

**IN THE COURT OF APPEALS OF IOWA**

No. 6-1080 / 06-0885  
Filed February 28, 2007

**IN RE THE MARRIAGE OF JODY ANN BALK  
AND JEFFREY RICHARD BALK**

**Upon the Petition of  
JODY ANN BALK,  
n/k/a JODY ANN COLEE,  
Petitioner-Appellee,**

**And Concerning  
JEFFREY RICHARD BALK,  
Respondent-Appellant.**

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Appeal from the Iowa District Court for Humboldt County, Joel E. Swanson, Judge.

Respondent appeals the district court's modification of the visitation provisions of the parties' dissolution decree. **AFFIRMED AS MODIFIED.**

William H. Habhab, Fort Dodge, for appellant.

Dan T. McGrevey, Fort Dodge, for appellee.

Considered by Vogel, P.J., and Vaitheswaran, J., and Beeghly, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**BEEGHLY, S.J.****I. Background Facts & Proceedings**

Jody Colee and Jeffrey Balk were previously married. The parties' dissolution decree, issued on November 15, 2002, incorporated the parties' stipulation for joint legal custody of their two minor children, with Jody having primary physical care. Jeffrey was granted visitation "[e]very other weekend from 6:00 p.m. Thursday to 8:00 p.m. Sunday and opposite weeks from 6:00 p.m. Thursday to 7:00 a.m. Friday." He was also granted three weeks of visitation in the summer and alternating holidays.

At the time of the dissolution decree, both parties were living in Livermore, Iowa. Both parties have now remarried, and Jody is living in Humboldt, which is about twelve miles away from Livermore. On Friday mornings, Jeffrey would drop the children off at Jody's home in Humboldt between 7:15 and 7:40 a.m., on his way to work in Fort Dodge.

On September 26, 2005, Jody filed an application seeking to modify the dissolution decree by increasing Jeffrey's child support obligation. She also sought to eliminate Jeffrey's Thursday night visitation with the children and have visitation every other weekend from 6:00 p.m. Friday to 6:00 p.m. Sunday. Jody testified that when the children were returned at 8:00 p.m. on Sunday nights it was hard to get them to bed by 8:30 p.m., and they were sometimes tired at school the next day. She also stated that because Jeffrey did not return the children by 7:00 a.m. on Fridays, she had to hurry to get them to school by 8:00 a.m., although they were never actually late for school. Jeffrey testified that after

Jody moved to Humboldt they had informally agreed he could return the children by 7:30 a.m. on Friday mornings. Both parties complained about actions of the other party and testified to communication problems.

The district court found there had been a significant change of circumstances due to the parties' problems concerning visitation. The court found, "Some modification is required to ensure the maximum contact of both the Petitioner and the Respondent with the least disruption." The court modified the parties' dissolution decree to grant Jeffrey visitation every other weekend from 6:00 p.m. Friday to 7:00 p.m. Sunday. Jeffrey's summer visitation was increased to four weeks.

Jeffrey filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) requesting that he be allowed to claim the parties' youngest child as a tax exemption. He also asked the court to reinstate his Thursday night visitation with the children. The district court denied the post-trial motion, finding no reason to revisit its previous ruling. Jeffrey now appeals.

## **II. Standard of Review**

Our review of this equitable action is de novo. Iowa R. App. P. 6.4. We examine the entire record and decide anew the issues properly presented. *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005). In equity cases, especially when considering the credibility of witnesses, the court gives weight to the fact findings of the district court, but is not bound by them. Iowa R. App. P. 6.14(6)(g).

### **III. Visitation**

**A.** Jeffrey contends the district court should not have modified the parties' visitation schedule to require him to return the children at 7:00 p.m. Sunday instead of 8:00 p.m. He points out the parties stipulated to the original visitation schedule. He asserts Jody failed to show a sufficient change of circumstances to modify the schedule. In particular, he states Jody failed to show the current visitation schedule was detrimental to the children.

In order to modify the visitation provisions of a dissolution decree, a party must establish by a preponderance of the evidence that there has been a material change in circumstances since the decree, and that the requested change is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 236 (Iowa Ct. App. 2000). Generally, a much less extensive change in circumstances needs to be shown to modify visitation than to modify physical care. *In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa Ct. App. 1994).

We determine Jody showed a sufficient change in circumstances to modify the decree to require the children to be returned by 7:00 p.m. on Sunday nights instead of 8:00 p.m. There was evidence that returning the children at 8:00 p.m. was detrimental to them because they did not get to bed on time, and then were sometimes tired at school the next day. Changing the return time to 7:00 p.m. on Sunday is in the best interests of the children.

**B.** Jeffrey claims the district court should not have eliminated his Thursday night visitation. The only reason apparent in the record for eliminating

the Thursday night visitation was Jeffrey's difficulty in delivering the children by 7:00 a.m. on Friday morning.

During the trial, Jody testified about Jeffrey returning the children late on Friday mornings, as follows:

Q. 7:30 was working okay, later than that was not? A. Well, 7:00's easier, because therefore it's more time, but.

Q. I understand that, but 7:30 worked for you? A. It was all right, yes.

There was no evidence the children were ever late for school. Jody's complaints were that she did not have much time to get the children ready for school if Jeffrey returned them later than 7:00 a.m., not that she had a problem with the children spending Thursday nights with Jeffrey. We find no evidence that the Thursday night visitation was detrimental to the children.

We conclude Jody has failed to show a sufficient change of circumstances to justify elimination of the Thursday night visitation. We note the parties stipulated the children should be returned by 7:00 a.m. on Friday mornings, and even if this is inconvenient to Jeffrey, he should abide by the terms of the decree.

The decree should now provide for visitation:

- a. Every other weekend from 6:00 p.m. Thursday to 7:00 p.m. Sunday and opposite weeks from 6:00 p.m. Thursday to 7:00 a.m. Friday.

**C.** Jeffrey contends the district court should have granted him five weeks of visitation with the children in the summer, instead of four. The original decree granted Jeffrey three weeks of visitation in the summer. Jeffrey testified that at the time of the decree he had two weeks of vacation. He stated that his

employer had recently increased him to five weeks of vacation, which he wanted to spend with the children.

We affirm the district court's decision to modify the decree to increase Jeffrey's summer visitation to four weeks. We find no reason in the record to further increase that amount to five weeks.

#### **IV. Tax Exemption**

Jeffrey asks to have the parties' dissolution decree modified to award him the tax exemption for the parties' youngest child. Jeffrey raised this issue in his post-trial motion, which the district court denied. Generally, the custodial parent receives the tax exemption for a minor child. See Iowa Ct. R. 9.6(4). The district court has the ability, however, to award tax exemptions to a non-custodial parent "to achieve an equitable resolution of the economic issues presented." *In re Marriage of Rolek*, 555 N.W.2d 675, 679 (Iowa 1996). Under the facts in the present case, we determine the tax exemptions should remain with Jody.

We affirm the decision of the district court, as modified above. Costs of this appeal are assessed one-half to each party.

**AFFIRMED AS MODIFIED.**