

**IN THE COURT OF APPEALS OF IOWA**

No. 7-028 / 06-0455  
Filed March 14, 2007

**IN RE THE MARRIAGE OF KURT KLIMESH  
AND AMY KLIMESH**

**Upon the Petition of  
KURT KLIMESH,**  
Petitioner-Appellant,

**And Concerning  
AMY KLIMESH,**  
Respondent-Appellee.

---

Appeal from the Iowa District Court for Winneshiek County, John Bauercamper, Judge.

Kurt Klimesh appeals the district court's ruling in his dissolution decree.

**AFFIRMED AS MODIFIED.**

Kevin Kennedy of Kennedy & Kennedy, New Hampton, for appellant.

Judith O'Donohoe of Elwood, O'Donohoe, Stochl, Braun & Churbuck, Charles City, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**MAHAN, J.**

Kurt Klimesh appeals the district court's ruling in his dissolution decree. He argues the district court erred in awarding joint physical care of the children and in dividing the parties' assets and debts. We affirm as modified.

**I. Background Facts and Proceedings**

Kurt and Amy Klimesh were married in April 1990. They have two sons and a daughter, born in September 1994, October 1996, and November 2000, respectively. Kurt filed the petition for dissolution on March 24, 2005.

Kurt was thirty-eight years old at the time of trial and in good health. He works 10:00 p.m. to 6:00 a.m. at the Dura Automotive plant. His annual gross wage income is approximately \$38,500.

Amy was thirty-five years old at the time of trial and also in good health. She operates a day care service with nominal earnings. The district court imputed her an income of \$16,000.

While the couple was married, they lived on an acreage near Kurt's parents. Since they have separated, Amy has moved into a rental home in town, near the marital home. They shared joint physical care of the children prior to the dissolution decree.

This dissolution is marked by discord between the parties. Kurt argues the impetus for the divorce was Amy's affair with Brad, a family friend. Amy responds that Kurt had affairs during the marriage and that many different problems led to the divorce. We will not repeat the myriad of offenses of which each accuses the other except where relevant to our legal analysis. Unfortunately, we must note at the outset that the parties' hatred for one another

appears to have influenced their children to the point of endangering their safety. The only issues on appeal are the children's physical care and the division of property.

## **II. Standard of Review**

We review dissolution decrees de novo. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Though we are not bound by them, we give weight to the district court's factual findings and credibility determinations. *Id.*

## **III. Merits**

### **A. Physical Care**

Kurt argues joint physical care is not in the children's best interest. He requests primary physical care of the children. Amy, on the other hand, claims joint physical care will enable the children to have maximum continuing contact with both parents.

We review numerous factors in determining the physical care of a child. See Iowa Code § 598.41(3) (2005); *In re Marriage of Winter*, 223 N.W.2d 165, 166 (Iowa 1974). Our primary consideration, however, is the best interests of the child. *In re Marriage of Decker*, 666 N.W.2d 175, 177 (Iowa Ct. App. 2003).

Two factors we consider are of particular relevance in this case. First, the parents' ability to communicate about the children in a joint physical care arrangement is imperative. See *In re Marriage of Ellis*, 705 N.W.2d 96, 101 (Iowa Ct. App. 2005). We recognize communication between parents in the midst of divorce is often not ideal. *Id.* at 103. Thus, lack of communication during the dissolution proceedings need not necessarily preclude a joint physical care arrangement. *Id.* In this case, the parties' shortcomings with

communication are well-documented and specific. However, given the parties' different strengths, their parenting could be very complimentary. *See id.* For example, the record indicates Kurt tends to be more regimented with the children, while Amy tends to be more laid-back. Kurt can offer the children experience with animals and chores in the country while Amy can offer them a small-town experience. For joint physical care to work for these children, however, both parents must make sure the other is aware of what is happening in the children's lives. This includes informing the other parent about the children's education, extra-curricular activities, friends, and health (both mental and physical).

Second, each parent must support the other parent's relationship with the children. Iowa Code § 598.41(3)(e). The record indicates Kurt has failed to support his children's relationship with their mother. He has displayed his anger, bitterness, and hostility toward Amy in the presence of the children. He told them to stay away from her boyfriend because he was "no good." As a result, the couple's sons have been running away from Amy's home, sometimes going to a neighbor's house, but sometimes attempting to take their bikes on roads or "go cross-country" to get away. Kurt has appeared to acquiesce in this behavior and has allegedly offered advice to the children on running away. Needless to say, running away puts a child in a dangerous situation. Just feeling the need to do so disrupts a child's sense of stability and safety. Further, the children's statements to counselors indicate Kurt has presented the custody battle to his sons as a win/lose situation and has highly influenced their opinion as to Amy, her boyfriend, and their preferred living arrangement. The record also indicates

he has been more than proactive in getting his sons to repeat to counselors, relatives, their maternal grandmother, and his attorney that they want to live with him. We decline to repeat more of the record here, but we are adamant in declaring we find any behavior by one parent to alienate the other from their children abhorrent.<sup>1</sup> Divorce is traumatic for children, and they need to feel that they are safe and loved by both parents. Neither Amy nor Kurt has done an especially good job ensuring their children feel such security.

In its dissolution decree, the district court found problems with both Kurt and Amy. The district court also found Kurt bears the most responsibility for the “lack of progress in improving communications.” We agree.

Amy has exhibited lapses of good judgment in dealing with the children. Her immaturity in certain areas concerns us. However, we are more concerned with Kurt’s actions and maneuvering to bring the children directly into the problems and issues which should only be faced by the adult parties to this action. Of special concern are Kurt’s actions involving the children in the child

---

<sup>1</sup> See, e.g., *In re Marriage of Udelhofen*, 444 N.W.2d 473, 474-75 (Iowa 1989) (awarding physical care to father where mother used child as a pawn for personal gain against father, told child father did not love him, allowed child to leave telephone messages denigrating father’s new wife, and accused father of being demonically possessed when child was in Christian school); *In re Marriage of Leyda*, 355 N.W.2d 862, 866 (Iowa 1984) (granting father physical care where mother expressed hatred toward father and girlfriend in front of child and told child father’s family were evil, retards, and liars); *In re Marriage of Winnike*, 497 N.W.2d 170, 174 (Iowa Ct. App. 1992) (awarding physical care to father where mother used visitation to collect evidence against father and tried to run away with the child); *In re Marriage of Wedemeyer*, 475 N.W.2d 657, 659 (Iowa Ct. App. 1991) (granting father physical care where mother pressured children to spy on father, sent letters to children telling them father was an insane sex addict, and enrolling them in counseling as codependents of a sex addict without informing their father); *In re Marriage of Downing*, 432 N.W.2d 692, 694-95 (Iowa Ct. App. 1988) (awarding father physical care where mother intercepted mail sent to children from father, interfered with visitation with father, and removed telephone when she left to prevent children from calling father or grandparents).

custody and support issues and in the incidents surrounding the note found in Kaylie's backpack on September 20, 2005.<sup>2</sup> We cannot condone these actions. We conclude that Kurt's actions have exacerbated the important factors of communication between the parents and the necessity that each parent supports the other parent's relationship with the children. See Iowa Code § 598.41(3)(c), (e).

This, however, is an unusual case. Notwithstanding the parents' hostility toward each other, we conclude each has special parenting characteristics that will enable their children to grow into happy, fulfilled, productive individuals. We fear that giving Kurt primary physical care of the children would effectively eliminate their access to their mother. We also agree with Amy that awarding her primary physical care would be unworkable given their current attitude toward her. We affirm the district court's award of joint physical care. We share Amy's hope that stability results from this adjudication. Nevertheless, we repeat the admonition the district court gave these parents prior to their dissolution:

*The parties shall actively encourage the children to have a good relationship with the other parent. The custody arrangement set forth by this court . . . is not discretionary. A parent shall not allow a child to decide whether or not that child is going to the other parent's home.*

*Neither party shall discuss the other parent in the presence of the children. Likewise, the parties shall not discuss the other parent's friends, including romantic relationships, in the presence of the children. The parties shall direct their family members and friends to not discuss the other parent or that parent's friends in the presence of the children. Should any discussion commence the parent having the children shall remove the children from that location.*

(Emphasis added.)

---

<sup>2</sup> The incident involving the note was made worse by Kurt's less-than-candid testimony.

## **B. Property Division**

Kurt argues the district court erred in dividing the parties' property. The parties in a dissolution are entitled to an equitable division of their joint property. *In re Marriage of Russell*, 473 N.W.2d 244, 246 (Iowa Ct. App. 1991). We, however, do not require an equal division or percentage distribution. *Id.* The parties' respective valuations of their property were not widely different. Both parties also used marital assets during their separation. Amy admits some of the findings in the district court's property division are not supported by the record. She argues, however, that the property division is still equitable. Kurt argues there should be some adjustment. We agree. We also agree with Kurt that the easiest asset to adjust is the boat. We modify the district court's property division to transfer the boat to Kurt. The remaining property division is affirmed.

## **C. Appellate Attorney Fees**

Amy requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Amy's request for appellate attorney fees is denied. Costs of the appeal are taxed one-half to each party.

## **AFFIRMED AS MODIFIED.**

Sackett, C.J., concurs; Huitink, J., concurs specially.

**HUITINK, J.** (concurring specially)

I concur in the result only.