

IN THE COURT OF APPEALS OF IOWA

No. 7-630 / 97-0252

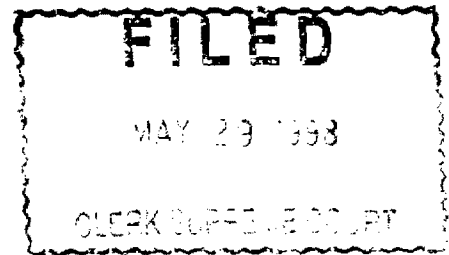
**IN RE THE MARRIAGE OF BEVERLY ROBIN
ROSENFELD AND MARTIN SANFORD ROSENFELD**

**Upon the Petition of
BEVERLY ROBIN ROSENFELD,**

Petitioner-Appellee,

**And Concerning
MARTIN SANFORD ROSENFELD,**

Respondent-Appellant.



Appeal from the Iowa District Court for Polk County, Jerrold W. Jordan,
Judge.

Respondent appeals a district court order requiring him to pay petitioner \$1400
in attorney fees due to his request to change the location of his 1996 Thanksgiving
vacation visitation. **AFFIRMED.**

David S. Wiggins of Wiggins, Anderson, & Conger, P.C., West Des Moines,
for appellant.

Bernard L. Spaeth and Megan M. Antenucci of Whitfield & Eddy, P.L.C.,
Des Moines, for appellee.

Considered by Cady, C.J., and Huitink and Mahan, JJ. Streit, J., takes no part.

MAHAN, J.

This is an appeal by a husband claiming the district court should not have ordered him to pay a portion of his wife's attorney fees for the parties' visitation dispute. We affirm the decision of the district court.

Martin and Beverly Rosenfeld were divorced in December 1990. They have two minor children, Andrew and Natalie. The children are in the primary physical care of Beverly. *See In re Marriage of Rosenfeld*, 524 N.W.2d 212, 216 (Iowa App. 1994). Martin and Beverly are both doctors of osteopathy.

In June 1995, Beverly filed an application to modify visitation because she was planning to move to North Carolina. On September 1, 1995, the district court modified the parties' visitation schedule. The court determined Martin should have visitation in Des Moines for spring break, winter break, and five weeks during the summer. Also, Martin was entitled to visitation in North Carolina for Thanksgiving and Rosh Hashana beginning in 1996, and in alternating years thereafter. Martin was ordered to pay a portion of Beverly's attorney fees. We affirmed on appeal. *In re Marriage of Rosenfeld*, No. 95-2226 (Iowa App. Nov. 27, 1996).

On October 11, 1996, Martin filed a request to have Thanksgiving visitation in Des Moines for that year. He testified he was on call for the weekend of Thanksgiving and had been unable to exchange time with any other doctors in his practice group. He asked to have the children visit him because he was unable to travel to North Carolina. Beverly resisted the application.

The district court found there had not been a material and permanent change in circumstances. The court granted Martin's request as an attempt to accommodate the parties to permit a visitation which would have been lost otherwise. The court believed Martin could have avoided the matter if he had acted earlier. Martin was ordered to pay Beverly's attorney fees of \$1400.

Martin has appealed. He contends the district court should not have awarded attorney fees to Beverly. Under Iowa Code section 598.36, a prevailing party in a modification may be awarded attorney fees. *In re Marriage of Bolick*, 539 N.W.2d 357, 361 (Iowa 1995). Martin asserts Beverly was not the prevailing party in the modification action.

We find the present matter is not a modification action. The district court specifically found there had not been a substantial change in circumstances. Furthermore, the court's ruling did not permanently change the parties' visitation schedule, but instead was a one-time accommodation to permit Martin to have visitation in Des Moines instead of North Carolina.

We find the attorney fees were authorized by Iowa Code section 598.21, which permits a court to make such order in relation to the children, property, parties, and the maintenance of the parties as shall be justified. *In re Marriage of Romig*, 207 N.W.2d 780, 783 (Iowa 1973). This section contemplated and anticipated the allowance of attorney fees in a proper case. *Id.*

District courts have considerable discretion in awarding attorney fees. *In re Marriage of Miller*, 552 N.W.2d 460, 465 (Iowa App. 1996). To overturn the decision of the trial court, a party must establish the trial court abused its discretion. *In re Marriage of Erickson*, 553 N.W.2d 905, 908 (Iowa App. 1996). An award of attorney fees must be for a fair and reasonable amount and based on the parties' respective abilities to pay. *Miller*, 552 N.W.2d at 465.

We find no abuse of discretion in the district court's award of attorney fees to Beverly. Martin's income is much greater than that of Beverly. Also, as the district court found, Martin was aware of the scheduling problem with his 1996 Thanksgiving visitation for some time, but was unable to work out a solution on his own. We affirm the award of \$1400 in attorney fees to Beverly.

Martin claims he should have been awarded attorney fees for the visitation dispute. We determine the district court did not abuse its discretion in failing to award attorney fees to Martin.

Both parties seek attorney fees for this appeal. Appellate attorney fees are discretionary. *In re Marriage of Ask*, 551 N.W.2d 643, 646 (Iowa 1996). In determining this question, we 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. *Id.* We determine Martin should pay Beverly \$1000 toward her appellate attorney fees.

We ~~affirm~~ the decision of the district court. Costs of this appeal are assessed to Martin.

AFFIRMED.