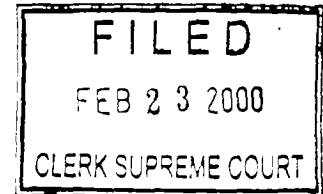


IN THE COURT OF APPEALS OF IOWA

No. 0-001 / 98-1333
Filed February 23, 2000

**IN RE THE MARRIAGE OF ELIZABETH JOHNSON
AND RUSSELL JOHNSON**



Upon the Petition of
ELIZABETH JOHNSON,

Appellant,

And Concerning
RUSSELL JOHNSON,

Appellee.

Appeal from the Iowa District Court for Franklin County, Jon Stuart Scoles,
Judge.

Mother appeals the district court's order modifying the parties' dissolution
decree to grant primary physical custody of their son to the father. **REVERSED.**

Richard N. Thompkins, Jr. of Thompkins Law Office, Mason City, for
appellant.

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

Considered by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

ZIMMER, J.

~~Elizabeth~~ Johnson, n/k/a Elizabeth Bell, appeals the district court's order modifying the dissolution decree to grant primary physical care of the parties' son to her former husband, Russell Johnson. We reverse.

Elizabeth and Russell separated in 1985 but did not divorce until 1991. They had one son, Phillip, born in February of 1986. Elizabeth has an older son, Jessie, a half-brother to Phillip. In the original dissolution decree in January of 1991, the district court gave primary physical care of Phillip to Elizabeth. Several years later, Russell sought modification of the 1991 decree. On March 11, 1996, the district court granted Russell's petition for modification, giving him joint legal custody and establishing a visitation schedule for him. Elizabeth's status as Phillip's primary physical caretaker was unchanged by the modification decree.

From that time, Russell had regular visitation with Phillip. In the spring of 1997, Russell asked to have Phillip for the summer. Although Russell was entitled to only three weeks of summer visitation under the terms of the parties' decree, Elizabeth agreed to an extension. After six weeks of the summer passed, on July 10, 1997, Russell sent a letter to Elizabeth proposing that she stipulate to a permanent change in primary physical care. Elizabeth was surprised and upset by this proposal and contacted the sheriff and had Phillip returned to her immediately. Eight days later, on July 18, 1997, Russell filed a second petition for modification in which he requested a transfer of primary physical care to him.

Phillip entered the sixth grade during the 1997-1998 school year and had academic and disciplinary difficulties all year. He nearly failed the sixth grade.

However, the record showed Phillip had never been a model student and had received mostly Cs and Ds since he began receiving letter grades. Russell's second modification petition came on for hearing on June 16, 1998. The district court modified the dissolution decree and granted primary physical care of Phillip to Russell.

Elizabeth appeals. She contends there was not a substantial change in circumstances since the last modification in 1996. She also asserts Phillip's academic problems have been ongoing and are not a 'new circumstance' warranting a change of her primary caretaker status. She also maintains Russell did not prove a superior ability to parent.

I. Scope of Review. We review the record de novo in a proceeding to modify the custodial provisions of a decree. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996). We give weight to the findings of the trial court, although they are not binding. *Id.*

II. Modification of Custody. The court can modify custody only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa App. 1998). The change must be more or less permanent and relate to the welfare of the child. *Id.* Additionally, the parent seeking custody must prove an ability to minister more effectively to the children's well-being. *Dale*, 555 N.W.2d at 245. This strict standard is premised on the principle that once custody of children has been determined, it should be disturbed only for the most cogent reasons. *Id.*

The district court found Phillip's declining school performance constituted a substantial change in circumstances. In our de novo review, we reach a different conclusion. We find Russell has not carried his heavy burden of proof to show a substantial change in circumstances since the last modification. At trial, Russell claimed Phillip's academic difficulties were his main reason for seeking modification. However, upon examination of his petition to modify, we find no mention of Phillip's academic difficulties as the basis for modification. Other concerns were alluded to during testimony, such as Elizabeth's past relationships with men and several moves, however, this information is either outdated or unsubstantiated in the record. Elizabeth remarried about a year before the modification hearing and had only moved once in the time since the 1996 modification. Furthermore, the trial court did not rely on these latter two factors to support modification.

We share the trial court's concern regarding Phillip's poor performance at school. However, the record clearly indicates Phillip's school problems have been ongoing for years, something the district court found as a fact. It is only Russell's concern that has changed since the last modification. While we find it commendable that Russell has taken an increased interest in his son's life and academic performance, under the law this interest does not serve as the basis for a modification of primary physical care.

Russell attempted to demonstrate Elizabeth's lack of concern. Elizabeth did not attend two parent-teacher conferences which she clearly should have attended; however, she did meet with the principal about Phillip's problems. Russell himself has not attended all conferences and, in fact, sought little or no information from the

school system regarding Phillip until the 1997-1998 school year. To her credit, Elizabeth hired a tutor for Phillip when it appeared he might not pass the sixth grade and sat with him herself after school to make sure he did his homework. To Russell's credit, when Phillip stayed with him, he had homework sent to his house and the family helped Phillip. While it appears both of these parents are capable of providing Phillip with a good home and have responded to his academic problems, we adhere to our principle that custody, once determined, should not be lightly disturbed.

Furthermore, Russell failed to establish Phillip's poor academic record is somehow attributable to Elizabeth. One of Phillip's sixth grade teachers testified the transition into sixth grade and middle school is difficult for many students and causes some to struggle academically. The teacher also indicated Phillip improved over the year in his class. The teacher did not attribute Phillip's improvement to Russell's involvement:

Q Have you got any idea what caused or affected [sic] that change [improvement]?

A . . . Phillip and I started to form more of a relationship. . . . I think part of it Phillip decided he was going – decided he was going to do his part. Two, we had a pretty good relationship. You know, he just decided to do it.

Elizabeth attributed the beginning of Phillip's school difficulties in 1994 to the fact that Russell "had dropped out of his life for a year from May of '93 to May of '94."

Russell did not deny that he 'lost touch' with Phillip for a significant period of time.

We find his reasons for lack of contact with Phillip unconvincing. It seems that

Phillip had fewer problems prior to 1993 both academically and behaviorally.

Russell admitted Phillip gets caught in between his parents and it is likely that some of their acrimony has also affected Phillip, along with adjustments to their new spouses and his new step-siblings.

It appears the true underpinning of the petition for modification was Russell's understandable and increased desire to spend more time with his son. Russell did not seek primary physical care in 1996 when the decree was first modified. Instead, he sought custody eight days after Elizabeth refused to stipulate to a permanent change in custody and terminated Phillip's extended summer visit with Russell. Russell stated several times during the hearing he wanted to see more of Phillip:

Q Prior to this year, had you had any involvement at all with the Hampton school system or any other school system that Phillip was in?

A No.

Q Prior – what prompted your concern this year?

A Um, what prompted my concern is that I want to see more of him all the time. And so I decided to call the school up and just to find out what was happening with the school. . . .

While this is certainly a positive in Phillip's life, this desire does not constitute a substantial change in circumstances as the law defines that term.

The district court also found that Russell could provide more stability and a home environment that is more conducive to learning. The support offered for this statement is that Russell's stepchildren earn high grades and would be good role models, while Phillip's half-brother Jessie, who lives with Elizabeth, has his own academic problems. While the record alludes to Jessie, no details are provided regarding the exact nature of his difficulties. Elizabeth testified Phillip and Jessie

get along and share friends in common. We believe Russell's stepchildren can serve as role models for Phillip even if he does not live with them.

We conclude this record does not warrant a modification of primary physical care. With the exception of visitation, Phillip has always lived with Elizabeth. Russell agreed to the characterization that it was a "pretty nice situation for Phillip" since Elizabeth's remarriage. We find no serious failings on her part such that a modification is justified. We return Phillip to the primary physical care of Elizabeth.

REVERSED.