

IN THE COURT OF APPEALS OF IOWA

No. 8-359 / 97-1574

**IN RE THE MARRIAGE OF DENISE DAWN BAUMGARTNER AND KENT
DOUGLAS BAUMGARTNER**

Upon the Petition of
DENISE DAWN BAUMGARTNER,
Appellee,

And Concerning
KENT DOUGLAS BAUMGARTNER,
Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K.
Bovard, Judge.

The respondent appeals the district court's ruling on his petition for
modification of the parties' original dissolution decree. **AFFIRMED IN PART AND
MODIFIED IN PART.**

Mark A. Young of Young Law Office, Mason City, for appellant.

Denise Dawn Baumgartner, Largo, Florida, pro se, appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ.

VOGEL, J.

Kent Baumgartner appeals the district court's ruling on his petition for modification of the parties' original dissolution decree. We find that visitation should be modified to accommodate the distance between Kent and the children and spousal support terminated but otherwise affirm.

Background facts. A dissolution decree dissolving the marriage of Kent and Denise Baumgartner was entered in January of 1995. Denise was granted physical care of their two children, Terry, born in 1983, and Sherri, born in 1986. Kent was granted liberal visitation and was ordered to pay \$1,008 per month in child support.

In September of 1995 Kent filed a petition to modify, seeking a reduction in child support and a modification of the visitation provisions of the original decree. In August of 1996, Kent filed an application for a temporary injunction after learning that Denise and the children were planning to move to Florida. The court denied the temporary injunction, and Kent amended his still-pending petition to modify in January of 1997 to request a change of custody.

After a trial on January 29, 1997, the district court, by Judge John Mackey, issued a ruling dated February 21, 1997, in which Kent's child support payments were reduced to \$255 per month. Although not requested in Kent's petition to modify, the court also terminated Kent's \$150 per month spousal support obligation. Denise

received notice of the trial but was not present nor represented. Both modifications were retroactive to October 1, 1995. Denise did not appeal the ruling.

Following the January 29th trial but prior to the February 21st ruling by Judge Mackey, another order was signed by Judge Bovard which set a trial date of May 29, 1997, for the issues of custody, child support and visitation. Just prior to that trial, and over the objections of Kent's counsel, Judge Bovard advised counsel that in addition to the child custody and visitation issues, he intended to revisit the issues of child and spousal support. Denise was again not present nor represented by counsel, but had sent letters addressed to the court to state her position regarding child and spousal support, custody, and visitation. After a hearing, Judge Bovard affirmed the earlier reduction of Kent's child support obligation entered in February of 1997 but vacated the prior termination of spousal support, finding that the issue was decided prematurely by Judge Mackey and that Kent had failed to show substantial evidence of his inability to provide spousal support. Judge Bovard further denied Kent's requests for modification of child custody and visitation. Kent appeals.

Standard of review. We review a district court's modification of a dissolution decree de novo. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996); Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound to them. *Courtade*, 560 N.W.2d at 37; Iowa R. App. P. 14(f)(7).

I. Authority to modify spousal support. Kent contends the district court was without authority to modify the February 21st order modifying the spousal support provision. Kent asserts that without a request from either party, the district court may not change provisions of a prior order merely because it decided a previous judge decided an issue prematurely.

As Kent's contention is a challenge to Judge Bovard's authority to modify Judge Mackey's order on spousal support, we review for correction of errors of law. *See In re Marriage of Seyler*, 559 N.W.2d 7, 8-9 (Iowa 1997); *In re Marriage of Engler*, 532 N.W.2d 747, 748 (Iowa 1995).

Contrary to both district court's conclusions, we find that Kent did not raise the issue of spousal support in his petition or amended petition. Judge Mackey's order was therefore voidable. *See Mahaffa v. Mahaffa*, 230 Iowa 679, 683-84, 298 N.W. 916, 919 (1941) ("Where a court has jurisdiction over the person and the subject matter of a case, no error in the judgment can make it void."). However, Denise did not file a 179(b) motion nor appeal Judge Mackey's order, and therefore the order must stand as a final judgment. *See Gail v. Western Convenience Stores*, 434 N.W.2d 862, 863 (Iowa 1989) ("A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review.")(citing *Marshfield Homes, Inc. v. Eichmeier*, 176 N.W.2d 850, 851 (Iowa 1970)); *see also Bisenius v. Bisenius*, 573 N.W.2d 258, 260 (Iowa 1998).

Because Judge Mackey's ruling was a final, unappealed judgment, the issue of spousal support could not be revisited by Judge Bovard at the May 1997 trial nor can we at this point address it on appeal. We therefore modify that portion of the June 1997 order dealing with spousal support and reinstate the February 21, 1997 order which terminated spousal support retroactive to October 1, 1995.

II. Custody. Kent next argues the court failed to modify the decree by awarding him physical care of their children.

"To change a custodial provision of a dissolution decree, the applying party must establish 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 make the requested change." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983) (citing *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980)). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. *Id.* This burden is premised on the principle that once custodial arrangements for a child have been fixed, it should be disturbed only for the most cogent reasons. *See Id.*

A change in the residence of a party is a factor the court shall consider when determining whether there is a substantial change in circumstances on a petition for modification. Iowa Code § 598(8)(f) (1995).¹

¹ Since Denise's move to Florida in August of 1996, the legislature has expanded on this factor in Iowa Code section 598.21(8A) (1997) which provides in part:

Previous appellate decisions which have addressed the issue of a change in residence as a ground for modification of custody generally focus on the motivation behind the move, as well as the overall impact of the move on the children. *See, e.g., Frederici*, 338 N.W.2d at 160; *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa App. 1996); *In re Marriage of Smith*, 491 N.W.2d 538, 540-41 (Iowa App. 1992). However, a change in residence by the custodial parent following the original decree, even out-of-state, does not itself justify a change in custody. *Dale*, 555 N.W.2d at 245.

During the hearing on the temporary injunction, Denise testified that she had been struggling financially since her day care operation closed and because she was receiving less child support after Kent lost his job with UPS. Denise testified that she had been unsuccessful in obtaining employment in Iowa and was planning to stay with her mother in Florida and look for employment there. We find Denise's motives were proper and that the move by itself is not a change that would warrant a change of primary physical care.

Kent also complains that Denise has not kept him informed of the children's activities and has refused to allow the children to call him. The best interest of a child includes the opportunity for a continuous relationship with both parents. *In re*

If a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation substantial change in circumstances.

Marriage of Zabecki, 389 N.W.2d 396, 398 (Iowa 1986). If visitation rights of the noncustodial parent are jeopardized by the conduct of the custodial parent, such acts can provide an adequate ground for a change of custody. *In re Marriage of Quirk-Edwards*, 509 N.W.2d 476, 480 (Iowa 1993). However, in Denise's letters to the court, she states that she has been willing to allow Kent to exercise visitation, but that his vague estimations of when he will pick up and return the children have been continually disruptive. She complains that Kent wants to take the children out of school so that he can exercise visitation and that he has failed to return the children at agreed-upon times. Given the conflicting facts asserted by the parties, we agree with the trial court that Kent does not meet his heavy burden to justify a change in custody.

Kent also asserts the district court improperly considered his psychological report prepared on November 8, 1994, prior to the original dissolution trial. He claims that its use at this modification trial was entirely outside the rules of evidence. At the outset of the trial, the court informed Kent that Denise's correspondence was going to be included as part of the record. Kent's counsel did not object to this; however, he was apparently unaware that Denise had attached the psychological report to her correspondence. In ruling on Kent's 179(b) motion, the court found that while the report was not offered during the course of the hearing, it was part of the court file and as such could be judicially noticed by the court pursuant to Iowa Rule

of Evidence 201(b) and (f). We find that the report does not fall within the scope of rule 201, and therefore should not have been considered by the court. However, we note the court drew its own conclusions in regard to Kent's candidacy as a custodial parent from observing his demeanor and testimony at trial. Excluding the psychological report from consideration, we nonetheless find that Kent has failed to met his burden to modify custody.

III. Visitation. Finally, Kent contends the district court erred in failing to find there had not been a substantial change in circumstances justifying modification of the visitation provisions of the decree.

To justify a change in visitation, a party must show there has been a change of circumstances since the dissolution decree. *In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa App. 1994). The burden in a modification of visitation rights is different than the burden in a child custody case. *Id.* Generally, a much less extensive change in circumstances need be shown in visitation rights cases. *Id.*

In the original decree, Kent was granted visitation on alternate weekends and holidays, some weekly visits, and five weeks of vacation during his vacation schedule. A change in residence by the custodial parent involving a substantial distance can present significant obstacles to regular and active visitation by the noncustodial parent. *Dale*, 555 N.W.2d at 245 (Iowa App. 1996). It can frustrate an important underlying goal that children be assured the opportunity for maximum continuing

physical and emotional contact by both parents following their parents divorce. *Id.*; *In re Marriage of Ruden*, 509 N.W.2d 494, 496 (Iowa App. 1993). Although not in existence during the time of trial, legislation regarding this issue has since been enacted in Iowa Code Chapter 598, and provides some guidance.² Moreover, with the greater distances involved in travel to accomplish visitations, the continuation of the initial visitation provisions of the decree may prove to be unjustifiably upsetting and disruptive to the children. *See In re Marriage of Lower*, 269 N.W.2d 822, 827 (Iowa 1978); *Remsburg v. Remsburg*, 180 N.W.2d 461, 463 (Iowa 1970).

The trial court found: “the visitation schedule as set out in the Stipulation contains sufficient flexibility particularly with reference to extended visitations during summer and school vacation opportunities that it provides a suitable framework for the children to benefit from optimum contacts with their father without further ‘tinkering’ by the Court.” While we too are hesitant to “tinker,” we find that no adjustment was made to the visitation which would accommodate the great distance between the children and their father. We find there has been a sufficient change of circumstances in this case to justify modification of the visitation provisions.

² Iowa Code section 598.21(8A) (1997) provides, in part:

If the court determines that the relocation is a substantial change in circumstances, the court shall modify the custody order, to, at a minimum, preserve, as nearly as possible, the existing relationship between the minor child and the nonrelocating parent. If modified, the order may include a provision for extended visitation during summer vacations and school breaks and scheduled telephone contact between the nonrelocating parent and the minor child.

Consequently, we modify the visitation as follows: Five weeks during the summer, with Kent to notify Denise by March 1 of each year as to the specific dates; spring break in alternate years with one week during Christmas break. Should Kent be in Florida, he is allowed reasonable visitation with the children provided he notify Denise at least 48 hours in advance of the visit. The telephone contact provision of the original decree is not modified.

We remind the parties that liberal visitation rights are in the best interests of the children. Iowa Code § 598.41(1)(1995); *In re Marriage of Muell*, 408 N.W.2d 774, 777 (Iowa App. 1987). Both parents, as joint custodians, are charged with maintaining those interests. *In Marriage of Riddle*, 500 N.W.2d 718, 720 (Iowa App. 1993).

Having considered all other issues before us on appeal, we affirm the district court as modified.

AFFIRMED IN PART AND MODIFIED IN PART.

Huitink, J., concurs; Sackett, P.J., concurs in part and dissents in part.

SACKETT, P.J. (concurring in part; dissenting in part)

I concur in part and dissent in part. I would affirm the trial court.