

IN THE COURT OF APPEALS OF IOWA

No. 1999-123 (9-339) / 98-1194

Filed June 23, 1999

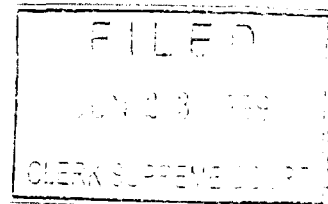
**IN RE THE MARRIAGE OF LISA OTT
and RAYNOLD OTT**

**Upon the Petition of
LISA OTT,**

Petitioner-Appellee/Cross-Appellant,

**And Concerning
RAYNOLD OTT,**

Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Bremer County, John S. Mackey,
Judge.

Respondent appeals, and petitioner cross-appeals, from a district court order
on petitioner's action to modify the parties' dissolution decree. **AFFIRMED.**

Christopher F. O'Donohue of Elwood, O'Donohue, O'Connor & Stochl, New
Hampton, for appellant.

Dale E. Goeke of Hagemann, Goeke, Egli & Thalacker, Waverly, for appellee.

Heard by Sackett, C.J., and Mahan and Zimmer, JJ.

SACKETT, C.J.

Respondent-appellant Raynold R. Ott appeals and petitioner-appellee Lisa K. Ott cross-appeals from a district court order modifying the custodial, visitation, and child support provisions of their dissolution decree. Lisa requests appellate attorney fees. We affirm.

Lisa and Raynold were divorced in 1995. At the time, they stipulated Lisa should have primary physical care of their children, Catherine, born in 1990, and Richard, born in 1993. They also agreed to a complicated schedule of exchange of custodial responsibilities which resulted in the children nearly equally dividing their time between their parents. At the time, both parties lived near Fredericksburg, Iowa. The district court approved the stipulation and fixed Raynold's child support beginning January 1, 1996, at \$350 a month. The dissolution court found child support was "based on the guidelines with adjustments made for the time the children spend with both parents."

Lisa subsequently moved to Tripoli, Iowa, which resulted in the parties living in different school districts and in the transportation arrangement that formed the basis of the original exchange becoming extremely complicated.

Lisa petitioned for modification of visitation and for an increase in child support. The district court modified the original decree to (1) substantially decrease the visitation time Raynold would spend with the children, and (2) increase his child

support obligation to \$599 a month. In addition, Raynold was ordered to pay \$1500 toward Lisa's attorney fees and the court costs associated with the action.

Raynold appeals contending the decree should not have been modified. Furthermore, he contends if it is modified we should remand to order the district court to provide additional visitation for him. Lisa contends the district court should have ordered the child support increase to be retroactive. She also asks Raynold be ordered to pay her appellate attorney fees; Raynold contends each party should pay his or her own.

We review de novo. *In re Marriage of Ruter*, 564 N.W.2d 849, 851 (Iowa App. 1997).

Modification of a dissolution decree is only permitted when there has been a material and substantial change in circumstances since the original decree. *Mears v. Mears*, 213 N.W.2d 511, 514-15 (Iowa 1973). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of evidence. *Thayer v. Thayer*, 286 N.W.2d 222, 223 (Iowa App. 1979). "The trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity." *In re Marriage of Kern*, 408 N.W.2d 387, 389 (Iowa App. 1987) (citing *In re Marriage of Vetternack*, 334 N.W.2d 761, 762 (Iowa 1983)). The principles enumerated in *Vetternack* and applied in *Kern* are applicable here as well:

"A number of principles emerge from our cases: (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within the contemplation of the trial court when the original decree was entered." *Vetternack*, 334 N.W.2d at 762.

In re Marriage of Staton, 511 N.W.2d 418, 420 (Iowa App. 1993)

Raynold contends Lisa has failed to establish a substantial change in circumstance not within the contemplation of the district court at the time the decree dissolving the parties' marriage was entered. He contends the only changes were Lisa's decision to transfer Catherine to a different school district and Lisa's decision to change the place of her residence. Raynold contends these changes were unilateral actions which made more burdensome the arrangement the parties had negotiated with each other at the time of the dissolution. He advances that agreement assured both parents had maximum contact with the children. Raynold contends it is Lisa, not he, who moved and his time with the children should not be curtailed because of Lisa's decision to do so.

This case presents a scenario where the parties negotiated a plan that was barely reasonable and became unreasonable once Lisa changed her residence. There is some merit to Raynold's position he should not lose substantial contact with his children because Lisa decided to move her place of residence. It is argued by Lisa the

move was necessitated by Raynold's unreasonable behavior, while Raynold argues she moved to change the custodial arrangement.

Our review of the record convinces us, while both parents love their children and have placed them in a prioritized place in their lives, neither has been completely reasonable with the other nor have they always put their interests aside in attempting to arrange for the children to maintain maximum contact with both parents. However, our primary concern is not with what is good for Raynold and Lisa. Rather, our concern is what situation serves the interests of the children.

We agree with the district court Lisa's move, when viewed in the context of the custodial arrangement the parties had established, was a substantial change in circumstances. The change made the previous custodial arrangement difficult for the children. We affirm the district court's decision there has been a change in circumstances.

Raynold was granted visitation that included alternating weekends from Friday at 6 p.m. until Sunday at 6 p.m., alternating Wednesdays from 6 p.m. to 9 p.m., and certain holidays specified by the district court. We find the visitation ordered for Raynold by the district court to be reasonable.

Raynold is fair in questioning whether Lisa's voluntary move, motivated not by any significant reasons but at least in part by a desire to distance herself from Raynold, should result in the decree being modified to provide her with more time with the children. We agree, as Raynold urges, there needs to be integrity between

parties when they negotiate a custodial arrangement that is approved and made a part of a dissolution decree to maintain residences that allow the provisions of the decree to be carried out. Yet, the district court was in the better place to assess the interests of the children and we decline to change the modification provisions the district court made.

Lisa contends the child support should have been made retroactive. The district court is given considerable discretion in determining whether child support should be made retroactive. *See In re Marriage of Ober*, 538 N.W.2d 310, 313 (Iowa App. 1995). There is no showing the district court abused its discretion.

Lisa has requested attorney fees on appeal. She was not successful on her issue on cross-appeal. Additionally, while she has been successful in having the custodial and support provisions of the modification affirmed, it was her move that triggered the modification. Under these circumstances, it is not equitable to require Raynold to pay any additional attorney fees for her and we deny her request for the same. Costs on appeal are taxed two-thirds to Raynold and one-third to Lisa.

AFFIRMED.

No. 98-1194. [1999-123 (9-339)] IN RE MARRIAGE OF OTT

Appeal from the Iowa District Court for Bremer County, John S. Mackey, Judge. **AFFIRMED.** Heard by Sackett, C.J., and Mahan and Zimmer, JJ. Opinion by Sackett, C.J. (6 pages \$2.40)

Raynold appeals and Lisa cross-appeals from a district court order modifying the custodial, visitation, and child support provisions of their dissolution decree. Lisa requests appellate attorney fees. We affirm. Lisa and Raynold were divorced in 1995. At the time, they stipulated Lisa should have primary physical care of their children and they agreed to a complicated schedule of exchange of custodial responsibilities which resulted in the children nearly equally dividing their time between their parents. At the time, both parties lived near Fredericksburg, Iowa. The district court approved the stipulation and fixed Raynold's child support at \$350 a month finding the support was "based on the guidelines with adjustments made for the time the children spend with both parents." Lisa moved to Tripoli, Iowa, which resulted in the parties living in different school districts and in the transportation arrangement that formed the basis of the original exchange becoming complicated. Lisa petitioned for modification of visitation and for an increase in child support. The district court modified the original decree to decrease the visitation time and increase Raynold's child support obligation to \$599 a month. Raynold was ordered to pay \$1500 toward Lisa's attorney fees. Raynold contends the decree should not have been modified, and if modified, we should remand to order the district court to provide additional visitation. Lisa contends the court should have ordered the child support increase to be retroactive. She asks Raynold be ordered to pay her appellate attorney fees. Raynold contends Lisa has failed to establish a substantial change in circumstances. He contends the only changes were Lisa's decision to change the place of her residence. Raynold contends these changes made more

No. 98-1194. [1999-123 (9-339)] IN RE MARRIAGE OF OTT (continued)

burdensome the arrangement the parties had negotiated. He advances that agreement assured both parents had maximum contact with the children. Both parents love their children. We agree with the district court Lisa's move, when viewed in the context of the custodial arrangement the parties had established, was a substantial change in circumstances. We affirm. We find the visitation ordered for Raynold by the district court to be reasonable. Lisa contends the child support should have been made retroactive. The district court is given discretion in determining whether child support should be made retroactive. There is no abuse of discretion. Lisa has requested attorney fees on appeal. She was not successful on her cross-appeal. It was her move that triggered the modification. It is not equitable to require Raynold to pay any additional attorney fees for her.