IN THE COURT OF APPEALS OF IOWA

No. 1-229 / 10-1973
Filed May 25, 2011

IN RE THE MARRIAGE OF VICKIE L. WAD AND JAMES D. WAD

Upon the Petition of
VICKIE L. WAD, n/k/a
VICKIE L. BERGMANN,
Petitioner-Appellee,

And Concerning
JAMES D. WAD,
Respondent-Appellant.

Appeal from the Iowa District Court for Chickasaw County, Margaret L. Lingreen, Judge.

A father appeals from the district court's order denying his application to modify physical care of his children. **AFFIRMED.**

John J. Hines of Dutton, Braun, Staack & Hellman, P.L.C., Waterloo, for appellant.

Lana L. Luhring of Laird & Luhring, Waverly, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

VOGEL, P.J.

James Wad appeals from the district court's order denying his request to modify the child custody provisions of his and Vickie Bergmann's, f/k/a Vickie Wad, dissolution decree. As we agree with the district court that James failed to show a substantial change of circumstances, we affirm.

James and Vickie's marriage was dissolved in April 2008. They have two children: Dustin (born in 1996), and Nicholas (born in 1999). Pursuant to a stipulated dissolution decree, the parties were granted joint legal custody of the children, with Vickie having physical care and James visitation. In January 2010, James sought to modify the dissolution decree asserting there had been a substantial change of circumstances. Following a hearing, the district court denied James's request to change the physical care of the children. James appeals.

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).

James asserts Vickie's ongoing failure to support the boys' relationship with him and failure to cooperate in facilitating additional visitation, coupled with the boys' stated desire to reside with him, supports a change in placement. He seeks physical care of the boys during the school year, while continuing the current summer arrangement. Vickie responds that no material and substantial changes have occurred since the time of the dissolution, and James cannot provide superior care. The district court found,

> In the instant case, the Court finds a failure of proof by [James]. The only change in circumstances is the stated preference of the boys to reside with [James]. As noted, a child's expressed preference is entitled to less weight in a post-judgment proceeding to modify a custody decree, than in the original custody proceeding. Furthermore, [James] has not shown a superior claim of ability to minister to the children's well being. The evidence indicates the children are doing well, both academically and socially, in [Vickie's] physical care.

We defer to the credibility assessments on our de novo review of the record, and we conclude the district court's factual findings were fully supported by the evidence presented. Further, the district court's ruling reflects it considered and weighed the appropriate factors in considering a modification of physical care award. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (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*).

James also seeks reversal of Vickie's award of attorney fees at trial, but fails to cite supporting authority, thus he has waived this issue on appeal. *See Soo Line R.R. Co. v. Iowa Dep't of Transp.*, 521 N.W .2d 685, 691 (Iowa 1994) ("[R]andom mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for our consideration."). Had the issue been properly raised, we would nonetheless affirm the district court's award, as it was well within the court's broad discretion to do so. *See In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993).

Vickie requests appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (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 trial court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Upon our review, we decline to award appellate attorney fees. Costs assessed one-half to each party.

AFFIRMED.