IN THE COURT OF APPEALS OF IOWA

No. 8-436 / 07-1329
Filed August 27, 2008

IN RE THE MARRIAGE OF AUDREY S. HITCHCOCK AND BENJAMIN J. HITCHCOCK

Upon the Petition of

AUDREY S. HITCHCOCK, n/k/a
AUDREY S. ALLEN,
Petitioner-Appellee,

And Concerning

BENJAMIN J. HITCHCOCK,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

Benjamin Hitchcock appeals the district court's denial of his petition for modification of the visitation provisions of the decree dissolving his marriage to Audrey Hitchcock. **AFFIRMED.**

Kent Balduchi, Des Moines, for appellant.

Jeanne Johnson and Robert Laden, Des Moines, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

MILLER, J.

Benjamin Hitchcock appeals the district court's denial of his petition for modification of the visitation provisions of the decree dissolving his marriage to Audrey Hitchcock. Benjamin claims the court erred in denying his request for increased visitation with the parties' two children, and erred in awarding attorney fees to Audrey. Each party requests an award of appellate attorney fees. We affirm.

The parties' marriage was dissolved by an October 24, 2002 decree. Their two children were then approximately four-and-one-half years of age and three years of age. The agreed-to decree ordered joint legal custody of the children and placed their physical care with Audrey. It provided that Benjamin would have visitation alternating weekends, from 6:00 p.m. Friday to 7:00 p.m. Sunday; each Wednesday evening until the younger child began kindergarten, and then overnight each Wednesday; father's day and Benjamin's birthday; one-half of the children's birthdays; one-half of major holidays, with the holidays alternating each year; one-half of the children's winter break from school; one-half of the children's spring break from school; and three weeks each summer. The decree required Benjamin to pay child support, plus an additional amount each month toward a child support arrearage.

In August 2006 Benjamin filed a petition to modify the decree. He sought increased visitation as well as some changes in the visitation schedule. The increased visitation he sought consisted in large part of Sunday night overnights on the weekends he had the children during the school year, and additional time

during summers. Audrey filed an answer denying material allegations of Benjamin's petition, and included a counterclaim for increased child support. She sought an award of attorney fees and costs.

The parties agreed to an increase in child support. After Benjamin presented evidence and rested, Audrey moved for dismissal of his request for modification of visitation. *See* Iowa R. Civ. P. 1.945. The district court sustained the motion and dismissed Benjamin's petition, ordered the agreed-to increase to $798.32 per month in Benjamin's child support obligation, awarded attorney fees to Audrey, and ordered Benjamin to pay court costs. Benjamin appeals.

Our review of the district court's involuntary dismissal of Benjamin's petition in equity for modification is de novo, because that dismissal operates as an adjudication on the merits. Iowa R. Civ. P. 1.946; *King v. King*, 291 N.W.2d 22, 24 (Iowa 1980). We examine the entire record and adjudicate anew rights on the issues properly presented. *In re Marriage of Ales*, 592 N.W.2d 698, 702 (Iowa Ct. App. 1999). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*). This is because the trial court has a firsthand opportunity to hear the evidence and view the witnesses. *In re Marriage of Will*, 489 N.W.2d 394, 397 (Iowa 1992). Prior cases are of little precedential value on modification of visitation issues, and courts must base their decisions on the particular circumstances of the parties before them. *In re Petition of Holub*, 584 N.W.2d 731, 732 (Iowa Ct. App. 1998).

> The parent seeking to modify child visitation provisions of a dissolution decree must establish by a preponderance of evidence

> that there has been a material change in circumstances since the decree and that the requested change in visitation is in the best interests of the children. This standard follows the criteria used in actions to modify child custody, except a much less extensive change in circumstances is generally required in visitation cases. The rationale for this lower standard is found in the prevailing principle that the best interests of children are ordinarily fostered by a continuing association with the noncustodial parent. When a noncustodial parent seeks to expand the visitation provisions provided in the original decree, the burden of proof rests with the parent seeking the enlarged visitation.

In re Marriage of Salmon, 519 N.W.2d 94, 95-96 (Iowa Ct. App. 1994).

In his petition Benjamin alleged as grounds for modification that since the dissolution of the parties' marriage (1) he had remarried, (2) he was now able to exercise more time with the children, and (3) Audrey had returned to school, creating periods of time the children could spend with him without detracting from their time with Audrey. The evidence shows that in the four and three-fourths years since dissolution of the parties' marriage certain changes had occurred. Benjamin had remarried and had a supportive wife who got along well with the children and was at times able to assist him with them. He had moved from a duplex shared with a roommate to a house he and his wife were buying. Benjamin had changed employment, from a job that involved some overnights out of town to one that did not and allowed him some additional flexibility. He had apparently matured, having resolved unemployment fraud and domestic abuse charges by receiving deferred judgments and having no further charges or allegations of criminal activity. The children had become nine and seven years of age. The district court noted these changes in circumstances, and concluded

they did not amount to such changes as to justify modification to increase Benjamin's visitation with the children.

"[W]e recognize the reasonable discretion of the district court [concerning modification of] visitation rights and will not disturb its decision unless the record fairly shows it has failed to do equity." *Salmon*, 519 N.W.2d at 95. The agreed-to schedule in the decree of dissolution provides Benjamin with what can reasonably be characterized as normal or typical visitation for a "noncustodial" parent. Benjamin has the children for visitation about one-third of the days of the year. Although there have been changes in circumstances, all of the changes are of a nature that may reasonably be contemplated at the time of a dissolution of marriage and frequently occur thereafter. They do not, either individually or collectively, rise to such a level as to require modification in the best interests of the children. We conclude the record does not show that the district court's decision on this issue failed to do equity. We therefore affirm the court's denial of Benjamin's petition to modify visitation.[1]

The district court awarded Audrey $4,500 in attorney fees. Benjamin claims the court erred in doing so, arguing: "The record is devoid of any exhibit or evidence regarding the specific amount of Audrey's attorney fees or whether the alleged fees are fair and reasonable." In a proceeding for modification of a decree dissolving a marriage the district court "may award attorney fees to the prevailing party in an amount deemed reasonable by the court." Iowa Code §

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[1] In affirming on this issue we nevertheless note our Supreme Court's strong disapproval, for stated reasons, of moving for or, ordinarily, sustaining a motion to dismiss at the conclusion of the moving party's evidence in an equity case. *See King*, 291 N.W.2d at 24.

598.36 (2007). An amount awarded must be fair and reasonable and based on the parties' respective abilities to pay. *In re Marriage of Hansen*, 514 N.W.2d 109, 112 (Iowa Ct. App. 1994). "An award of 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).

Audrey is the prevailing party. Benjamin is employed full-time as a licensed plumber. Benjamin's testimony shows that Audrey was in school when the dissolution decree was entered in October 2002, remained in school when Benjamin filed a petition for modification in 2004,[2] and remained in school when Benjamin filed the current modification action in August 2006.[3]

Audrey's attorney made a professional statement that his attorney fees would have been $7,500 if trial had taken the two days a calendar entry order had required the parties to suggest. Trial in fact took approximately one-half day. We find the trial court's award of attorney fees supported by evidence in the form of counsel's professional statement. Although the amount of the award appears rather large given the limited number and nature of the issues presented and the length of trial, we cannot say that the trial court abused its considerable discretion. We therefore affirm on this issue.

Each party seeks an award of appellate attorney fees. Appellate attorney fees are not a matter of right, but rather rest in the appellate court's discretion. *In*

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[2] That petition was dismissed for Benjamin's failure or refusal to produce documents sought by Audrey.

[3] The record does not appear to make clear whether Audrey remained in school at the time of trial on the current petition for modification.

re Marriage of Sullins, 715 N.W.2d 242, 255 (Iowa 2006). We consider the needs of a party seeking an award, the ability of the other party to pay, and the relative merits of the appeal. *Id.* Applying these factors to the circumstances in this case, we award Audrey $1000 in appellate attorney fees.

AFFIRMED.