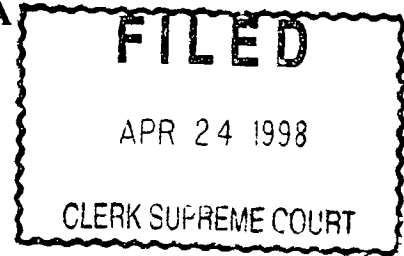


IN THE COURT OF APPEALS OF IOWA

No. 8-111 / 97-1311
Filed April 24, 1998



**IN RE THE MARRIAGE OF BRIAN W. CROSSER
AND TERESA J. CROSSER**

Upon the Petition of
BRIAN W. CROSSER,
Appellee,

And Concerning
TERESA J. CROSSER,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, John S. Mackey,
Judge.

Teresa Crosser appeals from a district court ruling denying her motion to set
aside a default judgment entered upon Brian Crosser's modification petition for a
change of child custody. **REVERSED AND REMANDED.**

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellant.

J. Mathew Anderson of Laird, Heiny, McManigal, Winga, Duffy &
Stambaugh, P.L.C., Mason City, for appellee.

Considered by Cady, C.J., and Huitink and Streit, JJ.

HUITINK, J.

This is an appeal by a mother claiming the district court should have granted her motion to set aside a default judgment entered on the father's application for modification of the custody provision of the parties' dissolution decree. We reverse the decision of the district court and remand.

A decree of dissolution was entered for Brian and Teresa Crosser on April 29, 1993. The district court placed primary physical care of the parties' child, Colby, born in September 1988, with Teresa. In May 1997, Teresa informed Brian she intended to move with Colby to Oklahoma.

On June 6, 1997, Brian filed an application to modify the custody provision of the dissolution decree. Teresa received service of notice on June 11, 1997. She met with her attorney, Kristy Arzberger, on June 17, 1997, and arranged to defend the action. Arzberger drew up an appearance, answer, and counterclaim, but due to turnover of staff in her office, the answer was not timely filed. Arzberger became aware of the problem over the Fourth of July weekend.

On Monday, July 7, 1997, at 11:35 a.m., Brian filed an application for entry of default. The district court granted his default and modified the dissolution decree to give Brian primary physical care of Colby.¹ On the same day, at 4:17 p.m.,

¹ We note Iowa Rule of Civil Procedure 232 was amended effective January 24, 1998, to require notice prior to the entry of a default to all parties who have filed an appearance. The change to rule 232 would have no effect in this case because Teresa had not entered an appearance prior to the default.

Arzberger filed an answer. At the time the answer was filed, the default had not yet been placed in the court file.

On July 9, 1997, Brian's counsel sent Arzberger a letter apprising her of the default. Arzberger did not receive this letter until July 14, 1997, and she filed a motion to set aside the default on July 16, 1997. After a hearing, the district court denied the motion to set aside the default. The court found Teresa had not been negligent. The court concluded, however, the carelessness, inattention, or neglect of Teresa's attorney did not constitute good cause to set aside the default. Teresa now appeals.

A district court has broad discretion in ruling on a motion to set aside a default, and we reverse such only a ruling only if that discretion has been abused. *Purethane v. Iowa State Bd. of Tax Review*, 498 N.W.2d 706, 709 (Iowa 1993). Under Iowa Rule of Civil Procedure 236, a court may set aside a default which has been entered due to mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty.

We consider four factors to determine whether there has been excusable neglect. *Millington v. Kuba*, 532 N.W.2d 787, 791 (Iowa 1995). First, Teresa actually intended to defend the action. Second, she asserts a defense in good faith. Third, she did not willfully ignore or defy the rules of procedure. We find the default was the result of a mistake. Finally, whether relief is warranted should not depend on who made the mistake. *Id.*

Based on the four factors considered above, we determine the default was the result of excusable neglect. We are mindful these factors should be liberally construed in order to advance the goal of determination of controversies on their merits. *Id.* We find the district court abused its discretion by not setting aside the default. The court's action led to a change in physical care of Colby without any review of the facts or a consideration of the child's best interests.

We reverse the decision of the district court and remand for further proceedings in the modification action. Primary physical care of Colby should remain with Teresa pending a district court decision on modification. We do not retain jurisdiction. Costs of this appeal are assessed to Brian.

REVERSED AND REMANDED.