

IN THE COURT OF APPEALS OF IOWA

No. 3-272 / 12-1791

Filed May 15, 2013

**IN RE THE MARRIAGE OF MELISSA MILANI
AND ANTHONY MILANI**

**Upon the Petition of
MELISSA MILANI n/k/a
MELISSA MESECHER,**
Petitioner-Appellant,

**And Concerning
ANTHONY MILANI,**
Respondent-Appellee.

Appeal from the Iowa District Court for Appanoose County, Daniel P. Wilson, Judge.

Melissa Mesecher appeals the district court denial of her petition for modification of physical care of her minor child. **AFFIRMED.**

Lisa M. Noble of Van Cleef & McCormack Law Firm, L.L.P., Des Moines, for appellant.

Gregory G. Milani of Orsborn, Milani, Mitchell & Goedken, L.L.P., Ottumwa, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Melissa Mesecher and Anthony Milani are the parents of minor child born in 2000. The parties' marriage was dissolved on October 14, 2002. Upon dissolution, Melissa was granted physical care of the child, subject to Anthony's visitation. A stipulated order modifying the decree was entered August 27, 2007.

Melissa filed a petition for modification May 18, 2010, asserting a substantial and material change in circumstances, including her discharge from the Navy, and seeking physical care of the child. After trial the district court dismissed her petition for modification, finding Iowa Code section 598.41C (2009) did not apply¹ and that the child's best interests were served by continued placement with Anthony. On appeal Melissa contends the district court erred by not applying section 598.41C to grant her physical care after her discharge from military service.

We review Melissa's appeal de novo. See Iowa R. App. P. 6.907. We acknowledge, however, the virtues inherent in listening to and observing the parties and witnesses. *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). Consequently, we give weight to the trial court's findings of fact, especially when considering the credibility of witnesses, but are not bound by them. *Id.*

¹ The court noted that the statute was enacted in 2008 and amended in 2010, subsequent to the entry of the stipulated order modifying physical care which placed Kelton with Anthony. The issue of retroactivity aside, the court also determined the statute did not apply to this situation, observing that the stipulated order demonstrated intent of the parties for the change in physical care to be permanent, as the order made provisions for alteration of visitation and holidays in the future, should Melissa's service cease.

Our primary consideration in determining the appropriate child custody and visitation is the best interests of the children. *In re Marriage of Wessel*, 520 N.W.2d 308, 309 (Iowa Ct. App. 1994). Generally, the party requesting modification must establish (1) a substantial change in material circumstances that is more or less permanent and affects the child's welfare and (2) the requesting parent is able to provide superior care and minister more effectively to the child's needs. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

Having reviewed the record, we agree with the district court's findings that Iowa Code section 598.41C does not apply, and there has not been a change of circumstances warranting a change of custody. We only add that even if the policy behind the legislation may be appropriate to apply to cases involving modifications prior to the effective date of the legislation now found in Iowa Code section 598.41C, the facts in this case do not support reinstating the prior physical care award for the reasons stated by the district court. We therefore affirm without further opinion. See Iowa Ct. R. 21.26(1)(d).

AFFIRMED.