

IN THE COURT OF APPEALS OF IOWA

No. 0-843 / 10-0184
Filed February 23, 2011

**IN RE THE MARRIAGE OF
LAURIE CHRISTINE OLANIYI
AND OLABAYO OLANIYI**

**Upon the Petition of
LAURIE CHRISTINE OLANIYI,
n/k/a CRISTINA G. RINCÓN,
Petitioner-Appellant,**

**And Concerning
OLABAYO OLANIYI,
Respondent-Appellee.**

Appeal from the Iowa District Court for Johnson County, Kristin L. Hibbs,
Judge.

Cristina Rincón appeals from the district court's order denying her request
to modify the child custody provisions. **AFFIRMED.**

Cristina G. Rincón, Battle Creek, appellant pro se.

Sally H. Peck, Iowa City, for appellee.

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

VOGEL, J.

Cristina Rincón appeals from the district court's order denying her request to modify the child custody provisions of her and Olabayo Olaniyi's dissolution decree. As we agree with the district court that Cristina failed to show a substantial change of circumstances, we affirm.

Cristina and Olabayo's marriage was dissolved in October 2003. They have two children: Oba (born in 1997), and Aluna (born in 2000). Pursuant to the dissolution decree, the parties were granted joint legal custody of the children, with Olabayo having physical care and Cristina visitation. Cristina appealed the dissolution decree, and in March 2005, we affirmed the district court's decision to grant the parties joint legal custody. *In re Marriage of Olaniyi*, No. 03-1791 (Iowa Ct. App. March 16, 2005). At the time of the dissolution, Cristina lived in Michigan, and Olabayo lived in Iowa.

In August 2008, Cristina sought to modify physical care of the children, asserting there had been a substantial and permanent change of circumstances. In August 2009, she filed a motion to request an attorney be appointed to represent the children. The district court appointed an attorney from Kids First Law Center, who subsequently withdrew, as the children lived outside the service zone for Kids First.¹ After a December 2010 hearing, the district court denied Cristina's request to change the physical care of the children.

Cristina appeals. Cristina asserts the district court should have modified the child custody provision of the dissolution decree to grant her physical care of

¹ Kids First services Linn and Johnson counties; the children resided in Jefferson County.

the children. We review modification proceedings de novo. *In re Marriage of McKenzie*, 709 N.W.2d 528, 531 (Iowa 2006). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the factual findings of the district court, especially when considering the credibility of witnesses, but are not bound by them. *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). The controlling consideration in child custody cases is always what is in the best interests of the children. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). A party who seeks a modification of child custody must establish by a preponderance of the evidence that there has been a material and substantial change in circumstances since the entry of the decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

Cristina specifically asserts that she proved a material and substantial change in circumstances and that she is the superior parent.² She maintains she can provide superior care both financially and emotionally based on her stable employment and close location to family. Olabayo responds that no material and substantial changes have occurred since the time of the dissolution, and it is not in the children's best interests to be moved. The district court found,

Although there have been changes since the Decree—Olabayo's remarriage, the birth of his three children with Reena who are half-

² Cristina also asserts the district court erred when it failed to appoint an attorney to represent the children. After the attorney's withdrawal, Cristina did not request another attorney nor raise this issue at trial. See *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) ("Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal."). Because this issue was not properly preserved in the underlying proceedings, we are unable to address its merits on appeal.

siblings to the children concerned here, his move to Batavia—none of these events are of such a nature that this Court would say would have not been within the contemplation of the parties or the Court at the time of the Decree. The Court finds that Cristina has failed to prove a substantial change in circumstances not within the contemplation of the parties or the Court at the time of the Decree that would warrant a change in the custodial arrangement.

Further, the Court finds that Cristina has failed to prove that she has the superior claim based on her ability to minister to the child's needs more effectively than the custodial parent.

We defer to the credibility assessments made by the district court and conclude the district court's factual findings were fully supported by the record. Further, the district court's ruling reflects it considered and weighed the appropriate factors in considering a modification of physical care award. *Frederici*, 338 N.W.2d at 158 (stating that for modification, the changed circumstances must not have been contemplated by the court when the decree was entered, they must relate to the welfare of the children, and a parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being). Thus, we affirm the district court pursuant to Iowa Court Rules 21.29(1)(a), (b), (d) and (e).

AFFIRMED.