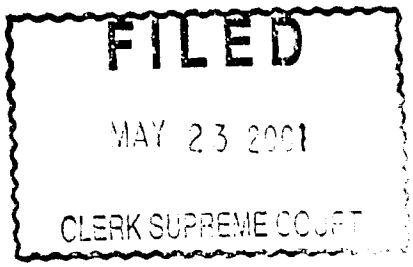
IN THE COURT OF APPEALS OF IOWA

No. 1-257 / 00-0670
May 23, 2001

IN RE THE MARRIAGE OF JOHN R. LARSEN AND TRICIA E. LARSEN

Upon the Petition of
JOHN R. LARSEN,
Petitioner-Appellant,



And Concerning
TRICIA E. LARSEN,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

The petitioner appeals a district court ruling on his petition to modify child custody, and respondent's counterclaim for modification of child support and visitation. **AFFIRMED.**

Norman L. Springer, Jr. of McGinn, McGinn, Jennings & Springer, Council Bluffs, for appellant.

Christopher J. Tinley of Root, Tinley & Sondag, Council Bluffs, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

The petitioner, John Larsen, appeals a district court ruling on his petition to modify child custody, and respondent's counterclaim for modification of child support and visitation. Petitioner argues the district court erred in: (1) failing to award him physical care of the parties' minor child; (2) modifying his visitation schedule; and (3) calculating his child support obligation. Respondent, Tricia Larsen, requests an award of appellate attorney fees. We affirm.

Background Facts and Proceedings. Tricia and John were married in August 1994. The parties' child, Mollie, was born in January 1996. The marriage was dissolved pursuant to a stipulated decree of dissolution filed October 6, 1997. Tricia was not represented by counsel during the dissolution proceeding. The decree awarded joint custody with physical care to Tricia "subject to reasonable rights of visitation in [John]." Due to the parties' work schedules, John's visitation with Mollie occurred on Thursday evening through Monday morning each week.[1]

John filed a petition for modification on February 13, 1998, four months following entry of the decree, requesting primary physical care of Mollie.[2] Tricia filed an answer and counterclaim on February 26, 1998, requesting an increase in child support pursuant to the Iowa Child Support Guidelines and modification of visitation to provide a fixed schedule. Trial on the petition for modification was not held until February 2000.

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[1] John, a salesman with his family's company, was required to travel during the week, and Tricia worked most weekends.

[2] The filing of the petition was prompted by Tricia's move from Tabor, Iowa, to Ames. Tricia moved back to Tabor after two to four weeks.

In the fall of 1999, John enrolled Mollie at the Montessori school in Council Bluffs. Mollie attended classes Mondays and Wednesdays. John also enrolled Mollie in various extracurricular activities including swimming, gymnastics and dance. Due to Mollie's preschool schedule and John's decreased weekday travel schedule, the parties agreed to change John's visitation. At the time of trial, Mollie spent Sunday evening through Thursday morning with John.

Tricia testified John unilaterally enrolled Mollie in preschool and other activities without discussing it with her. Tricia acquiesced to Mollie's preschool placement because it was in Mollie's best interest. However, Tricia testified she did not intend for the preschool arrangement to be permanent. In addition, she disagreed with John's insistence Mollie take part in activities she apparently does not enjoy, such as dance and gymnastics.

The district court denied John's motion to modify physical care and granted Tricia's counterclaim by outlining specific visitation times and increasing John's support obligation. The court denied John's motion to enlarge or amend pursuant to Iowa Rule of Civil Procedure 179(b). In it's order denying John's 179(b) motion, the court concluded:

> Finally, the Court must comment on the demeanor of John during the trial. It was apparent that John hoped to exploit Tricia's cooperative arrangements for "reasonable" visitation, as provided by the decree of dissolution, as he testified he did not believe he should be required to pay child support because he had the child about equal time. The contradiction of John's position is quite obvious. If Tricia does not liberally cooperate with visitation, John will complain he didn't receive reasonable visitation. If she yields to his demands, he will contend he shouldn't pay child support. It appeared to the Court that John intended to control their post-dissolution relationship to his best advantage. Further, John did not always spend his time with his daughter, Mollie. On many

occasions, Mollie was left in the care of other family members or his girlfriend.

John appeals.

Scope of Review. Our review is de novo. Iowa R. App. P. 4. Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us. *In re Marriage of Weidner*, 338 N.W.2d 351, 356 (Iowa 1983). We give weight to the trial court's fact findings, particularly when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7); *In re Marriage of Fox*, 559 N.W.2d 26, 28 (Iowa 1997).

Child Custody. Custody, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). To change a custodial provision of a dissolution decree, the party seeking modification must establish by a preponderance of evidence that conditions since the order was entered have so materially and substantially changed that the child's best interest make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The change must be more or less permanent and relate to the welfare of the children, but must not have been contemplated by the court when the decree was entered. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998).

In addition to the burden of showing a material and substantial change in circumstances, John must also show he has the ability superior to that of Tricia to minister to Mollie's needs. *Whalen*, 569 N.W.2d at 628. Therefore, the question

is not which is the better home but whether John has demonstrated he can offer Mollie superior care. *Id.*

John argues his burden of proof should be lessened due to his status as de facto primary physical care giver. He asks the court to address the issue left unanswered by this court in *In re Marriage of Spears*, 529 N.W.2d 299 (Iowa Ct. App. 1994) (because father, de facto primary caretaker, demonstrated a superior ability to care for the children, no need to address whether the burden of proof to modify custody should have been shifted from him).

We refuse to address the issue John raises because he has failed to prove he is the de facto primary physical caretaker. John has arranged for Mollie to spend more than fifty percent of her time with him by enrolling her in preschool and various activities in Council Bluffs without first consulting Tricia. Moreover, the record reveals John's family members or girlfriend take Mollie to her activities most of the time. John has not "assumed the position of the primary care parent." *See Spears*, 529 N.W.2d at 302.

John argues he provides "the most stable environment for Mollie." To support his argument, he points to Tricia's six-month period of unemployment and her short-lived move to Ames. The move to Ames, however, took place nearly two years prior to the modification hearing. Our de novo review of the record reveals it had no negative effect on Mollie and did not interfere with John's visitation. In addition, Tricia was able to meet Mollie's needs during the period of her unemployment. We conclude John has failed to meet his burden of showing a material and substantial change in circumstances, or a superior ability to care for Mollie. We affirm the district court on this issue.

Visitation. To modify visitation privileges, the party seeking modification must show a change of circumstances has occurred since the entry of the initial decree. *Petition of Holub*, 584 N.W.2d 731, 733 (Iowa Ct. App. 1998). Generally, a much less extensive change of circumstances need be shown in visitation right cases. *Id.*

We conclude Tricia met her burden of showing a change in circumstances since the entry of the initial decree. The visitation schedule established at the time of the decree accommodated the parties' work schedules. At the time of trial on the modification petition, however, those work circumstances no longer existed. The visitation schedule followed by the parties just prior to the modification hearing permitted Mollie to attend preschool in Council Bluffs, a situation John set up on his own without consulting Tricia. Tricia never intended for the preschool arrangement to be permanent, and expressed a desire to enroll Mollie in a preschool program in Tabor beginning in the fall of 2000.

The district court realized Mollie would soon be enrolling in elementary school, which would require a change in the visitation schedule. It established a specific schedule in order to minimize conflicts between John and Tricia over visitation and "fix the boundaries for a minimum visitation schedule." We affirm the district court on this issue.

Child Support. The decree set child support at $300 per month, plus up to $285 per month for reasonable daycare expenses. Once Mollie enrolled in school, child support would be $585 per month. The district court found the child support ordered in the decree did not conform to the Iowa Uniform Child Support Guidelines, and the decretal court gave no reason for the deviation. *See* Iowa

Code 598.21(4)(a). Therefore, the court, using child support worksheets offered into evidence by Tricia, set John's child support obligation at $626.67 per month, to be adjusted retroactively.

John argues the district court erred in calculating his child support obligation by failing to allow a deduction for dependent health insurance. However, John presented no evidence concerning health insurance at trial. John has failed to rebut the presumption that the amount of child support resulting from the application of the guidelines is the correct amount of child support to be awarded. *See In re Marriage of Gulsvig*, 498 N.W.2d 725, 727 (Iowa 1993). We affirm the district court's modification of John's child support obligation.

Attorney Fees. Tricia requests appellate attorney fees. An award of appellate attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Wood*, 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). A successful party does not have a vested right to appellate attorney fees. *In re Marriage of Vieth*, 591 N.W.2d 639, 641 (Iowa Ct. App. 1999). 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. *Wood*, 567 N.W.2d at 684; *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We order John to contribute $500 toward Tricia's appellate attorney fees.

AFFIRMED.