

IN THE COURT OF APPEALS OF IOWA

No. 4-034 / 93-947

IN RE THE MARRIAGE OF KYMM J. GUYER AND DANIEL R.

Upon the Petition of

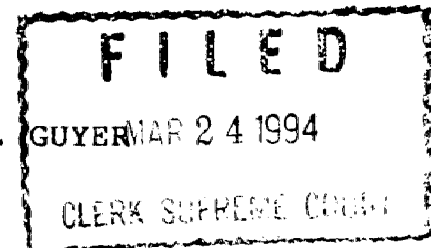
KYMM J. GUYER, n/k/a KYMM J. SCOTT,

Appellant,

And Concerning

DANIEL R. GUYER,

Appellee.



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Appeal from the Iowa District Court for Fayette County,
James L. Beeghly, Judge.

Mother appeals decision of district court modifying
dissolution decree to award physical care of children to
father. **AFFIRMED AS MODIFIED.**

James T. Peters of Ristvedt & Peters, P.C.,
Independence, for appellant.

David James Hanson of Hoffmeyer, Hurley & Hanson, P.C.,
Fayette, for appellee.

Heard by Schlegel, P.J., Sackett, J., and Critelli,
S.J.,* but decided by Donielson, C.J., Hayden, Sackett,
Habhab, Cady, and Huitink, JJ.

*Senior judge from the 5th Judicial District serving
on this court by order of the Iowa Supreme Court.

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PER CURIAM

Kymm and Daniel Guyer were married on July 1, 1978. They had identical twin sons, Joshua and Corey, born on May 20, 1980. The parties were divorced on February 1, 1982. Pursuant to the decree, Kymm was awarded sole legal custody of the children.

Kymm lived with the children in Iowa until 1985, when they moved to Cave Creek, Arizona. Kymm purchased a mobile home there. Kymm's mother and a brother also live in Cave Creek and she has relied on them to help care for the children. In a subsequent relationship Kymm has had another child, Dillon. Kymm has been employed as a housekeeper and had net monthly income of about \$975. At the time of the present proceedings Kymm was unemployed.

Joshua and Corey had both been diagnosed as having an attention deficit disorder with hyperactivity. Although they are of average intelligence, they need special educational attention. Kymm's mother was a school volunteer to assist with Joshua and Corey and other children with learning disabilities. One summer Kymm hired a tutor to help the children.

The children are also difficult to supervise when they are together. They have been placed in separate classes from the time they started school in Arizona in 1985. In order to further separate the boys, Joshua spent the 1989-90 school year in Garnavillo, Iowa, where he lived with an aunt and uncle. From March to May 1990 Corey lived

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with Rose Horkheimer, a friend of Kymm's, and attended school in Oelwein, Iowa.

Both children returned to school in Arizona for the next two school years. In the summer of 1992, Kymm decided to move to Montana. The children attended school in Montana until October 1992, when Kymm lost her job and they moved back to Arizona. In December 1992, shortly before Christmas, Kymm called Daniel and asked if he wanted to take physical care of the children temporarily. She stated she was having trouble disciplining the children.

Daniel and Bernadine Pritchard Guyer picked up the children on December 26, 1992. Daniel and Bernadine have cohabited for several years and consider their relationship a common law marriage. They have a son, Anthony, who was born in 1990. Daniel works for Imperial Roof Systems and has net monthly income of about \$975. Bernadine is a dental assistant and she has net monthly income of about \$1,083.

Daniel enrolled the boys in North Fayette Middle School. Testing of the children revealed they were not performing up to their grade level. School officials and Daniel and Bernadine made a concerted effort to help the boys with their education, and they started to improve scholastically. Daniel and Bernadine were renting a house in West Union, Iowa, when they received physical care of Joshua and Corey. In order to give the boys more room,

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they began to rent a house in rural Fayette County. However, the boys attended the same school after the move.

On March 16, 1993, Daniel filed a petition for modification of the custody provision of the dissolution decree. The district court awarded him temporary custody of Joshua and Corey while the modification action was pending.

In April 1993, Joshua and Corey found a container in Daniel's car which contained a small pipe, rolling papers, and some marijuana seeds. From drug awareness classes in school, the boys recognized the container had once held marijuana. Daniel told the boys to either burn or destroy the contents of the container. Instead, the boys gave the container to Rose Horkheimer.

On April 11, 1993, Joshua and Corey called Kymm in Arizona. They told her about the container and complained about living in Iowa. Kymm came to Iowa on April 15, 1993. She took the container to the police. She then picked up the children and took them to Arizona. She did not tell Daniel she had removed the children until later that evening. Kymm testified that both children needed medical attention when they reached Arizona because of their poor living conditions while in Daniel's care.

The parties agreed to an expedited hearing to resolve the issue of primary physical care. They agreed to joint legal custody of the children. A hearing was held on May 5, 1993. The district court determined there had been

a substantial change in circumstances since the time of the dissolution decree. The court awarded primary physical care of the children to Daniel. The court found that the children tended to be disruptive and were a challenge to control. The court found Daniel could better supervise the children and that he had made a commitment to assisting the children's educational development. Kymm was granted specific visitation and ordered to pay child support of \$299 per month. Kymm has appealed.

I. Our review of this equitable action is de novo. Iowa R. App. P. 4. We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992).

In considering a petition for modification, we must determine whether the party seeking modification has established a substantial change in circumstances from the time the decree was entered making it equitable and just that different terms be fixed. In re Marriage of Dawson, 467 N.W.2d 271, 274 (Iowa 1991). A decree is not to be modified unless its enforcement will be attended by positive wrong or injustice. Id.

II. Kymm first contends she should have been granted physical care of Joshua and Corey. She points out that Daniel only attempted to visit the children once while they lived in Arizona and that he did not pay child support.

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She also raises a question as to whether Daniel has a substance abuse problem. Daniel admitted he had smoked marijuana, but stated he did not do so with the children around. Daniel also admitted that he drank a beer every day.

Kymm believes it is in the children's best interests to be placed in her care. She states that she has been the primary caretaker for the children for most of their lives. She asks us to note that both children expressed a preference for living with her.

To change the custodial provisions of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. In re Marriage of Howe, 471 N.W.2d 902, 903 (Iowa App. 1991). The changed circumstances must relate to the welfare of the children. Id. The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. In re Marriage of Scott, 457 N.W.2d 29, 31 (Iowa App. 1990). This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. Id.

We find there has clearly been a substantial change in circumstances since the time of the dissolution decree. The fact that the children have an attention deficit

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disorder with hyperactivity and resulting behavioral problems was not foreseen at the time of the dissolution decree. The children's educational and behavioral problems make it expedient to change the physical care of the children.

After examining all of the evidence in the case, we conclude Daniel can minister more effectively to the children's well-being. Although we believe Kymm has made a tremendous effort to care for the children, for some reason the children's needs were not being met. The testing the children received when they arrived in Iowa showed they needed more help with their education. Moving the children from Iowa to Arizona, to Iowa, to Arizona, to Montana, to Arizona, to Iowa, and finally back to Arizona again, was detrimental to the children's education. Also, Kymm admitted she was having problems supervising the children.

Daniel has shown he has an interest in continuing the children's education. He and Bernadine have actively participated with school officials in attempting to improve the children's grades. He has also shown he can provide a more structured and stable lifestyle for the children.

We affirm the decision of the district court awarding physical care of Joshua and Corey to Daniel.

III. Kymm contends the district court incorrectly determined her net monthly income for purposes of applying the child support guidelines. The district court found her net monthly income was \$975. This was based on her

previous employment as a housekeeper. She points out that she was unemployed at the time of the modification hearing. Kymm states that the most she can expect to earn from a new job is \$5 per hour. Full-time work at \$5 per hour would give her income of \$10,400, and net monthly income of about \$607.

In applying the child support guidelines, we find Kymm's child support obligation should be \$184 per month. We modify the district court decision to provide that Kymm should pay child support of \$184 per month.

Costs of this appeal should be assessed one-half to each party.

AFFIRMED AS MODIFIED.