IN THE COURT OF APPEALS OF IOWA

No. 8-371 / 07-2056
Filed July 16, 2008

IN RE THE MARRIAGE OF JAMIE JO SCHILTZ AND DAVID ALLEN SCHILTZ

Upon the Petition of
JAMIE JO SCHILTZ,
Petitioner-Appellee,

And Concerning
DAVID ALLEN SCHILTZ,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur A. Gamble, Judge.

The respondent appeals from the district court's order denying his petition to modify the child custody provision of a dissolution decree. **AFFIRMED.**

Michael Oliver of Oliver Law Firm, Des Moines, for appellant.

Jane Odland and Lee Walker of Walker & Billingsley, Newton, for appellee.

Considered by Vogel, P.J., and Zimmer and Eisenhauer, JJ.

VOGEL, P.J.

David Schiltz appeals from the district court's order denying his petition to modify the child custody provisions of his and Jamie Schiltz's dissolution decree. Under the 2003 decree, Jamie was given physical care of the children and David now seeks joint physical care. Because we agree with the district court that David failed to establish a substantial change in circumstances, not contemplated by the decretal court, we affirm.

Jamie Schiltz and David Schiltz's marriage was dissolved in December 2003. They have two children: Kyle (born in 1997) and Presley (born in 1998). The dissolution decree adopted the parties' stipulation to award joint legal custody with Jamie having physical care. The parties also agreed upon a visitation schedule, which granted David visitation on alternating weekends, spring break week, two weeks during the summer, and half of the winter break. At the time of the dissolution, Jamie lived in Ankeny, Iowa and David lived in Springfield, Missouri. Although David lived some distance from the children, he diligently exercised his visitation and was actively involved in the children's lives.

In November 2004, David moved back to Ankeny. The parties were able to work together so that David could be with the children at times other than his scheduled visitation. However, after some disagreements arose between the parties David filed a petition for modification requesting that he and Jamie be granted "shared parenting time" with the children. David proposed that he and Jamie alternate weeks with the children because his work schedule was such that he worked seven days on and seven days off. The district court denied David's petition finding that he had failed to establish there had been a material

and substantial change in circumstances since the entry of the decree that was not contemplated by the decretal court. David appeals.

We review modification proceedings de novo. Iowa R. App. P. 6.4; *In re Marriage of Zebecki*, 389 N.W.2d 396, 398 (Iowa 1986). However, we recognize that the district court was able to listen to and observe the parties and witnesses. *Zebecki*, 389 N.W.2d at 398. 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. 6.14(6)(*g*). Our overriding consideration is the best interests of the children. Iowa R. App. P. 6.14(6)(*o*).

Physical Care. Child custody may only be modified where there has been a material and substantial change in circumstances since the entry of the dissolution decree. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change in circumstances cannot be one contemplated by the district court when the decree was entered and must be of a permanent nature. *In re Marriage of Scott*, 457 N.W.2d 29, 31 (Iowa Ct. App. 1990) (quoting *Frederici*, 338 N.W.2d at 158). The parent requesting the modification must establish by a preponderance of the evidence that conditions since the original decree was entered have so materially and substantially changed that it is in the children's best interests to change custody. *Frederici*, 338 N.W.2d at 158. This heavy burden "stems from the principle that once custody of a child has been fixed it should be disturbed only for the most cogent reasons." *Id.*

David asserts that his move from Missouri to Iowa is a material and substantial change in circumstances. The district court found: "It was

understood by the parties and the Court at the time of the dissolution of marriage trial that David would move back to Polk County from Springfield, Missouri as soon as he could." David asserts that although it was his intention to move back to Iowa as soon as possible, it was only aspirational and not a "fact" known to the district court at the time the dissolution decree was entered. He points to the language in the dissolution decree that states: "Because of the distance between the parties' residence, [David] shall call [Jamie] upon his departure from his residence and confirm with [Jamie] that he will visit with the children for that weekend." However, David's testimony at the modification hearing included the following:

> Q. Okay. And at the time of the trial you — it was your intention to move back to Iowa as soon as you could, wasn't it? A. Once I realized that Jamie was not going to move down there, then it was my objective to move back to Iowa, yes.
>
> Q. And that was your testimony at the time of the trial, that you were going to move back to Iowa as soon as you could? A. Yes.

David indicated that not only was it his intention to return to Iowa as soon as possible, but he also communicated this to the district court in 2003. Therefore, we conclude the district court on modification properly found that David did not establish a substantial change in circumstances as his return to Iowa was, by his own admission, contemplated by the district court at the time the dissolution decree was entered.

Both Jamie and David love their children and are good parents. The district court found:

> The decree provides liberal visitation for David and Jamie is generally inclined to provide extensive visitation beyond the minimum visits set forth in the Decree . . . . [I]f David will respect

> Jamie's role as the primary physical custodian, the Court is satisfied that Jamie will provide David and the children the maximum continuing physical and emotional contact consistent with the best interests of the children."

We note that in the past Jamie and David have worked together on visitation for the benefit of the children. *See* Iowa Code § 598.41(1)(a) (2007) (stating visitation is to provide the children with "maximum continuing physical and emotional contact with both parents"); Iowa Code § 598.41(5)(b) (stating that "the parent responsible for providing physical care shall support the other parent's relationship with the [children]").

Appellate Attorney Fees. Jamie requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (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 district court's decision on appeal. *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). Having considered the appropriate factors, including the parties' income differential, we grant Jamie $1500 appellate attorney fees. Costs on appeal are assessed to David.

AFFIRMED.