

IN THE COURT OF APPEALS OF IOWA

No. 5-680 / 95-410

FEB 02 1996

CLERK SUPREME COURT

Upon the Petition of
GREG G. MEIN,
Appellant,

And Concerning
CHORAL L. GILSON,
Appellee.

Appeal from the Iowa District Court for Linn County, William L. Thomas,
Judge.

Greg Mein appeals from a district court order awarding primary physical care
of his daughter, Kira Mein, to her mother, Choral Gilson. **AFFIRMED.**

Chad Von Kampen and Michael J. Frey of Simmons, Perrine, Albright &
Ellwood, P.L.C., Cedar Rapids, for appellant.

Judy L. Goldberg of Maher & Nidey Law Firm, Cedar Rapids, for appellant.

Heard by Sackett, P.J., Cady, J., and McCartney, S.J.*

***Senior judge from the 2nd Judicial District serving on this court by order of
the Iowa Supreme Court.**

CADY, J.

This appeal requires us to decide the difficult question of which unwed parent should be designated the primary caretaker of their child. On our *de novo* review, we affirm the decision of the trial court.

Greg Mein instituted this action for determination of custody and support of his daughter, Kira Mein. Kira was born June 7, 1993. Choral Gilson gave birth to Kira while she and Greg were living together. Choral and Greg never married and eventually separated after Kira was born. The parties alternated caring for Kira prior to the hearing.

The district court awarded joint custody with primary care to Choral. The court found both parties had poor past records. In 1989, Choral was convicted of felony neglect of a dependent person based on a bizarre incident in December 1988 when she held her son, Michael, in the water in the Cedar River. Choral subsequently violated her probation and was ordered to reside at a community corrections center. Further violations resulted in serving a thirty day jail sentence for contempt. Choral also pled guilty to OWI in 1991 and had her driver's license barred. Michael, who was seven years of age at the time of trial, has lived with Choral's mother since the 1988 incident, but there are plans to terminate the guardianship.

Greg has an extensive criminal record, including four OWI convictions, two possession of marijuana convictions, as well as convictions for assaulting a police officer and public intoxication. Both parties were physically abusive in the past.

Greg appeals the trial court's decision to award primary care to Choral. He notes while both parties have criminal convictions in their backgrounds, only Choral has been convicted of a crime involving danger to her child. Greg also alleges he should have been awarded primary care because his employment is stable and is better educated. He finally maintains Choral's abdication of her parental responsibility toward Michael is indicative of her ability to parent Kira.

Our review is de novo. Iowa R. App. P. 4. We are not bound by the findings of that court, but we give them weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14 (f)(7). We recognize the superior opportunity of the trial court to view, firsthand, the demeanor of the parties and evaluate them as custodians. *In re Marriage of Krone*, 530 N.W.2d 468, 471 (Iowa App. 1995).

The principles which guide the determination of child custody are well known. The first and primary consideration is the best interest of the child. Iowa R. App. P. 14 (f)(15). The critical question in determining the best interests of the child is which parent will do better raising the child. *In re Marriage of Love*, 511 N.W.2d 648, 649 (Iowa App. 1993).

In our review of the record in this case, we observe ample evidence for and against each parent's claim for custody. In particular, both parents were burdened with objectionable pasts, and easily a case can be made for custody for one parent by considering the negative evidence about the other parent. Consequently, an important consideration in determining which custodial setting would be in the best interests of

the child turns on the character of the parents and the likelihood their negative conduct will remain in the past.

In making this important decision, we are provided with more than the printed trial transcript. The trial court embellished the record by providing insight into the credibility of the parties. It specifically found Choral's reformation "more believable than Greg's" and found "grave doubts" about Greg's credibility. The trial court observed:

"[Greg] has persistently lied about his criminal record and it appears to me, from a thorough review of the various files and from observing him testify, that he is only willing to admit that which he believes someone else will discover anyway."

With the evidence in conflict and the ultimate decision so close, we place weight on the important perspective of the trial court which is unavailable to us. *See In re Marriage of Brainard*, 523 N.W.2d 611, 614. Considering all the evidence and the findings and observations of the trial court, we conclude the best interests of the child would be served by designating Choral as the primary custodian.

We affirm the decision of the trial court and grant Choral's request for appellate attorney fees. Considering the needs and abilities of the parties, we award Choral Appellate attorney fees of \$1,000.

AFFIRMED.