN KLEPZIG,**
Respondent-Appellant.



Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

Gregory Klepzig appeals the custody provisions of the decree dissolving his marriage to Kristan Klepzig. **AFFIRMED.**

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellant.

Brett A. Nelson of Nelson, Keys, Keys, & Schultz, P.C., Rock Island, Illinois, for appellee.

Heard by Sackett, C.J., and Vogel and Schlegel,* JJ., but decided en banc.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

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VOGEL, J.

Gregory Klepzig appeals the custody provisions of the decree dissolving his marriage to Kristan Klepzig. We affirm.

Background facts. Gregory and Kristan met while attending college in Arizona. Kristan earned a bachelor's degree in counseling psychology in 1992; Gregory earned a bachelor's degree in aeronautical engineering in Spring 1993. Following Gregory's graduation, the parties moved to Pennsylvania so Kristan could take care of her terminally ill mother. In July 1993, the parties moved to New Jersey where Gregory had obtained employment as an engineer. Kristan did not work outside the home while the parties lived in New Jersey. The couple's son, Gregory, was born in October 1993, and the parties married on November 27, 1993.

In July 1994, Gregory left his employment and the parties filed for bankruptcy. Gregory and Kristan moved to Moab, Utah, to live with Gregory's parents. For a time Gregory worked for his father's company, LaSal Oil. In August of 1994, Kristan's mother died. Around this same time, Gregory decided to look for another engineering job. In December of 1994, Gregory and Kristan moved the family to Davenport, Iowa, in order to allow Kristan to attend the Palmer College of Chiropractic. Kristan's brother Jason was already attending Palmer, so Kristan's father bought a house for Jason and the Klepzig family to live in.

Kristan enrolled at Scott Community College to complete prerequisites for admission to Palmer and gave birth to the parties' second child, Brittany, in May

1995. She enrolled at Palmer in July 1995. Gregory was unemployed while in Davenport, and decided to join Kristan at Palmer in July 1996. While both parties attended Palmer, they placed the children with a licensed day care provider. They dispute who the primary caregiver of the children was while Gregory was unemployed.

After Kristan's father died in September 1996, Kristan's two teenage brothers moved into the home in Davenport. Gregory did not get along well with Kristan's younger brothers, and this became a stressor in the marriage. In May 1997, Kristan took the children to visit family in Oregon. Gregory had remained in Iowa and urged Kristan to drop the children off in Utah on her way home for a two-week visit with his parents. He told Kristan he would drive to Utah at the end of the visit and bring them home. However, when Gregory met Kristan at the airport, he informed her that he was dropping out of school and returning to Utah. After much discussion, he promised to bring the children back to Iowa in July. Gregory did so, but convinced Kristan to let him take the children back to Utah until she finished her school trimester in October. When Kristan flew to Utah in October, Gregory had not packed the children's things. With Gregory's assurance that he would return to Davenport in a few days, Kristan returned to Iowa to begin her new semester. However, Gregory did not return the children as promised, and on November 25, 1997, finally admitted that he had no intention of returning to Iowa and would not return the children.

Kristan immediately filed a petition for custody, and later amended her petition to include a request for a dissolution of the parties' marriage. After trial, the district court entered its decree, granting Kristan primary physical care of the children. Gregory now appeals.

Scope of review. Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Barry*, 588 N.W.2d 711, 712 (Iowa App. 1998). We give weight to the fact findings of the district court, especially in determining the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

I. Primary physical care. Gregory contends he should have been awarded primary physical care of the parties' children. He asserts the district court mischaracterized the parties' relative strengths and weaknesses.

In assessing an issue of child custody, the controlling consideration is the interest of the children. *In re Purscell*, 544 N.W.2d 466, 468 (Iowa App. 1995). The court determines placement according to which parent can minister more effectively to the children's long range best interests. *In re Marriage of Buttrey*, 538 N.W.2d 322, 324 (Iowa App. 1995) (citing *In re Marriage of Vrbanc*, 359 N.W.2d 420, 424 (Iowa 1984)). The court's objective is to place the children in the environment most likely to bring them to a healthy physical, mental, and social maturity. *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa App. 1996). 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 re Marriage of Courtade*, 560 N.W.2d 36, 38 (Iowa App. 1996).

We identify numerous factors to help determine which parent should serve as the primary caretaker of the children in a divorce. *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa App. 1997) (citation omitted); *see* Iowa Code § 598.41 (1997). Some factors are given greater weight than others, and the weight ultimately assigned to each factor depends on the particular facts of each case. *See Daniels*, 568 N.W.2d at 54; *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992).

We agree with the district court's finding that the decision was a close call as both Kristan and Gregory are loving and caring parents who are capable of serving as the primary physical caretaker of the children. After carefully reviewing the record, we agree that Kristan should be the children's primary caretaker.

While Gregory's supportive family is an asset, we agree with the trial court's observation that his parents' generosity "has made it easy for Gregory to rely on them instead of assuming the typical responsibilities which come when one marries and has children."

Also of concern is Gregory's failure at times to adequately communicate with Kristan regarding the children. He misled Kristan on several occasions, particularly by telling her that he planned to return to Iowa with the children while actually

planning to stay in Utah indefinitely. This deception led to several months of Kristan's separation from the children.

Kristan has her own weaknesses, including, on occasion, putting a priority on vacations and spending time away from the children. However, Kristan has demonstrated a higher level of maturity and responsibility despite having to deal with many personal difficulties in recent years, including the loss of her parents, the responsibility of caring for her teenage brothers, and the break up of her marriage. Again, as the trial court noted, this is a close call between two loving parents. However, in deferring to the trial court credibility findings, we agree Kristan is more capable than Gregory of providing the children an environment which will bring them to a healthy physical, mental, and social maturity. Gregory will have ample opportunity to maintain a strong relationship with the children through the liberal visitation provided by the decree. For these reasons, we affirm the trial court's decision on primary physical care.

II. Appellate attorney fees. Kristan has requested appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa App. 1997). We decline to award appellate attorney fees.

Having considered all arguments properly before us on appeal, we affirm the .district court's decree. Costs on appeal are assessed to Gregory.

AFFIRMED.

All judges concur except Sackett, C.J., who specially concurs without opinion.