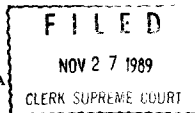


IN THE COURT OF APPEALS OF IOWA

No. 9-499 / 89-585



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IN RE THE MARRIAGE OF JOHN H. GRAP AND KRISTIE M. GRAP

Upon the Petition of JOHN H. GRAP,

Appellee/Cross-Appellant,

and Concerning KRISTIE M. GRAP,

Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Crawford County, Terry L. Huitink, Judge.

The wife has appealed the district court's decision challenging the award of physical care to the husband, the visitation schedule, an evidentiary ruling, and she seeks attorney's fees and costs on appeal. The husband has cross-appealed, contending the district court erred by assessing costs to him when he was the successful party in district court. **AFFIRMED.**

R. J. Tilton of Nepper & Tilton, Denison, for the appellant/cross-appellee.

Reed H. Reitz of Reimer, Lohman & Reitz, Denison, for the appellee/cross-appellant.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

The dissolution decree placed the parties' two children in the husband's physical care. The wife has appealed, challenging primarily the award of physical care to the husband. She also challenges the visitation schedule and an evidentiary ruling. We affirm the trial court.

John and Kristie Grap were married in 1983, when John was 21 years old and Kristie was 16. They have two children, boys born in 1983 and 1985. (Kristie also has a third child, born in 1988 after the parties had separated; the parties agree that John is not the father of this child.)

The dissolution decree placed the parties' two children in joint legal custody and in John's physical care. In explaining its custody decision, the district court noted with concern that Kristie had two extramarital affairs during the marriage, that she virtually abandoned the children for six months while she went to California with a boyfriend, and that she currently lives with a boyfriend whose parenting abilities and interests are unknown.

Kristie contends the district court erred by placing the children in John's physical care. She acknowledges her faults but asserts the district court overemphasized them. She argues John is a poor custodian because he has physically abused the older child, he physically abused her during the marriage, and he has little interest or experience in the domestic details of parenting.

Kristie also contends the district court erred by excluding the testimony of a social worker who had investigated Kristie's report concerning John's alleged physical abuse of the older child. The district court ruled that this testimony was barred by Iowa Code section 235A.12, which provides for the confidentiality of child abuse reports. Kristie responds that she did not plan to have the witness testify about the child abuse report, which was determined to be unfounded, but about the witness's general impression that Kristie would be a good parent.

In addition, Kristie challenges the dissolution decree's visitation provisions. The decree awarded Kristie visitation on alternating weekends, alternating holidays, and for two two-week periods in the summer. She contends she should be awarded more extensive visitation to allow her to baby-sit the children during John's working hours. She complains that the district court's visitation schedule gave the children less contact with their mother than with John's hired baby-sitters.

Finally, Kristie requests attorney's fees on appeal.

In his cross-appeal, John contends the district court erred by assessing costs to him when he was the successful party in district court.

Our review in cases such as these is *de novo*. Iowa R. App. P. 4. We give weight to the fact findings of the

trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

In child custody cases, the best interests of the child is the first and governing consideration. The factors the court considers in awarding custody are enumerated in Iowa Code section 598.41(3) and in In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983), and In re Marriage of Winter, 223 N.W.2d 165, 166-67 (Iowa 1974). All factors bear on the "first and governing consideration," the court's determination of what will be in the long-term best interests of the child. In re Marriage of Vrban, 359 N.W.2d 420, 424 (Iowa 1984). 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 attempting to gain custody in a dissolution proceeding. In re Marriage of Ullerich, 367 N.W.2d 297, 299 (Iowa App. 1985).

Kristie contends the trial court should have admitted the testimony of a social worker, Wayne Robertson. This contention is based on the claim of trial counsel that Mr.

Robertson would only be testifying as to his observations of Kristie's home and of her as a mother. Therefore, the testimony would not infringe upon the confidentiality given to child abuse reports under Iowa Code section 235A.12. Even if we assume that Mr. Robertson's testimony would be entirely favorable toward Kristie, under our de novo review the best interests of the children still require that they be placed with John.

The trial court very clearly gave little weight to Kristie's testimony. The court specifically stated that her credibility was suspect. In addition, the court looked more to the actions of each party rather than testimonials to determine who would be the better parent. We agree with the trial court's decision. The actions of John show that he is very interested in his children's well being and can act responsibly. There is no question Kristie loves her children, however her actions suggest that her children are not yet number one on her list of priorities. She left the children for six months with very little contact. If Kristie truly believed that John was abusive toward the children, running away from the situation could not have been in their best interests. Immoral conduct on the part of one parent is a factor to be considered. It is not the conduct itself that is important here, but rather how it affects the children. Kristie's relationship with her boyfriend has caused her to leave her children for six

months. Kristie also admits that her boyfriend is untrustworthy and yet maintains that he will be a permanent part of her life.

All of the factors point to John as the best able to provide for the long-term care of the children. Kristie has only demonstrated that she cannot act responsibly toward her children. The trial court was correct in placing primary custody with John.

Kristie also contends the visitation was inadequate. Her main argument is that she should be allowed to have the children during the day when John is at work. It is not unrealistic to assume that Kristie will work or may have to work in the future. This is especially true considering she has worked before when she had a child under two years of age and that now she has three children to support. The record shows that her boyfriend will not be much help to her. The trial court was correct in granting visitation as it did.

The trial court did not abuse its discretion in assessing John the costs. Iowa trial courts are permitted considerable discretion in allowing attorney's fees and costs in dissolution actions. In re Marriage of Morehead, 224 N.W.2d 242, 245 (Iowa 1974).

Kristie requests attorney fees on appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial

positions. ¹⁷¹In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). The needs and ability to pay of each party does not require an award of attorney fees. The request for attorney fees is denied.

AFFIRMED.