IN THE COURT OF APPEALS OF IOWA

No. 3-058 / 02-1096
Filed April 30, 2003

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

Upon the Petition of KIMBERLY KAY NELSON,
Petitioner-Appellee,

And Concerning KIRK EDWARD NELSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Hardin County, Michael J. Moon, Judge.

Kirk Nelson appeals the district court's refusal to modify the physical care provisions of the parties' dissolution decree. **REVERSED IN PART, VACATED IN PART, AND REMANDED.**

Andrew Howie of Hudson, Mullaney & Shindler, P.C., Des Moines, for appellant.

Barry Kaplan and Melissa Nine of Fairall, Fairall, Kaplan, Condon & Frese, Marshalltown, for appellee.

Heard by Huitink, P.J., Hecht, J., and Brown, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2003).

HUITINK, P.J.

Kirk Nelson appeals the district court's denial of his application to modify the physical care provisions of the parties' dissolution decree and the award of attorney fees to Kimberly Nelson. We reverse and remand for further proceedings.

I. Background Facts and Proceedings.

The parties' original dissolution decree filed May 14, 1997, granted them joint custody of their son, Tanner. Kimberly was granted physical care, subject to Kirk's right to visit Tanner at the times specified in the decree and "at any other reasonable times the parties shall mutually agree."

In January 1999 Kirk filed an application to modify the physical care provision of the dissolution decree. In its ruling on Kirk's application the district court noted, "[a]n exceptionally high level of animosity existed between the parties." The court also noted that Kimberly's prohibition of telephonic and written contacts between Tanner and Kirk was inconsistent with the child's best interests. The court further noted "a child can be severely harmed by ongoing parental conflict. If the parties choose to continue their conduct into the future, their custodial status could be adversely affected." Looking at the evidence as a whole, however, the court concluded Kirk had failed to show a substantial change in circumstances warranting modification.

On appeal we affirmed. *In re Marriage of Nelson,* No. 99-1998 (Iowa Ct. App. Sept. 13, 2000). We, however, expressed misgivings, noting:

> 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 to his father on the telephone and has kept letters and pictures from Tanner that Kirk has sent.

We also stated, "[o]ur affirmance of the district court's custodial finding today does not foreclose the issue from future reassessment." We concluded both parties "must change and be civil to and reasonable with each other."

In December 2000 Kirk filed a second application to modify the physical care provisions of the dissolution decree. Kirk cited Kimberly's continuing failure to support his relationship with Tanner, her remarriage, and Tanner's academic problems as circumstances requiring modification of Tanner's physical care. The trial court denied Kirk's application, resulting in this appeal.

II. Standard of Review.

Modification proceedings are reviewed de novo. Iowa R. App. P. 6.4. In child custody cases, the governing consideration is the best interest of the child. Iowa R. App. P. 6.14(g)(*o*). To change the custody set by a dissolution decree, the party seeking the modification must establish by a preponderance of the evidence conditions have so materially and substantially changed since the decree the child's best interests make the requested change expedient. *In re Marriage of Moore,* 526 N.W.2d 335, 337 (Iowa Ct. App. 1994). The parent seeking to take custody from the other must prove an ability to minister more effectively to the child's well-being. *In re Marriage of Whalen,* 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). This heavy burden comes from the principle that once custody has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Downing,* 432 N.W.2d 692, 693 (Iowa Ct. App. 1988).

III. Custody.

Kirk asserts Kimberly has not supported his relationship with Tanner, and has unreasonably restricted contact with Tanner beyond that specified in the decree.

As joint legal custodians, Kirk and Kimberly are entitled to "equal participation in decisions affecting the child's legal status, medical care, education, extracurricular activities, and religious instruction." Iowa Code § 598.41(5) (1999); *In re Marriage of Fortelka,* 425 N.W.2d 671, 673 (Iowa Ct. App. 1988). We have stated:

> 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.*

Fortelka, 425 N.W.2d at 673 (emphasis added). Parents must put away their personal animosities and work together to meet their child's needs. *Id.* at 672. "Parents who must measure visitation periods by minutes do not have the maturity and flexibility contemplated by joint custody awards." *Id.*

The record indicates Kimberly continues to deny telephone contact between Kirk and Tanner. Kimberly's stepdaughter testified no one in Kimberly's house was permitted to answer the telephone if Kirk called. She also testified Tanner was not allowed to listen to Kirk's telephone messages. Additionally, Tanner has not received letters Kirk sent him.

Kimberly concedes making little or no effort to share educational information about Tanner with Kirk. Most notably, Kimberly met with school officials and decided Tanner should advance to first grade over recommendations to retain him in kindergarten. Kimberly failed to inform Kirk about this meeting or consult him regarding her decision. Kimberly testified she did not understand why this was a concern because Kirk could get the same information from the school. There is also evidence that Kimberly failed to share medical information about Tanner with Kirk. Again, Kimberly felt Kirk could get this information from Tanner's doctors.

Lastly, we note Kimberly's unreasonable failure to agree to additional visitation beyond that specified in the decree. She has agreed to additional visitation only if the weather interfered with scheduled visits and when Kirk arranged skills testing for Tanner to determine the areas in which Tanner needed help in school. Kimberly has also considered Tanner's school-recommended counseling sessions as visits and counted them against Kirk's scheduled visitation time.

It is apparent Kimberly remains inattentive to our admonitions as well as her obligations as a joint custodial parent. We find Kimberly has not supported Kirk's relationship with Tanner and as a result, she has denied Tanner the opportunity for maximum continuing contact with Kirk. Based on the record, we find Kirk has established the requisite substantial change in circumstances necessitating modification of Tanner's physical care.

We also determine Kirk has shown an ability to minister more effectively to Tanner's well-being. Since our last decision, Kirk has made efforts to ease the tensions with Kimberly. He has limited additional visitation requests to important events, like family reunions. Additionally, Kirk completed the Children in the Middle class twice and is now an instructor for that class. In contrast, Kimberly's hostility and antagonistic attitude toward Kirk remains unchanged.

The trial court wisely observed that "a child can be severely harmed by ongoing parental conflict." This observation was prophetic. Tanner has been diagnosed with a situational adjustment disorder and receives counseling to help him deal with the stress of being torn between his parents. Moreover, Tanner's school principal testified this stressful situation could impede Tanner's academic progress. Clearly, Kimberly's inability to set aside her personal animosities and support Kirk's relationship with Tanner has compromised rather than advanced Tanner's best interests. We therefore conclude the parties' decree should be modified by placing Tanner in Kirk's physical care. We remand for a hearing setting Kimberly's child support obligation and visitation rights.

IV. Attorney Fees

Kirk also challenges the trial court's award of $5000 attorney fees to Kimberly. Iowa Code section 598.36 provides for the discretionary award of attorney fees to the prevailing party in a modification proceeding. *See In re Marriage of Mueller*, 400 N.W.2d 86, 89 (Iowa Ct. App. 1986). Because Kimberly is not the prevailing party, she is not entitled to attorney fees, and we accordingly vacate the trial court's award of trial attorney fees.

We further determine that each party shall pay his or her own appellate attorney fees. *See In re Marriage of Castle*, 318 N.W.2d 811, 817 (Iowa Ct. App. 1982).

We reverse the trial court's modification decision and vacate the award of attorney fees to Kimberly. We remand the resulting child support and visitation issues to the trial court for further proceedings in conformity with our opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.