

IN THE COURT OF APPEALS OF IOWA

No. 1-683 / 11-0688
Filed November 9, 2011

**Upon the Petition of
NATHANIEL KOCH,**
Petitioner-Appellant,

**And Concerning
JOSEPHINE STEPHENS,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Brad McCall, Judge.

A father appeals from the district court's denial of his petition for modification of child custody. **AFFIRMED.**

Andrew B. Howie and Steven H. Shindler of Hudson, Mallaney, Shindler & Anderson, P.C., West Des Moines, for appellant.

Elizabeth Kellner-Nelson of Kellner-Nelson Law Firm, P.C., West Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Nathaniel “Nate” Koch appeals from a district court ruling denying his petition to modify the physical care provisions of the parties’ custody decree. He also contends the district court erred in awarding Josephine “Jo” Stephens trial attorney fees. Upon our de novo review, we affirm the ruling of the district court. We award Jo \$1000 in appellate attorney fees.

I. Background Facts and Proceedings.

Nate and Jo are the parents of Hayden, born in 2007. Nate and Jo never married. In 2008, the parents stipulated to a decree of custody, visitation, and support, which was subsequently approved by the district court. The stipulation provided that the parents share joint legal custody of Hayden, with Jo having “primary physical care”¹ and Nate having reasonable and liberal visitation.

In January 2010, Nate filed his application for modification of the decree. He asserted that since the entry of the decree there had been a material change in circumstances that was not contemplated in the decree. Nate requested Hayden be placed in his physical care with Jo to receive liberal visitation. Jo resisted modification of the custody provisions in the decree, but requested the visitation and support provisions be modified.

Following the March 2011 trial, the district court ruled from the bench, and later in writing, denying Nate’s application to modify the decree. The court specifically found the parties were both “generally credible.” However, when the court compared the credibility of the two parents, the court found

¹ “Primary physical care” is not defined in Iowa Code chapter 598 (2009), nevertheless, we recognize the term is commonly used by parties, their counsel, and the courts.

[it] must give [Jo] the edge. [Jo], although she was naïve in her testimony at times and in her understanding of the legal process, was overall forthright and credible and believable in the testimony that she gave during the course of these proceedings.

[The court characterized Nate] as less than candid. . . .

As to those events between these parties that were in direct dispute, [the court found] that [Jo's] version [was] more credible

The court found there was “absolutely no question” that there had been friction, arguing, and disagreements between the parties. The court also found Jo had denied many of Nate’s requests for extra visits with Hayden. However, the court found there was no evidence Jo had denied Nate any of the visitation he was authorized to have under the original decree. The court further found there was no evidence Jo took any other action to affirmatively deprecate Nate in Hayden’s eyes. The court found it was “unable to conclude that there [had] been a material change in circumstances . . . which would justify a modification of the custodial provisions of the decree.” The court did find there had been a material change in circumstances concerning the visitation and support provisions of the decree, and it modified those provisions. Modification of these provisions is not at issue here. The district court also ordered Nate to pay \$3500 toward Jo’s attorney fees.

Nate appeals.

II. Discussion.

We review custody orders de novo. Iowa R. App. P. 6.907 (2009). However, the district court had the advantage of listening to and observing the parties and witnesses. See *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986); *In re Marriage of Vrban*, 359 N.W.2d 420, 423 (Iowa 1984).

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. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Sullins*, 715 N.W.2d 242, 247 (Iowa 2006). Our overriding consideration is the best interests of the child. Iowa R. App. P. 6.904(3)(o).

A. Physical Care.

In seeking to modify the physical care arrangement, Nate has a heavy burden. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). Nate must establish “by a preponderance of the evidence, a substantial change in circumstances justifying his requested modification.” See *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). The burden upon the parent seeking a change is heavy “because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children.” *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213-14 (Iowa Ct. App. 1994). Consequently, we follow the principle that once custody has been fixed, it “should be disturbed only for the most cogent reasons.” *Id.* at 214. When the modification would mean that one parent receives physical care, that parent must also demonstrate an ability to minister more effectively to the child’s well-being. *Frederici*, 338 N.W.2d at 158.

In seeking modification of the original decree, Nate asserts Jo is immature, unstable, and reckless in her behavior in her personal life and in her treatment of Nate. Nate further claims Jo does not communicate with Nate and is unsupportive of his relationship with Hayden and that these claims establish a substantial change in circumstances justifying modification of the decree. Upon

our thorough review of the record, we agree with the district court that Nate failed to meet his burden.

Here, the district court, which had the opportunity to observe the parties' demeanor firsthand, found Jo's testimony to be more credible. Despite Nate's assertions, the record reveals communication issues on the part of both parents, as well as occasional behavior by each parent that may be deemed reckless, unsupportive of the other parent, or even immature. However, we agree with the district court that while both parties have made some mistakes, they are fine parents. There is no doubt both parents love Hayden and can provide equally for his care, as they have been doing for a number of years. After considering all of the evidence, we agree with the district court's conclusion that Nate has not shown a substantial change in circumstances. We emphasize the district court's sentiment that the parties "need to put aside the differences that exist between [them] and focus on [Hayden]."

B. Trial Attorney Fees.

Additionally, Nate argues the district court erroneously awarded Jo trial attorney fees. An award of attorney fees is not a matter of right, but rather rests within the district court's discretion. *In re Marriage of Hocker*, 752 N.W.2d 447, 451 (Iowa Ct. App. 2008). We review the district court's award of attorney fees for abuse of discretion. *Sullins*, 715 N.W.2d at 255. An award of attorney fees is based upon the respective abilities of the parties to pay the fees and whether the fees are fair and reasonable. *In re Marriage of Applegate*, 567 N.W.2d 671, 675 (Iowa Ct. App. 1997).

Nate was earning substantially more than Jo at the time of the trial. Due to their disparate earning capacities and in light of the respective financial stability of the parties, we cannot say the district court abused its discretion in awarding \$3500 in trial attorney fees to Jo. We therefore conclude the district court did not abuse its discretion when it awarded Jo attorney fees.

C. Appellate Attorney Fees.

Finally, Jo requests an award of appellate attorney fees. Appellate attorney fees are not a matter of right. *Sullins*, 715 N.W.2d at 255. We consider the parties' needs, ability to pay, and the relative merits of the appeal. *Id.* Applying these factors to the circumstances in this case, we award Jo \$1000 in appellate attorney fees.

Costs are assessed to Nate.

AFFIRMED.