

**IN THE COURT OF APPEALS OF IOWA**

No. 8-733 / 08-0557  
Filed January 22, 2009

**IN RE THE MARRIAGE OF NAREN CUNNINGHAM AND SCOTT  
CUNNINGHAM**

**Upon the Petition of  
NAREN CUNNINGHAM,**  
Petitioner-Appellee,

**And Concerning  
SCOTT CUNNINGHAM,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Dallas County, Paul R. Huscher,  
Judge.

Scott Cunningham appeals a district court order denying his petition to  
modify the custody provisions of a dissolution decree. **AFFIRMED AS  
MODIFIED.**

Jane White of Parrish Kruidenier Dunn Boles Gribble Parrish Gentry &  
Fisher L.L.P., Des Moines, for appellant.

Angela Shutts of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Heard by Eisenhauer, P.J., and Doyle, J., and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**EISENHAUER, J.**

Scott Cunningham appeals a district court order denying his petition to modify the custody provisions of a dissolution decree. We affirm the custody award and modify visitation to include Easter in the alternating holiday schedule.

**I. Background Facts and Proceedings.**

Scott and Naren Cunningham divorced in 2005 when their daughter, Jordan, was two years old. Pursuant to a stipulation, the dissolution decree awarded the parties joint legal custody of Jordan with physical care to Naren. At the time of the divorce, Scott was a Waukee police officer working a nine-day rotation: three days, three nights, three days off. The decree's visitation schedule included three overnight stays and one afternoon visit every nine days. In the summer, Scott had three weeks of visitation. Subsequently, Scott changed jobs and now works Monday through Friday, 8:00 a.m. to 4:00 p.m., as a school resource officer.

In July 2007, Scott applied to modify the decree seeking physical care of Jordan. At the hearing, however, Scott changed his request to joint physical care. The district court ruled Scott had not established a substantial change of circumstances warranting a change in physical care. The court, however, increased Scott's visitation to include five weeks in the summer. Scott also received alternate weekends plus two overnight visitations: (1) every Thursday; and (2) on Mondays when Naren had Jordan on the weekend. This appeal followed.

## II. Custody Modification.

To obtain a modification of custody, Scott had to show a substantial change of circumstances since the time of the decree, not contemplated when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). He also had to show the change was more or less permanent and related to the welfare of Jordan. See *id.* A “substantial change in circumstances” involves changed conditions which are material as opposed to trivial and permanent or continuous as opposed to temporary. *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006). “This heavy burden stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.” *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). In applying these standards, we review the record de novo. Iowa R. App. P. 6.4.

Scott claims he established a substantial change of circumstances not contemplated at the time of the decree by a combination of three occurrences: (1) his remarriage; (2) changes in his work schedule; and (3) the fact he took Jordan to the majority of her medical appointments after the divorce.

The remarriage and new family which Scott offers are matters which were foreseeable when the decree was entered and do not establish a basis for changing custody. See *In re Marriage of Mikelson*, 299 N.W.2d 670, 673 (Iowa 1980); *In re Marriage of Wagner*, 272 N.W.2d 418, 421 (Iowa 1978) (holding remarriage insufficient to change custody). He is to be commended for having

what appears to be a stable family with a new spouse, but those circumstances do not demonstrate a compelling basis for changing custody.

Scott cites no authority where physical care is changed based upon a parents' changed work schedule. Also, we are also not convinced Scott's new hours meet the "permanent change" portion of the test. Obviously, work schedules of divorced parents can and do fluctuate. Original divorce decrees are "entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties." *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa Ct. App. 1991). Therefore, "any changes in circumstances that are natural occurrences and as such could be foreseen by the court, will not justify modification." *Id.* Scott's new work hours are a natural occurrence.

Finally, the record shows Scott took Jordan to the majority of her health appointments because his prior work schedule included three days off and three unscheduled days after working the midnight shift. Scott's flexibility and willingness to accommodate Jordan's regularly-scheduled medical needs meant neither parent had to leave work for these appointments. However, Naren testified that currently, since Scott works days, the medical appointments have "pretty much gone 50/50." The record concerning this factor does not demonstrate a compelling basis for changing custody.

Our conclusion does not change as we consider the factors in combination, as urged by Scott. For such an argument to be successful, Scott must show "the simultaneous occurrence of the multiple factors was so unusual as to cast doubt on its foreseeability." *Chmelicek*, 480 N.W.2d at 575. Scott has

not made such a showing. First, the factor concerning transportation to medical appointments has changed due to the change in Scott's work schedule. Second, we do not consider the combination of Scott's remarriage and new work hours to be simultaneous occurrences so unusual as to be unforeseeable.

In seeking to modify the physical care arrangement, Scott has a heavy burden. See *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The trial court had the parties before it. Giving deference to the trial court's findings, we likewise conclude Scott did not establish a substantial change of circumstances not contemplated at the time of the decree that was more or less permanent and related to the welfare of Jordan. Because we decide no substantial change of circumstances has been proven, we do not address the issue of burden of proof when changing from physical care with one parent to joint physical care.

### **III. Visitation Modification.**

In the alternative, Scott seeks to change the district court's visitation modification. Scott argues he should receive additional week-night visitation and additional Easter and Christmas visitation. After our de novo review, we agree Easter should be added to the rotation of alternating holidays. Easter visitation shall be from 6:00 p.m. on Saturday until 6:00 p.m. on Sunday. We consider the district court's visitation modification to be equitable and decline Scott's request for additional week-night visitation. Finally, we adopt the district court's logic and explanation of winter break and Christmas visitation:

The simple fact is this child has a break from her schooling that provides a week usually in the middle of the school year. And it's

appropriate for the court to attempt to divide that period so that both parties will have some time with the child.

**IV. Attorney Fees.**

Scott seeks appellate attorney fees, which are discretionary. See *In re Marriage of Krone*, 530 N.W.2d 468, 472 (Iowa Ct. App. 1995). We decline to award attorney fees. Costs are taxed to Scott.

**AFFIRMED AS MODIFIED.**