

IN THE COURT OF APPEALS OF IOWA

No. 2-525 / 92-100

FILED

MAY 04 1993

CLERK SUPREME COURT

IN RE THE MARRIAGE OF LINDA DIANE HENDERSON FARLEY AND
DAVID WAYNE HENDERSON

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Upon the Petition of

LINDA DIANE HENDERSON FARLEY,

Appellant,

And Concerning

DAVID WAYNE HENDERSON,

Appellee.

Appeal from the Iowa District Court for Johnson County,
William L. Thomas, Judge.

The mother appeals from the district court's order
modifying the visitation provision of the dissolution
decree. **AFFIRMED.**

C. Peter Hayek and Lisa A. Oxley of Hayek, Hayek &
Brown, Iowa City, for appellant.

Stephen C. Gerard, II, of Gerard & Becker, Coralville,
for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ.

HABEAS, J. 000248

Linda Diane Henderson appeals the district court's order modifying the visitation provisions of the dissolution decree. We affirm as modified.

Linda and David Henderson were divorced in 1987. At that time, the parties resided in Johnson County.

Linda and David have two children, Christopher, age thirteen, and Casey, age six. Pursuant to the divorce decree and in accordance with a stipulation of the parties, the petitioner and respondent were awarded joint custody of their children, with primary care awarded to petitioner-appellant.

David was granted liberal and frequent visitation rights. In this respect, the dissolution decree incorporated the following from the parties' stipulation:

The Court is not at this time requested to establish specific minimum visitation periods for the exercise of frequent and liberal visitations has not posed a problem in the past and it is not expected to in the future. However, the parties do agree, that in the event either party changes their principal place of residence from Johnson County, Iowa to a non-contiguous county to Johnson County, then either party may request that the Court establish minimum visitation periods in the event the parties are unable to do so themselves.

Linda moved to Waterloo. The parties were unable to agree to a visitation schedule. David then filed a petition for modification of the decree, requesting that the district court establish specific minimum visitation periods.

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On December 23, 1991, the district court ordered the following modification: David is entitled to alternate weekend visitation from 5:00 p.m. Friday to 5:00 p.m. Sunday. David is entitled to six weeks summer visitation, during which time Linda is to have weekend visitation on the weekends she would have under the alternate weekend schedule. The children's attendance at camps, not to exceed ten days total, is to count as part of David's visitation.

In addition, the trial court, in its modification decree, set forth the following visitation schedule for the parties, which does not appear to be in dispute:

c. CHRISTMAS. The parties have agreed to the following for Christmas, 1991: the children shall remain with Linda from the beginning of the school Christmas vacation until 8:00 A.M. on December 25, 1991. David shall have the children with him from 8:00 A.M. December 25, 1991 until 5:00 P.M. on December 31, 1991.

For 1992 and following years, David shall be entitled to visitation during the Christmas holidays which will include Christmas Day each odd numbered year and which will not include Christmas Day each even numbered year. In odd numbered years, David's visitation shall begin at 8:00 A.M. on Christmas Day and continue until 5:00 P.M. on December 31. In even numbered years, David's visitation shall begin at 5:00 P.M. on the day the children are dismissed from school for the winter break and continue to 8:00 A.M. on Christmas Day and shall resume again at 5:00 P.M. on New Year's Eve and continue until 5:00 P.M. on the day before the commencement of school in the new year.

d. OTHER HOLIDAYS. In addition, David shall, during odd numbered years, have visitation with the minor children on New Year's Day, Memorial Day, and Labor Day. In even numbered years David shall [have] visitation with the children during their spring break from school.

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During even numbered years, David shall have visitation with the minor children on Independence Day and Thanksgiving Day.

David shall have visitation with the minor children on David's birthday and on Father's Day each year and on the minor childrens' birthdays in even numbered years. Linda shall have visitation with the children on her birthday each year, and on Mother's Day each year.

Generally, holiday visitation shall begin at 5:00 p.m. on the day preceding the designated holiday and shall end at 8:00 p.m. on the day of the designated holiday.

Independence Day visitation shall be from 5:00 p.m. on July 3, until July 5 at 8:00 a.m. In odd numbered years, if the Independence Day visitation period occurs during David's summer visitation, then Linda shall be entitled to visit with the children from 5:00 p.m. July 3 until 9:00 a.m. July 5.

Spring break visitation shall begin at 5:00 p.m. on the Sunday following the last day of school prior to the commencement of spring break and shall continue to 5:00 p.m. the following Friday.

Thanksgiving Day visitation shall commence when the children are dismissed from school at the commencement of the Thanksgiving break, but not earlier than 12:00 on the Wednesday preceding Thanksgiving, and shall continue to 5:00 p.m. on the Friday following Thanksgiving.

The trial court also provided that each party would have four weekend "wild card" days and six weekday "wild card" days, on which visitation could occur if there were special circumstances that warranted consideration for a change in the visitation scheduling. Each party could deny access once per year.

For the most part, Linda on appeal challenges only the length of summer visitation allowed David, along with his weekday "wild card" days.

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Our review of this equitable action is de novo. In re Marriage of Brown, 487 N.W.2d 331, 332 (Iowa 1992). We are not bound by the district court's findings of fact, but we do give them deference because the district court had an opportunity to view, firsthand, the demeanor of the witnesses when testifying. Id.

Pursuant to Iowa Code section 598.21(8) (1991), a court of competent jurisdiction may subsequently modify a decree of dissolution where there has been a substantial change in circumstances. In re Marriage of Feustel, 467 N.W.2d 261, 263 (Iowa 1991); See Iowa Code § 598.21(8)(a)-(k) (1991). Linda's move to Waterloo made impractical the parties already tenuous visitation agreement. The relationship between the parties has deteriorated so they are no longer able to agree on a liberal visitation schedule without the assistance of the court.

I. Six Weeks Summer Visitation.

Linda contends that while a six-week visitation may be desirable for Casey, the younger child, Christopher, is reaching his young adolescence and may not want so much visitation due to increased summer activities. Linda also argues that the six-week visitation period would hamper her plans for a vacation with the children and her new husband.

The court should include liberal visitation where appropriate, in order to afford the children the opportunity to maximize the continuing physical and

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emotional contact with both parents. Iowa Code § 598.41(1) (1991). The governing consideration, as always, is the best interest of the children. Id. A healthy parent-child relationship has already been established between the children and their father. This relationship should be encouraged and nourished. We agree with the trial court that the six weeks summer visitation period maximizes the opportunity for the children and David to maintain a close relationship. We believe the provision in the modification which includes the children's attendance at camp (up to ten days) in David's visitation time, makes the summer visitation flexible enough to accommodate Christopher's busy schedule. However, we remind the parties that when scheduling visitation, they need to give due consideration to the educational and social needs of the children.

II. Wild Card Visitation.

Linda also objects to the weekday wild card provision. She feels that it would be too disruptive to the children because David is only required to give 24-hour notice. We disagree and affirm on this issue.

Linda has no objections to the weekend wild card provision. With that in mind, we will not disturb that part of the visitation schedule.

III. Attorney Fees.

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Finally, David requests attorney fees for this 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 Hunt, 476 N.W.2d 99, 103 (Iowa App. 1991). 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. Id. at 104.

We conclude each party should pay his/her own attorney fees for this appeal. Costs of this appeal are assessed to Linda.

AFFIRMED.