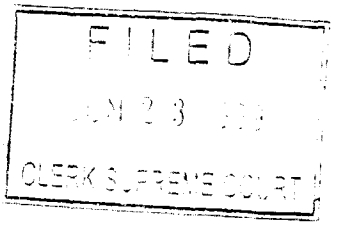
IN THE COURT OF APPEALS OF IOWA

No. 1999-52 (9-207) / 98-1348
Filed June 23, 1999

IN RE THE MARRIAGE OF STEPHANIE HARRINGTON-SCHUSTER AND JOHN SCHUSTER

Upon the Petition of
STEPHANIE HARRINGTON-SCHUSTER,
Petitioner-Appellee,

And Concerning
JOHN SCHUSTER,
Respondent-Appellant.



Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Respondent appeals the district court order sustaining petitioner's motion to dismiss respondent's application for modification of the custody provisions of the parties' dissolution decree. **AFFIRMED.**

Eric Borseth of Borseth and Genest Law Office, Pleasant Hill, for appellant.

Kolleen K. Samek, Des Moines, for appellee.

Considered by Huitink, P.J., and Zimmer and Schlegel,* JJ.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

SCHLEGEL, S.J.

John Schuster appeals the district court order sustaining Stephanie Harrington-Schuster's motion to dismiss his application for modification of the custody provisions of the parties' dissolution decree. John contends the district court erred in determining it lacked subject matter jurisdiction to modify the decree. We affirm.

John and Stephanie have one child together, Zachary, born May 25, 1994. Their marriage was dissolved by decree entered on May 24, 1996. The parties were awarded joint legal custody of Zachary; primary physical care was awarded to Stephanie.

The decree acknowledged it was in Zachary's best interest to remain in Iowa and provided that Stephanie's relocation with Zachary out-of-state would constitute a substantial change of circumstances which would allow John to seek a modification of the custody provisions of the decree.

Stephanie remarried and moved to Missouri in May 1997. John filed his application for modification in April 1998, eleven months after Stephanie and Zachary left Iowa.

Stephanie filed a motion to dismiss for lack of personal jurisdiction. The district court granted the motion, concluding: (1) John is a resident of Iowa; (2) Zachary's home state is Missouri; (3) the jurisdictional requirements of Iowa

Code section 598A.3 are not met; and (4) pursuant to section 598A.7, Missouri is the more appropriate forum.

I. STANDARD OF REVIEW. Because the underlying action involves child custody, equitable principles apply and our review is de novo. *In re Marriage of Cervetti*, 497 N.W.2d 897, 899 (Iowa 1993); *In re Marriage of Olive*, 340 N.W.2d 792, 794 (Iowa App. 1983). The jurisdictional requirements of the Uniform Child Custody Jurisdiction Act, as codified in Iowa Code chapter 598A, are mandatory, not discretionary. *In re Marriage of Ross*, 471 N.W.2d 889, 893 (Iowa App. 1991). If the district court lacks subject matter jurisdiction, it is without authority to hear the case and must dismiss the petition. *Id.*

II. SUBJECT MATTER JURISDICTION. In Iowa, we favor continuing jurisdiction of the decree state when modification is sought. *Cervetti*, 497 N.W.2d at 899. The child's residency in another state for more than six months does not diminish the preference. *Id.* However, at some point a child's ties to the decree state may become too tenuous to justify continuing jurisdiction. *Id.* at 900. Under Iowa law, we can no longer exercise jurisdiction, despite our status as the decree state, if the factors of Iowa Code section 598A.3 are not met. *Id.*

At the time of the hearing, John had been living in Kansas for seven months on a work assignment. John's employer has offices in the State of Iowa. John has a residence in Ankeny and testified he would return to Iowa when his work assignment was completed. John has bank accounts in Iowa and Kansas, files Iowa income tax

returns, and receives mail at his Ankeny address. John had also been traveling to Iowa twice a month and apparently maintained an Iowa driver's license.

John exercised his visitation with Zachary in Kansas. He acknowledged Zachary's medical records, school records, and other documents are located in the Missouri/Kansas area. Finally, John acknowledged the most up-to-date and pertinent information about Zachary was contained in records and documents located in the Missouri/Kansas area.

Iowa Code section 598A.3(b) requires a showing that the child and at least one contestant have a significant connection with this state, and there is substantial evidence concerning the child's present or future care, protection, training, and personal relationships available in this state. Clearly, Iowa is not Zachary's "home state." *See* Iowa Code § 598A.2(5). Nor does it appear Zachary has significant connections with Iowa because John spends little time in Iowa and Zachary visits his father in Kansas, not Iowa. *See Cervetti*, 497 N.W.2d at 900. Furthermore, it appears Missouri, rather than Iowa, better meets the requirements of section 598A.3(b). *See* Iowa Code § 598A.3(d).

We find the court correctly determined it did not have jurisdiction to determine this child custody matter. However, even if the facts of this case met the requirements of section 598A.3, jurisdiction could properly be declined under section 598A.7. Missouri is a more convenient forum because it is Zachary's "home state," has a closer connection to both Zachary and Stephanie, and substantial evidence concerning

the child's present or future care, protection, training, and personal relationships is more readily available in Missouri: the most up-to-date and pertinent information about Zachary was contained in records and documents located in the Missouri/Kansas area.

III. APPELLATE ATTORNEY FEES. Stephanie has requested appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests in our discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa App. 1997). In determining whether to award appellate attorney fees, 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 decision of the trial court on appeal. *Id.* We decline to award appellate attorney fees in this case.

For these reasons, we affirm the district court order sustaining Stephanie's motion to dismiss John's application for modification of the custody provisions of the parties' dissolution decree.

AFFIRMED.

No. 98-1348. [1999-52 (9-207)] IN RE MARRIAGE OF SCHUSTER

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge. **AFFIRMED.** Considered by Huitink, P.J., and Zimmer, J., and Schlegel, S.J. Opinion by Schlegel, S.J. (5 pages $2.00)

John and Stephanie have one child together, Zachary, born May 25, 1994. Their marriage was dissolved by decree entered on May 24, 1996. The parties were awarded joint legal custody of Zachary; primary physical care was awarded to Stephanie. Stephanie remarried and moved to Missouri in May 1997. John filed his application for modification in April 1998, eleven months after Stephanie and Zachary left Iowa. The district court dismissed this action for lack of jurisdiction concluding: (1) John is a resident of Iowa; (2) Zachary's home state is Missouri; (3) the jurisdictional requirements of Iowa Code section 598A.3 are not met; and (4) pursuant to section 598A.7, Missouri is the more appropriate forum. **OPINION HOLDS: I.** ***Subject Matter Jurisdiction.*** Clearly, Iowa is not Zachary's "home state." Nor does it appear Zachary has significant connections with Iowa because John spends little time in Iowa and Zachary visits his father in Kansas, not Iowa. Furthermore, it appears Missouri, rather than Iowa, better meets the requirements of section 598A.3(b). We find the court correctly determined it did not have jurisdiction to determine this child custody matter. Jurisdiction could also properly be declined under section 598A.7. Missouri is a more convenient forum because it is Zachary's "home state," has a closer connection to both Zachary and Stephanie, and substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in Missouri. **II.** ***Appellate Attorney Fees.*** We decline to award appellate attorney fees in this case.