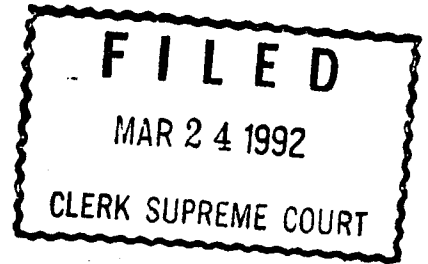


IN THE COURT OF APPEALS OF IOWA

No. 1-624 / 91-553



IN RE THE MARRIAGE OF DANA L. PETROWSKY AND
BARRY M. PETROWSKY

Upon the Petition of
DANA L. PETROWSKY,

Appellant/Cross-Appellee,

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And Concerning
BARRY M. PETROWSKY,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Polk County,
Gene Needles, Judge.

Both parties appeal a district court order modifying
their dissolution decree. **AFFIRMED.**

David L. Brown of Hansen, McClintock & Riley,
Des Moines, for appellant.

Tom Hyland of Hyland, Laden & Pearson, P.C., Des
Moines, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett,
JJ., but decided en banc. Oxberger, C.J., takes no part.

DONIELSON, P.J.

In June 1989, the marriage of Dana and Barry Petrowsky was dissolved. The parties were awarded joint custody of their two children, Todd, born in 1979, and Melissa, born in 1985. Dana was awarded the physical care of the children, and Barry was granted reasonable visitation.

Barry is a commercial real estate broker. In 1988, when the original dissolution decree was entered, he earned close to \$94,000. Accordingly, the dissolution court set his child support obligation at \$1,500 per month. Again, in 1989, he earned \$90,000. However, the record in this modification action shows that in 1990 Barry earned only \$43,000--less than half the amount upon which his child support obligation was originally calculated.

The decrease in Barry's income is attributable to a downturn in the commercial real estate market. Gene Stanbrough of Coldwell Banker Stanbrough and Associates Realtors testified the downturn was caused by the confluence of several factors, including the recession and the reluctance of lenders to finance real estate transactions in the wake of the banking and savings and loan crises. Stanbrough was not optimistic the market would recover quickly.

Dana was a supervisor with the Iowa Department of Human Services when the decree was entered. Her annual salary exceeded \$50,000. However, in February 1990, Dana left Des

Moines to take a federal position in Kansas City with a salary of approximately \$71,500 per year.

In February 1990, Barry filed a petition for modification of the parties' dissolution decree. He sought a change in custody based in part on Dana's move, her attempts to alienate the children from him, and her failure to consult Barry concerning the children. Barry later amended his petition to seek, in the alternative, a decrease in child support. Barry noted the change in the parties' incomes.

The district court modified the parties decree. The court refused to award Barry physical care of the children, but provided a more fixed schedule of visitation, including six weeks of visitation for Barry in the summer. The court also reduced Barry's child support obligation. The court required Barry to pay, as of January 1991, \$600 per month per child through April 1991. Thereafter, Barry was required to pay \$400 per month per child through January 1993, at which time the support would be increased to \$600 per month per child. Additionally, Barry's child support obligation was ordered reduced by fifty percent during summer visitation. The parties were required to pay their own attorney fees.

Dana appeals and Barry cross-appeals this modification order. In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly

presented. In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). 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. 14(f)(7).

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since entry of the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). The supreme court in In re Marriage of Vetterneck, 334 N.W.2d 761, 762 (Iowa 1983), lists the factors to be considered in determining whether modification is warranted.

A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been in the contemplation of the trial court when the original decree was entered.

I.

We first address the issue of custody. Once custody 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). We find Barry has not established by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially

changed such that the children's best interests require a modification. See In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983). The children have lived with Dana since 1989. Barry has not proven an ability to minister more effectively to the children's well-being. See id.

Barry argues Dana has put great effort into undermining his relationship with Todd. In addition, he states Dana has made decisions regarding the children's medical, religious, and social care without promptly consulting him. He also argues Dana leaves Todd alone for two hours after school without a baby-sitter. We agree with the trial court that some of these incidents are disturbing, but we still find it in the children's best interests that their primary physical care continue with Dana.

II.

We also affirm the trial court's modification of Barry's child support obligation. Dana argues the court erred in reducing Barry's support payments, claiming he failed to demonstrate a permanent and substantial change of circumstances. Barry states the trial court properly reduced his support obligation but failed to use the child support guidelines.

The party seeking modification must prove the changed circumstances are "material and substantial, not trivial, more or less permanent or continuous, [and] not temporary . . ." In re Marriage of Bergfeld, 465 N.W.2d 865, 870 (Iowa 1991) (quoting Mears v. Mears, 213 N.W.2d 511, 515 (Iowa

1973)). We believe Barry has met his burden of proof. We find Barry's income has been substantially reduced and will remain lowered for a sustained period of time. We also agree with the trial court that Dana's income has substantially increased. She has jumped from \$50,000 to \$71,500 since the time of the dissolution. While Dana argues she is a presidential appointee and can be removed at any time, we note that except in rare circumstances, all jobs can quickly come to an end.

We find these two factors constitute a continuing material and substantial change in the circumstances since entry of the original dissolution decree. We therefore affirm the trial court's decision to modify Barry's child support obligation.

Barry made \$43,091.42 or \$3,591.00 per month in 1990. The record shows he would have had a net income for child support purposes of \$2,395.25 per month. Dana earns more than \$3,000 per month. Therefore, applying the December 31, 1990, child support guidelines, Barry's obligation would be \$718.58 per month.

Thus, we find the trial court's award of \$1,200 per month (\$800 per month between April and January 1993) to be quite adequate. We believe the amount arrived at by the trial court properly reflects Barry's proven earning potential yet accounts for the present downturn in the commercial real estate market.

Additionally, while the trial court was clearly not required to do so, we believe the trial court was wise in reducing Barry's child support obligation by fifty percent during the summer months when Barry has six weeks of visitation. We understand this provision will require some budgeting on Dana's part. But Dana's income exceeds \$71,000 per year. Combined, her annual gross income and child support presently total approximately \$80,000. As such, we do not believe it unjust to ask Dana to budget her income and child support in order to be able to pay her expenses during the six-week period of reduced payments. Such a small inconvenience is clearly an equitable way to help Barry through hard economic times. We affirm the trial court's modification of Barry's child support obligation.

III.

The trial court set a specific visitation schedule for the parties. The schedule provides for visitation on alternate weekends and alternate holidays. Dana feels the parties' prior arrangements for visitation have been adequate; she believes the visitation requirement would be disruptive to the children's lives. Barry states that Dana has afforded him visitation nearly every weekend, but he fears Dana is now beginning to enroll the children in too many extracurricular activities in order to hinder his visitation.

In order to justify a modification in visitation rights, the moving party must show a change in circumstances since the dissolution decree. In re Marriage of Fortelka, 425 N.W.2d 671, 672 (Iowa App. 1988). We believe Barry has shown such a change. We affirm the trial court's visitation schedule. The evidence shows that Barry saw the children at least every other day when they were in Des Moines. Barry does not now have the ability to visit them so often. In addition, Dana's tendency to make decisions about the children without consulting Barry requires a mandatory visitation schedule. Visitation in this situation is possible every other week. The parties already have the habit of meeting half way between the two cities. We find the court did not err in setting a specific visitation schedule.

IV.

Finally, Dana argues she should be awarded appellate attorney fees. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. In re Marriage of Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). We are to 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 trial court's decision on appeal. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Taking these considerations into account, we determine the parties should pay their own

appellate attorney fees. The costs of this action should also be split.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.

All judges concur, except Schlegel and Hayden, JJ., who concur in part and dissent in part.

SCHLEGEL, J. (concurring in part, dissenting in part)

The trial court modified Barry's child support obligation, and the majority affirms this modification in toto. I disagree solely with the majority's determination that "while the trial court was clearly not required to do so, . . . the trial court was wise in reducing Barry's child support obligation during the summer months when Barry has six weeks of visitation."

I believe the trial court evinced no wisdom in so acting. The majority of Dana's expenses of maintaining a home will continue during the visitation period. See In re Marriage of Behn, 385 N.W.2d 540, 543 (Iowa 1986). "The reduced food and incidental expenses would not mandate interruption in support payments." Id. I would modify the trial court decree to order child support for a twelve-month year since the custodial parent's expenses "are only slightly reduced during the child's absence." In re Marriage of Oakes, 462 N.W.2d 730, 733-34 (Iowa App. 1990).

Hayden, J., joins this concurrence in part and dissent in part.