

IN THE COURT OF APPEALS OF IOWA

No. 6-723 / 06-0611
Filed October 11, 2006

**IN RE THE MARRIAGE OF KAREN KAY KRUSE
AND THOMAS JASON KRUSE**

**Upon the Petition of
KAREN KAY KRUSE,**
Petitioner-Appellee,

**And Concerning
THOMAS JASON KRUSE,**
Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Michael J. Moon,
Judge.

Thomas Kruse appeals the denial of his motion to modify the parties'
dissolution decree. **AFFIRMED.**

Lynn Wiese, Iowa Falls, for appellant.

Andrew Howie, West Des Moines, and Christine Hunziker of Payer,
Hunziker, Oeth & Rhodes, Ames, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Thomas Kruse appeals the denial of his motion to modify the dissolution decree. We affirm.

I. Background Facts & Proceedings.

A decree dissolving the parties' marriage was entered April 7, 2000. The parties were awarded joint custody of their son, Jackson. Karen Kruse was granted physical care subject to Thomas's specified visitation rights. On June 7, 2005, Thomas filed an application to modify the April 2000 decree, alleging Karen's financial irresponsibility necessitated a transfer of Jackson's physical care to him. Karen responded with an application to modify the decree by granting her sole, rather than joint, custody. She also requested increased child support and that Thomas's visitation with Jackson be supervised.

The trial court denied both parties' requests to modify custody. The court also increased Thomas's child support from \$1448 to \$2162 per month. Thomas was ordered to pay \$8500 of Karen's attorney fees and court costs.

On appeal, Thomas argues:

- I. The trial court erred in denying Thomas primary physical care.
- II. The trial court erred in failing to direct any increase in child support to a trust to be accumulated for postsecondary education.
- III. The trial court erred in awarding Karen \$8500 in attorney fees.

Karen has not cross-appealed. She requests an award of appellate attorney fees.

II. Standard of Review.

“Review in equity cases shall be de novo.” Iowa R. App. P. 6.4; see *In re Marriage of Daniels*, 568 N.W.2d 51, 54 (Iowa Ct. App. 1997). Although we are not bound by the district court’s findings, we give them deference because the district court evaluated the parties with a firsthand view of their demeanors. *Id.* “Prior cases have little precedential value; we must base our decision primarily on the particular circumstances in this case.” *Daniels*, 568 N.W.2d at 54; *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983).

III. Physical Care.

The court can modify custody only when there has been a substantial change in circumstances since the time of the decree and the change in circumstances was not contemplated when the decree was entered. *In re Marriage of Malloy*, 687 N.W.2d 110, 113 (Iowa Ct. App. 2004). The change of circumstances must be more or less permanent and relate to the welfare of the child. *Id.* The parent seeking to change the physical care has a heavy burden and must show the ability to offer superior care. *Id.* The strict standard is based on the principle that once custody of a child has been determined it should be disturbed for only the most cogent reasons. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996).

Thomas’s petition cites the following as substantial changes in circumstances justifying modification:

6. That petitioner has failed to obtain regular fulltime employment and has continued to borrow money from the respondent because of her inability to achieve any form of financial stability since the entry of the dissolution decree. Such loans presently total \$4892.92.

7. That petitioner's unanticipated lack of financial responsibility since the entry of the decree compounded with her failure to obtain regular employment has resulted in the placement of the financial responsibility for the welfare of the parties' minor child entirely upon the respondent. Further, petitioner's lifestyle and apathetic attitude toward financial responsibility sets a poor example for the parties' minor child all of which combine to constitute a material and substantial change in circumstances empowering the court to modify the parties' dissolution decree.

Thomas's modification demands are premised entirely on Karen's alleged financial irresponsibility. He cites Karen's failure to pay him rent on the Omaha home he purchased and leased to her in 2001. At trial Thomas claimed Karen was \$60,000 in arrears on her rent. Thomas also claims Karen has been chronically and intentionally under-employed since the decree was entered. He cites evidence indicating that her earnings history since then has been substantially less than the earning capacity upon which his child support obligations were based.

Even if we assume without deciding the foregoing is sufficient to establish a substantial change in circumstances, the record fails to support Thomas's claim that he can provide superior care for Jackson. Jackson has resided in Karen's continuous physical care since the decree was entered. By all accounts he has thrived in every respect while in her physical care. The evidence also indicates that Karen has been supportive of Jackson's relationship with Thomas, as well as Thomas's extended family. She has, for example, accommodated his needs for extended or modified visitation. Moreover, we are unable to find a connection between Karen's alleged financial irresponsibility and any failure to adequately provide for Jackson's physical care. At best, Thomas has established that he is more financially secure than Karen and is able to provide for Jackson's physical

care. Neither is sufficient to meet his burden to establish his ability to provide *superior care*. We affirm on this issue.

IV. Child Support/Trust.

As noted earlier, the trial court increased Thomas's child support obligation from \$1448 per month to \$2162 per month. Thomas filed a motion pursuant to Iowa Rule of Civil Procedure 1.904 requesting the court modify or amend its order by providing that this increase be directed to a trust to be accumulated for the benefit of Jackson's postsecondary education pursuant to Iowa Code section 598.21(5) (2004). Our review of the record indicates that the necessity of a trust for the benefit of Jackson's postsecondary education was not an issue tried or submitted to the court for adjudication at trial. Thomas has therefore failed to preserve this issue for our review. See *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002) (stating the purpose of a rule 1.904 motion is to resolve issues presented to but not decided by the trial court).

V. Attorney Fees.

An award of trial attorney fees rests in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). An award of attorney fees is not a matter of right. *In re Marriage of Scheppele*, 524 N.W.2d 678, 680 (Iowa 1994); *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). The award should be reasonable and fair and based on the parties' respective abilities to pay. *Scheppele*, 524 N.W.2d at 680. The trial court ordered Thomas to pay \$8500 of Karen's attorney fees. Karen was required to and successfully defended Thomas's petition to modify the custodial

provisions of the decree. Karen was also successful in her claim for increased child support. Karen's financial affidavit and testimony indicate that she is without sufficient funds to pay her attorney fees. Thomas's income and other resources indicate he is capable of paying a portion of Karen's attorney fees. We accordingly find the trial court did not abuse its discretion by ordering Thomas to pay Karen's attorney fees in the amount ordered.

Karen requests an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *Kurtz*, 561 N.W.2d at 289. 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 district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We determine Karen was required to and successfully defended the trial court's decision on appeal. We accordingly award Karen appellate attorney fees in the amount of \$1000. Costs of the appeal are assessed to Thomas.

AFFIRMED.