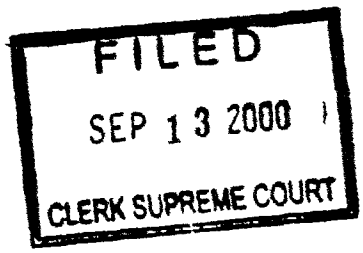
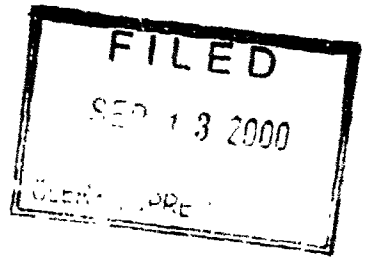
IN THE COURT OF APPEALS OF IOWA





No. 0-513 / 99-1998
Filed September 13, 2000

IN RE THE MARRIAGE OF KIMBERLY KAY NELSON AND KIRK EDWARD NELSON

Upon the Petition of
KIMBERLY KAY NELSON,
Petitioner-Appellee/Cross-Appellant,

And Concerning
KIRK EDWARD NELSON,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Hardin County, Dale E. Ruigh, Judge.

Respondent appeals the district court's order denying his petition seeking a modification of the child custody provisions of his dissolution decree. He contends he should have been awarded primary physical care. The petitioner cross-appeals contending the court should not have dismissed her request to transfer sole custody of the child to her and should have awarded her attorney fees. She requests appellate attorney fees. **AFFIRMED.**

Steven H. Shindler and Andrew B. Howie of Smith, Schneider, Stiles, Hudson, Serangeli, Mallaney & Shindler, Des Moines, for appellant.

Clark E. McNeal of Barker, McNeal, Wiese & Holt, Iowa Falls, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

SACKETT, C.J.

At the time of their May of 1997 dissolution Appellant Kirk Edward Nelson and Appellee-Cross Appellant Kimberly Kay Nelson agreed they would have joint custody of their son Tanner and Kimberly would have primary care. In January of 1999 following a number of disagreements, Kirk petitioned for a modification seeking primary physical care and Kimberly sought to have Kirk removed as a joint legal custodian. The district court denied both petitions and both parties have appealed from the decision. We affirm.

Kirk is a superintendent of an Iowa school system. Kimberly works for the United States Postal Service. Tanner, born in January of 1995, has two older half siblings from his mother's first marriage. The problem that brought this dispute to the courts is Kirk and Kimberly cannot work together in their child's best interest. Kirk contends his position should prevail because Kimberly is unable or unwilling to support his relationship with his son. Kimberly contends Kirk attempts to exercise too much control over Tanner's upbringing and therefore should not be a joint custodian.

We review both claims de novo. Iowa R. App. P. 4; *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991). The burden to modify a dissolution decree is a heavy burden. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa App. 1998). For either Kirk or Kimberly to be successful in his or her claim he or she as a party seeking modification has the burden to show by a preponderance of evidence that conditions since the dissolution decree was entered have so materially and substantially changed that it is in Tanner's

interest to make a change. *See In re Marriage of Jerome*, 378 N.W.2d 302, 304 (Iowa App.1985).

Kirk seeks to change primary physical care. He carries a heavy burden. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). It is not enough that he shows his home is better; he has to demonstrate he can offer Tanner superior care. *See In re Marriage of Morton*, 244 N.W.2d 819, 821 (Iowa 1976). Kirk must show an ability to minister to the child's needs superior to Kimberly's. *See In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981); *In re Marriage of Gravatt*, 371 N.W.2d 836, 840 (Iowa App.1985). Kirk was made a joint custodian in the dissolution decree. Therefore he is benefited in seeking physical care by the inference he has met the joint custody tests set forth in *In re Marriage of Burham*, 283 N.W.2d 269, 274 (Iowa 1979). *See In re Marriage of Leyda*, 355 N.W.2d 862, 864 (Iowa 1984); *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa App. 1997). However, in seeking a change in physical care, he carries a burden similar to that imposed on a parent seeking a change of custody. *Leyda*, 355 N.W. 2d at 864.

Kirk lives alone in a suitable home where he has lived since the dissolution. Kimberly, who has moved four or five times with Tanner since the dissolution, at the time of trial lived in a suitable home. Also residing with Kimberly are her live-in boyfriend, his two children, her two children from a prior marriage and Tanner.

The district court found both parties take good care of Tanner and we agree. They both show concern for Tanner. His physical needs are well met in both homes.

Kirk advances Kimberly has not supported his relationship with his son and consequently the decree should be modified. We agree with Kirk that Kimberly has a responsibility to support his relationship with his child. Legislative changes in the past decade have focused on creating the opportunity for substantial parental involvement in a child's life by both parents even when there has been a marriage dissolution. *See Mayfield*, 577 N.W.2d at 874. Tanner must be allowed to maintain substantial and continuing physical and emotional contact with Kirk. *See* Iowa Code § 598.41 (1997). The Iowa courts have addressed complaints such as Kirk's under other circumstances. *See In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-76 (Iowa 1989); *Leyda*, 355 N.W.2d 862, 865-67 (Iowa 1984); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659-60 (Iowa App.1991); *In re Marriage of Gratias*, 406 N.W.2d 815, 817-18 (Iowa App.1987). In *In re Marriage of Rosenfeld*, 524 N.W.2d 212 (Iowa App. 1994) we held a custodial father who did not support the children's relationship with their mother should lose custodial care.

Kimberly has allowed Kirk to exercise the specific visitation agreed to by the parties at the time of the dissolution. However, Kimberly has failed to allow any other visitation or reasonable deviations from the visitation specifically specified. She seems intent on using the power of her position as a primary physical care parent to control the situation and not allow Tanner to maintain

normal contact with his father under other than the specified circumstances despite the fact that the decree provided in addition to scheduled visits that Kirk "shall have visitation at any other reasonable times the parties shall mutually agree upon." Kirk made a number of verified requests for additional visits for legitimate purposes but as the district court found "Kim has never granted Kirk's requests for additional visitation periods." Kimberly testified she would not mutually agree to exchange of visitation time for family events with the proposals Kirk has made to her.

Kimberly has, among other things, not kept Kirk up to date on Tanner's medical problems, thwarted Tanner's attempts to greet his father at public events, failed to allow Tanner to speak with his father on the telephone and has kept letters and pictures from Tanner that Kirk has sent. Kirk finds it necessary to communicate with Kimberly by certified mail return receipt requested. Of these letters she has accepted some and has refused others.

Kimberly complains that there are too many letters and too many telephone calls and too many times that Kirk appears early to take Tanner for visits. An attempt by Kirk to pick Tanner up ten minutes early is a major problem that has resulted in law enforcement personnel being called.

Kirk got Tanner on a list for a preschool in Ackley and asked Kim if he could attend. Kirk promised to deliver and retrieve Tanner from school. Kimberly failed to respond to numerous requests with either a "yes" or "no". Instead she left Tanner during the time he could have been in an excellent preschool in the care of a childcare provider who cared for a number of other children and was

not certified. While the care provider was adequate, Kirk thought his son deserved better. When Kimberly decided Tanner was ready to go to preschool she enrolled him in another school without even telling Kirk what she was doing. Kimberly admitted at trial she did not tell Kirk of the orientation session for the preschool although he found out another way and appeared. She owed Kirk a duty as joint custodian of Tanner to provide him with information about the preschool orientation session. Kim refers to Kirk as "Toad" and "Mr. Wonderful" in her home. Kimberly contends she seeks to maintain rigid control of the visitation schedule and refuses any contact between father and son at other than specified visitation times because Kirk is trying to control her life. Kimberly advances that Kirk's invitations for discussion show a pushy, controlling attitude and he always expects to get his way.

The district court found, and we agree, Kirk has been extremely persistent and at times unreasonable in seeking some concessions in visitation with Tanner. Yet while we agree with Kimberly that Kirk is persistent and demanding, likewise she is far from reasonable in response to his contacts and requests. Her refusal to talk to him or respond to his written requests are not what is expected of a primary care parent or one having joint custodial care. Joint custodians need to communicate. *See In re Marriage of Behn*, 385 N.W.2d 540, 542 (Iowa 1986). Kimberly cannot avoid all contact with Kirk just because she finds him pushy and disagreeable.

This court has previously said:

> The parent having physical care will be the one receiving information on school events, getting conference slips and report

> cards. These should be shared with the other parent. Except for emergency situations, the parent then having physical care has a responsibility of communicating to the other parent the need to make the decision and making the necessary information available. Both parents have an obligation to personally discuss these problems with each other. While no one can expect medical and school personnel to serve as referees, we can and do expect the parents to meet with them jointly and we expect each parent to focus on the children's problem and help the personnel arrive at a solution that is in the children's best interests. Both parents should recognize the need for flexibility of visitation scheduling. Joint custodians should be mature adults who can put aside their differences and operate in their children's best interests.

In re Marriage of Fortelka, 425 N.W.2d 671, 673 (Iowa App. 1988).

Both parties have failed in communication. Kimberly has failed to be at all flexible in visitation scheduling, a responsibility she has undertaken as primary physical custodian. Kirk though over bearing and persistent in many cases has asked for no more information than he is entitled to receive. Kimberly's refusal to provide the necessary information to him is not justified.

We recognize both parents seek to put the other parent in an unfavorable light. The lack of communication in this case is serious and not in Tanner's best interest. *See Rosenfeld*, 524 N.W.2d at 215.

Tanner deserves to have security in his upbringing and to have a plan in place that allows him to know and peacefully interact with both of his parents. Both parents are denying him this security.

Kimberly asks in her cross appeal that we cut off Kirk's rights as a joint custodian. We recognize *In Re Marriage of Rolek*, 555 N.W. 2d 675, 677 (Iowa 1996) the court said the actions of the parties following a dissolution decree where they are no longer able to cooperate may result in a modification being

appropriate. The facts here are different than those in *Rolek.* Kirk has been substantially involved in the care of Tanner since his birth. He is an educator and is concerned about his child. He pays substantial child support. He has performed all responsibilities given him under the decree except that of adequately communicating with Kimberly. These facts distinguish this case from *Rolek.*

Children of a divorce have a need to maintain meaningful relationships with both parents. *Leyda*, 355 N.W.2d at 866; *Jerome*, 378 N.W.2d at 305. In assessing primary physical care Kimberly's professed lack of willingness to allow Kirk access to Tanner by seeking to have the decree modified to take away his position as joint custodial is not a factor in her favor. *See Burham*, 283 N.W.2d at 276.

This was a long trial with considerable evidence. The district court came to the conclusion the lack of communication was the fault of both parties. The district court judge listened to all the testimony and viewed the parties' exhibits. Consequently we give considerable weight to the credibility assessments made by the trial court. *See Rosenfeld*, 524 N.W.2d at 215-524.

Our affirmance of the district court's custodial finding today does not foreclose the issue from future reassessment. *Gratias*, 406 N.W.2d. at 818. While Kirk must be less demanding, so must Kimberly be more flexible. She cannot refuse to answer reasonable telephone calls or correspondence from Kirk. He cannot be unreasonable in either communication. She cannot continue to raise a fuss if Kirk appears ten minutes early for visits. She cannot ignore

Kirk's reasonable requests for additional visitation for family events and other reasons and should honor them if it is reasonable for her to do so. Kirk cannot be unreasonable if Kimberly needs additional time with their son. The manner both parties have handled things to this time has not worked. They both must change and be civil to and reasonable with each other. Kirk and Kimberly in accepting an award of joint custody accepted a responsibility to communicate with each other and to support the other parent's relationship with the child. *See Fortelka*, 425 N.W. 2d at 671. They must therefore put away their personal animosities toward each other and work together to meet the Tanner's needs. *See id.* Substantial contact with both parents is one of these needs. The contact should be structured so that it gives consideration to Tanner's educational and social activities outside either home. *Id.* Parents have a further obligation to assure the transition between homes during the visitation period is without problems. *Id.* Parents who must measure visitation periods by minutes do not have the maturity and flexibility contemplated in joint custody awards. *Id.*

Kimberly contends she should have been awarded attorney fees. Attorney fees are not recoverable as a matter of right, but rest within the trial court's discretion and depend upon one spouse's financial needs and the other spouse's ability to satisfy them. *In re Marriage of Orgren*, 375 N.W.2d 710, 714 (Iowa App.1985); *In re Marriage of Estlund*, 344 N.W.2d 276, 281 (Iowa App.1983). Any award of attorney fees depends on the financial circumstances and earnings of each party. *Burham*, 283 N.W.2d at 278. Considerable discretion is assigned to the trial court in the allowance of attorney fees. *Locke v.*

Locke, 263 N.W.2d 694, 696 (Iowa 1978). The district court did not abuse its discretion in failing to award attorney fees. Kimberly made a request for relief that was denied. Additionally her lack of cooperation has been a major factor in the problems that brought this matter back to the courts. We award no attorney fees on appeal. We affirm the judgment of the district court.

AFFIRMED.