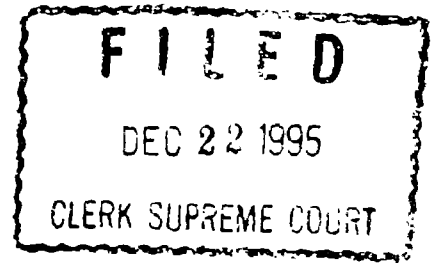


IN THE COURT OF APPEALS OF IOWA

No. 5-619 / 95-0317



**IN RE THE MARRIAGE OF KADIE JEAN VAN GUNDY AND
DEAN CLAUDE VAN GUNDY**

Upon the Petition of
KADIE JEAN VAN GUNDY,

Appellee,

And Concerning
DEAN CLAUDE VAN GUNDY,

Appellant.

Appeal from the Iowa District Court for Dallas County, David L. Christensen,
Judge.

Dean Van Gundy appeals a district court order dismissing his application for
modification of the decree dissolving his marriage to Kadie Van Gundy. **AFFIRMED.**

Ronald A. Baybayan, Des Moines, for appellant.

James V. McKinney of McKinney Law Offices, P.C., Waukegan, for appellee.

Considered by Hayden, P.J., and Cady and Huitink, JJ.

HUITINK, J.

Dean Claude Van Gundy appeals the district court order dismissing his application for modification of the decree dissolving his marriage to Kadie Jean Van Gundy. The district court determined it lacked subject matter jurisdiction to modify the decree pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA). We affirm.

Dean and Kadie's marriage was dissolved in 1992. The decree awarded the parties joint legal custody of their minor children, Michael and Christopher, and gave Kadie primary physical care. The decree provided Dean with liberal visitation privileges and specified Kadie was to keep Dean informed of the children's school and social activities. Kadie and the children were living in Glendale, Oregon, when the decree was issued and remained there throughout the course of these proceedings. Dean continues to reside in Iowa.

In May 1994 Dean filed an application for rule to show cause, claiming he was not allowed spring 1994 visitation with Christopher as required by the decree. Kadie subsequently filed an answer and application for modification of the support and visitation provisions of the decree. She denied violating the terms of the decree and requested the court to readjust child support obligations to reflect a change in Dean's income. She further released all of her custodial rights and obligations to seventeen-year-old Michael, stating Dean may be the better caretaker. Dean filed an

answer to Kadie's modification application along with an application to modify custody.

The district court found Kadie in contempt for violating the visitation provisions of the decree and required her to send the children to Iowa within four days of the June 10 order. That order also transferred custody of Michael to Dean as requested by the parties. Kadie, however, did not comply with the order and was again found in contempt on July 7, 1994. The order further transferred temporary custody of Christopher to Dean pursuant to Iowa Code section 598.23(b) and allowed Dean to travel to Oregon to pick up the children.

After a hearing to determine permanent custody of Christopher, the district court issued an order detailing Kadie's failure to comply with the dissolution decree and the court's orders. The court further found, however, that it lacked subject matter jurisdiction to change custody under the Uniform Child Custody Jurisdiction Act, Iowa Code section 598A. The court withdrew its prior custody orders but retained the contempt findings. Dean filed a motion to reconsider which the court denied citing lack of personal and subject matter jurisdiction in the prior rule to show cause proceeding. Kadie subsequently filed a motion to dismiss for lack of subject matter jurisdiction which the district court granted by calendar entry. Dean appeals.

Cases raised under the UCCJA are equitable in nature. *St. Clair v. Faulkner*, 305 N.W.2d 441, 445 (Iowa 1981). As a result, our review is de novo. *Id.*; Iowa R.

App. P. 4. We give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

The continuing subject matter jurisdiction allowing the trial court to modify a dissolution decree is subject to the provisions of chapter 598A when a party seeks modification of the child custody provisions of the decree. Iowa Code § 598.21 (1993), *In re Marriage of McEvoy*, 414 N.W.2d 855, 857 (Iowa App. 1987). Chapter 598A provides for a jurisdictional bias in favor of the decree-issuing state to retain jurisdiction unless contact with the children has virtually ceased. *Id.* The children's residency in another state for more than six months does not diminish that preference. *In re Marriage of Cervetti*, 497 N.W.2d 897, 899 (Iowa 1993). Submission of a person to the jurisdiction of the court does not confer jurisdiction under the act. *Slindel v. Valentine*, 298 N.W.2d 599, 602 (Iowa 1980). A court which has jurisdiction to modify a decree, however, may decline to exercise jurisdiction if it finds it is an inconvenient forum to make a custody determination under the circumstances. Iowa Code § 598A.7 (1993); *Cervetti*, 497 N.W.2d at 900-01.

The district court declined to modify the custody provisions of the Van Gundy's pursuant to the Uniform Child Custody Jurisdiction Act. The relevant provisions of the Act provide:

1. A court of this state which is competent to decide child custody matters has jurisdiction to make a custody determination by . . . modification decree if:

a. This state is the home state of the child at the time of commencement of the proceeding, or had been the child's home state within six months before commencement of the proceeding or;

b. It is in the best interest of the child that a court of this state assume jurisdiction because the child and the child's parents, or the child and at least one contestant, have a significant connection with this state, and there is in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

Iowa Code § 598A.3(1)(a) and (b).

Dean contends that although Iowa is not Michael and Christopher's home state under § 598A.3(1)(a) of the Act, the children have a "significant connection" with the state of Iowa to allow the court jurisdiction under section 598A.3(1)(b). We agree Michael and Christopher lived in Iowa until 1991 when their mother moved them to Oregon. Since that time they have made regular visits to see their father who continues to reside in Waukee. They have spent significant portions of their spring and summer vacations in Iowa, and Michael, in fact, lived with Dean from the summer of 1993 until December of that year. These facts, when viewed along with the preference for the decree state to retain jurisdiction, leads us to conclude that Iowa does not lack subject matter jurisdiction to modify the custody provisions of the decree.

Despite our determination that Iowa does not lack subject matter jurisdiction under the UCCJA, we find Iowa to be an inconvenient forum under section 598A.7(3) of the Act. That section provides that a court with jurisdiction may decline to take action on a modification application if another state is a more appropriate forum. Iowa

Code § 598A.7(3)(1993). In making its determination, the court must consider such things as the children's current residence, which state has the closest connection with the children and their family members, and where information concerning the children's present or future care, protection, training and personal relationships is most readily available. *Id.*; *Cervetti*, 497 N.W.2d at 901. Section 598A.7(3) also instructs us to make our determination in light of the UCCJA purposes. *Id.* Section 598A.1(3) provides that courts must assure that custody litigation takes place in the state with which the child and family have the closest connection and where information concerning the child is most readily available. Iowa Code § 598A.1(3). A court is to decline the exercise of jurisdiction when the child and the family have a closer connection with another state. *Id.*

Upon our de novo review, we find Oregon is the state with the most significant connection to Michael and Christopher. Michael, Christopher, and Kadie have resided in Oregon since 1991. Michael and Christopher attend school there and have made the state their home. Michael and Christopher's contacts with Iowa are limited to bi-annual visits with their father. While these visits are sufficient to retain jurisdiction, they do not make Iowa the best forum for us to determine important custody issues. We believe Oregon is the proper forum in which to best consider the children's present and future care, protection, training, and personal relationships.

We will affirm on appeal where any proper basis appears for the trial court's ruling, even though it is not the one upon which the court based its decision. *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 441 (Iowa 1988). We find the district court should have declined to modify the Van Gundys' dissolution decree based on forum inconvenience rather than lack of subject matter jurisdiction. Accordingly, we affirm the district court's result on these grounds.

Finally, Kadie requests that attorney fees and appeal costs be assigned to Dean. 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). Having considered these factors, we determine each party should be responsible for his or her own attorney fees and costs on appeal.

AFFIRMED.