

IN THE COURT OF APPEALS OF IOWA

No. 3-476 / 12-1663

Filed June 26, 2013

**IN RE THE MARRIAGE OF SANDRA J. LEUER
AND SCOTT A PETERSEN**

**Upon the Petition of
SANDRA J. LEUER,**
Petitioner-Appellant,

**And Concerning
SCOTT A. PETERSEN,**
Respondent-Appellee.

Appeal from the Iowa District Court for Linn County, Fae E. Hoover-Grinde, Judge.

Sandra J. Leuer appeals from the trial court's refusal to modify the visitation provision of the parties' dissolution decree entered August 27, 2008.

AFFIRMED.

Mark D. Fisher of Nidey, Erdahl, Tindal & Fisher, Cedar Rapids, for appellant.

Jacob R. Koller and Allison R. Slager of Simmons, Perrine, Moyer, Bergman, P.L.C., Cedar Rapids, for appellee.

Considered by Vaitheswaran, P.J., and Bower, J., and Goodhue, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

GOODHUE, S.J.

Sandra J. Leuer appeals from the trial court's refusal to modify the visitation provision of the parties' dissolution decree entered August 27, 2008.

I. Background Facts and Proceedings

The parties have a six year old son as the result of their marriage. The August 2008 decree adopted a stipulation which was the result of nearly a full year of negotiations, during which time both parties were represented by counsel. Both parties had children by prior marriages, and were obviously aware of custody and visitation issues. Almost six pages of the stipulation addressed custody and visitation in an apparent attempt to resolve all future disputes involving those issues.

During the marriage the parties had resided in Norwalk, Iowa, but Sandra left the marital home and moved to Cedar Rapids prior to the filing of the dissolution petition. She obtained full-time employment in Cedar Rapids and was making \$69,500 per year when the decree was entered. She is still working for the same company, with similar income. At the time the stipulation was negotiated there was an assumption that Scott would likely move to the Cedar Rapids area. Scott was awarded the marital home. He has tried to sell the home, but has been unable to do so and still resides in it. Scott did obtain employment for a short time in the Iowa City area, but the job did not work out. He has suffered health problems and is presently unemployed. He has financially survived by utilizing unemployment benefits, drawing on his retirement account, and borrowing against the equity in his house.

Even though the parties lived approximately 150 miles from each other, and still do, Scott was awarded liberal visitation. For the most part he has exercised the visitation allowed. The visitation is such that the parties' child has very little time with Sandra's twelve-year-old daughter. Sandra believes that it would be beneficial to the children if their visitation schedules coincided so they could spend more time together. Sandra also objects that the liberal visitation granted to Scott and the distance involved makes it difficult for their son to be in regular extra-curricular activities. Communication and cooperation between the parties is seriously lacking and reasonable accommodation outside the strict language of the decree is difficult to achieve. Sandra believes that as the custodial parent she should have more control over her son's activities, education, and life as a whole. Scott's liberal visitation thwarts her desires and she further believes that the liberal visitation is not in her son's best interests.

Scott is an indulgent, caring, and involved father. There is no serious contention to the contrary. He is cognizant of and has attempted to address his son's social, physical, educational, and other development needs. The parties' son did start and will be required to repeat his kindergarten class. Neither party blamed the other for the lack of progress and seemed to attribute it to his late August birthday.

Sandra brought action to modify the visitation schedule. Also at issue was Scott's request for a reduction in child support which was contemporaneously being addressed through Child Support Recovery. The petition to modify the visitation provision of the stipulation adopted by the decree was denied based on a lack of a change of circumstances. The child support set by Child Support

Recovery was adopted by the trial court. There was no appeal from the trial court's reduction of the child support from \$500 per month to \$320 per month.

II. Scope and Standard of Review

An action to modify a dissolution decree is an equitable action and therefore the review is de novo. *In re Marriage of Brown*, 778 N.W.2d 47, 50 (Iowa Ct. App. 2009). The trial court's findings of fact are not binding, but those findings are given deference on review. Iowa R. App. P. 6.904(3)(g); *In re Marriage of Zabecki*, 389 N.W. 396, 398 (Iowa 1986).

III. Discussion

Even though a modification of a visitation schedule is less demanding than an actual change in custody, there must be a change in circumstances to support the modification. *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000). Sandra, as the petitioner, must establish by a preponderance of the evidence that there has been a material change of circumstances, and that the requested change is in the best interests of the child. *See In re Marriage of Salmon*, 519 N.W.2d 94, 95-96 (Iowa Ct. App. 1994).

Sandra contends that it was anticipated at the time of the decree that Scott would relocate nearer to Cedar Rapids, and that anticipation was the basis for the extensive visitation, including mid-week overnight visitation, which was granted to Scott. As the trial court noted "there is no mention in the decree that either party will relocate nearer to the other." The parties continue to reside where they resided at the time of the decree.

In addition to her frustration and personal difficulties the existing visitation schedule presents for Sandra, she contends that the present schedule is not in

the best interests of the child. The best interest of the child is always paramount when issues affecting children are involved. *In re Marriage of Downing*, 432 N.W.2d 692, 693 (Iowa Ct. App. 1988). In reality Sandra is contending that the liberal visitation the decree and stipulation provide is having an adverse effect on the parties' son. She offered very little proof of that assertion. Primarily the liberal visitation is inconvenient to Sandra. Although there may be situations where too much visitation with a noncustodial parent adversely affects the child, they are rare. Existing legal precedent favors maximum contact with both parents. *Thielges*, 623 N.W.2d at 238. Recent legislative changes have focused on the opportunity for substantial involvement in a child's life by both parents even though there has been a dissolution of the marital relationship. *In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa Ct. App. 1998).

IV. Conclusion

Scott's present lack of employment, his failure to move to the Cedar Rapids area as anticipated by Sandra, and the parties' continuing difficulty in communicating do not constitute a change in circumstances to support a change in the visitation schedule. Sandra has failed to meet her burden. The decision of the trial court is affirmed.

V. Appellate Attorney Fees

The award of appellate attorney fees is not a matter of right, but is within our discretion depending on the needs of the party making the request, his or her need to defend, and the other party's ability to pay. *In re Marriage of Ales*, 592 N.W.2d 698, 704 (Iowa Ct. App. 1999). Scott has had to defend, and Sandra has the ability to pay. Scott is unemployed and has medical problems, but he seems

to have adequate resources to meet his needs. The request of appellate attorney fees is denied. Costs on appeal are assessed to Sandra.

AFFIRMED.