

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-622 / 89-684

MARY FRANCES CURTIS,

Appellee,

vs.

KELLY DARRIN FITZPATRICK,

Appellant.

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Appeal from the Iowa District Court for Linn County,
Thomas M. Horan, Judge.

Kelly appeals a district court ruling on an application
to modify a custodial order. **REVERSED.**

Christine L. Crilley of Ackley, Kopecky & Kingery,
Cedar Rapids, for appellant.

Stephen B. Jackson, Cedar Rapids, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

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Hilary Victoria Curtis was born on May 9, 1985. Her mother is Mary Curtis. She was unmarried.

On July 30, 1985, the State of Iowa, on behalf of Mary and Hilary, filed a petition to establish paternity and support against Kelly Fitzpatrick, the putative father. In July 1986, an order was entered approving the stipulation and agreement of the parties. Kelly admitted paternity. Custody was split between the parties such that Kelly had custody from Monday through Thursday and Mary had custody from Thursday to Monday. No child support was awarded. A final order of support and adjudication of paternity was entered in August 1986. Subsequent to this order, Hilary took her father's last name.

In November 1988, Kelly filed an application to show cause against Mary contending that she was not complying with the custody order. In response, Mary filed an application to modify the previous order regarding the support and custody of Hilary. The contempt action was eventually continued indefinitely.

At trial it was established that Kelly is a sergeant on the Cedar Rapids police force with a net weekly income of approximately \$475. Mary is employed by the Voice of the Hawkeyes and earns a net weekly income of approximately \$157.

Following trial, the district court entered its ruling on application to modify custodial order. Mary was awarded the primary physical care of Hilary subject to Kelly's visitation. Kelly was awarded visitation on alternating weekends and holidays as well as four weeks in the summer. Kelly was ordered to pay child support of \$75 per week commencing April 28, 1989. The parties are obligated to pay their own attorney fees. Kelly has filed an appeal from this ruling. Mary filed a cross-appeal in this court from the ruling. In her brief, Mary challenges the lack of an award of attorney fees in district court.

Our review in cases such as these is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7). We are not bound by these determinations, however. Id. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

Kelly contends there has been no substantial change in circumstances warranting a modification of the earlier decree. In considering a modification of the initial award of custody, the court looks for a material and substantial change in circumstances. In re Marriage of Dethrow, 357 N.W.2d 44, 45 (Iowa App. 1984). The principal question for

us, as it was for the trial court, is whether [the party seeking custodial change] established by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to [modify custody]. The changed circumstances must not have been contemplated by the trial court when the decree was entered. They must be more or less permanent or continuous, not temporary, and must relate to the welfare of the children. In re Marriage of Hubbard, 315 N.W.2d 75, 80 (Iowa 1982).

This case was not brought under chapter 598 of the Iowa Code. However, the criteria governing our determination of custody are the same, regardless of whether the parents are dissolving their marriage or are unwed. Neubauer v. Newcomb, 423 N.W.2d 26 (Iowa App. 1988). We hold that there has not been a material and substantial change in circumstances since the earlier decree. Both parties are still employed as they were at the time of the decree. They still work substantially the same hours as before. The custody is still the same and the strength of the relationships with her parents is unchanged. Hilary's world has remained unchanged and whatever changes have taken place have been insufficient to rise to the level of material and substantial. While we normally discourage this type of "split custody" arrangement, having found no

material change in circumstances, we reverse and remand to the trial court to reinstate the earlier decree.

Mary's counterclaim is dismissed. She failed to file the counterclaim in the district court where the order was filed as required by Iowa Rule of Appellate Procedure 6. The case of Gordon v. Wright County Board of Supervisors, 320 N.W.2d 565, 566 (Iowa 1982), also addresses this issue and states that we are without jurisdiction if the requirements of rule 6 have not been met.

Mary requests attorney fees on appeal. 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). Mary was not successful on her appeal, however this is not the only deciding factor. Kelly is in a substantially better position financially than Mary and should be required to contribute toward her attorney fees. We award Mary attorney fees in the amount of \$500 and assess costs against Kelly.

REVERSED.