

IN THE COURT OF APPEALS OF IOWA

No. 8-516 / 07-1018
Filed July 30, 2008

**IN RE THE MARRIAGE OF CARLIN KILSON
FRENCH AND ESTHER CAROL FRENCH**

**Upon the Petition of
CARLIN KILSON FRENCH,**
Petitioner-Appellant,

**And Concerning
ESTHER CAROL FRENCH,**
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, John Bauercamper, Judge.

Carlin French appeals the district court's denial of his application to modify the visitation provisions of a dissolution decree. **AFFIRMED.**

David A. Roth of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

Judith O'Donohoe of Elwood, O'Donohoe, Braun & White, Charles City, for appellee.

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

VAITHESWARAN, J.

Carlin French appeals the district court's denial of his application to modify the visitation provisions of a dissolution decree.

I. Background Facts and Proceedings

Carlin and Esther French divorced in 2002. The dissolution decree granted Esther physical care of the parties' two children, Brandon and Abbie, born in 1996 and 2001 respectively. Carlin was granted liberal visitation rights, subject to a default schedule, which, in pertinent part, provided as follows: (1) alternate weekend visitation from Friday at 5:00 p.m. until Tuesday at 8:00 a.m. until Brandon began school and, after that, Friday at 5:00 p.m. until Sunday at 6:00 p.m.; (2) one overnight visit per week on either Tuesday or Thursday evening, (3) up to four weeks of summer visitation, to be taken in two-week increments, and (4) and spring break in alternating years.

In 2006, Carlin applied to modify the visitation provisions of the dissolution decree. He sought (1) an extension of the overnight visitation provision from Thursday nights to Thursday through Monday nights in alternating weeks, allowing him alternating week visitation from 5:00 p.m. on Thursday until Tuesday morning, (2) an increase in summer visitation from four to six weeks, (3) visitation every spring break rather than every other spring break, and (4) visitation on evenings when Esther worked. In conjunction with this request for more visitation, Carlin sought a five percent decrease in his child support obligation. That obligation had recently been increased by the Child Support Recovery Unit from \$600 to \$850 per month.

Following a hearing, the district court denied Carlin's application, concluding the evidence was "not sufficient to carry the burden of proof in favor of a change in visitation." The court ordered Carlin to pay \$2500 toward Esther's trial attorney fees. Carlin appealed.

II. Visitation

To justify a change in visitation, a party must show there has been a change of circumstances since the divorce decree was entered. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa Ct. App. 1994). The governing consideration is the best interests of the children. *In re Marriage of Stepp*, 485 N.W.2d 846, 849 (Iowa Ct. App. 1992). On our de novo review, we agree with the district court that Carlin did not prove a change of circumstances.

Carlin first argues "the parties [sic] geographic location" warrants a modification. However, at the modification hearing, he conceded that he and his former wife were living in the same towns they had lived in at the time a supplemental dissolution decree was entered.¹ In fact, Carlin agreed with opposing counsel's assertion that there had "been no change in terms of the distance . . . since the entry of the decree of dissolution." Accordingly, we reject this ground for modification.

Carlin next argues the parties cannot communicate effectively about visitation, making court intervention the only "avenue for redress." Again, the record does not support his contention. In 2003, Esther agreed to temporarily adjust the visitation schedule so each party would have one child at a time. In

¹ A supplemental dissolution decree suggests otherwise, but Carlin's unequivocal testimony at the modification hearing appears more persuasive on this point.

2006, Esther agreed to extend Carlin's summer visitation to six weeks. Esther also agreed to swap visitation days and provided extra visitation on special occasions not specified in the decree. Finally, at the modification hearing, Esther agreed to allow Carlin visitation during the evenings she worked, as long as he exercised that visitation in her town rather than his. On this record, we are not persuaded that the parents experienced communication difficulties.

As Carlin failed to prove a change in circumstances, he is not entitled to a modification of the visitation schedule.

III. Attorney Fees

Under Iowa Code section 598.36 (2005), the district court is authorized to award attorney fees to the prevailing party in a modification action. An award is in the court's discretion based on the party's ability to pay and whether the party resisting the modification petition was successful. *In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995)

Carlin argues the court abused its discretion in awarding trial attorney fees "[b]ecause there was no finding nor evidence on the parties' ability to pay." We are not persuaded by this argument, because the record contains evidence that Carlin's income was significantly higher than Esther's. Based on this evidence, we affirm the award of \$2500 in trial attorney fees.

Esther requests an award of \$1500 in appellate attorney fees. Based on the parties' respective incomes, we order Carlin to pay this sum.

AFFIRMED.