

FILED

AUG 24 1988

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RENEE M. BOETGER AND KEVIN L. BOETGER

Upon the Petition of)

RENEE M. BOETGER,)

Petitioner-Appellee,)

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And Concerning)

8-181
87-1475

KEVIN L. BOETGER,)

Respondent-Appellant.)

Appeal from the Iowa District Court for Woodbury County
(No. 10005), Dewie Gaul, Judge.

Respondent-appellant appeals from the denial of his
petition to modify the custody and visitation provisions of
a dissolution decree. **AFFIRMED.**

Jack Faith of Green & Faith, Sioux City, for
respondent-appellant.

Bradley K. DeJong of Klay, Veldhuizen & DeJohn, Orange
City, for petitioner-appellee.

Heard by Donielson, P.J., and Hayden and Habhab, JJ.

HABHAB, J.

I.

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The main source of controversy, which is treated more seriously than other issues by the appellant in his brief, is the modification of visitation issue. A stipulation was entered into by the parties on February 20, 1986, which in pertinent part stated:

6.2 That the Husband shall have the right to visitation of the minor child every other weekend beginning on Friday at 6:00 p.m. and ending on Sunday at 6:00 p.m., and as otherwise mutually agreed upon by the Petitioner and the Respondent. (emphasis added).

During the first year subsequent to the original decree, the record indicates there were no problems between the parties in abiding by the stipulation. Thereafter, however, appellant contends that the appellee former wife has controlled the times of visitation. He states that due to appellee's behavior, the stipulation, with regard to visitation, "has little value or affect." He therefore prays that the original decree be modified so that he has visitation rights every other weekend, that the parties share holidays with the child, that there is an extended period of visitation lasting three months between appellant and the child each summer, and that appellant be granted a twenty-four-hour visitation between his "designated visitation weekends."

An appellate court's scope of review in divorce proceedings is de novo. Iowa R. App. P. 4. We give weight to

the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. Iowa R. App. P. 14(f)(7). Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties in this case. In re Marriage of Weidner, 338 N.W.2d 351, 356 (Iowa 1983).

A court may modify a dissolution decree when there is a substantial change in circumstances. Iowa Code § 598.21(8) (1987). In determining whether there is a substantial change in circumstances, the court shall consider, inter alia, changes in the physical, emotional, or educational needs of the child and other factors determined to be relevant. Id.

To justify a modification of visitation rights, the person asking for a modification must demonstrate a change of circumstances since the entry of the decree, but such change may be much less extensive than would be necessary to change custody. In re Marriage of Glass, 213 N.W.2d 668, 670 (Iowa 1973).

The changed circumstances, to justify a modification of a decree, must be such as were "not within the knowledge or contemplation of the parties" when the original decree was entered. In re Marriage of Bolin, 336 N.W.2d 441, 443 (Iowa 1983). The burden of proof in a modification proceeding is on the party seeking modification. In re Marriage of Brown, 247 N.W.2d 2, 4 (Iowa 1976).

Based on the record before us, we find no substantially changed circumstances warranting a modification of visitation rights. In regard to this issue, the trial court found

From listening to the testimony and observing the witnesses, it is clear the difficulties in regard to visitation, such as there have been, are due to the Respondent's desire to have greater amounts of visitation than are prescribed by the Decree. The Decree provides that the Respondent has 48 hours visitation every other weekend and such additional visitation as is "mutually agreed." The Respondent clearly resents the fact that the Petitioner, in order for there to be mutual agreement, must agree with him. He apparently feels his wishes and desires in some way require him getting the additional visitation. There is nothing sinister in the Petitioner not agreeing with all the requests of the Respondent for additional visitation. The evidence is clear that the Petitioner is agreeable to Respondent having visitation with the child every other holiday, although she objects to splitting a single holiday between the parents--a position which is reasonable, given the fact that the Respondent lives in the Morningside area of Sioux City and the Petitioner lives in or near Hinton. There is no evidence that the Petitioner has refused to allow some visitation on some holidays, nor is there any evidence she will refuse to allow such in the future or that the parties are unable to mutually agree on a reasonable arrangement. . . . If the Respondent will realize that "mutual agreement" means both must agree, satisfactory alteration as to holidays can be worked out between the parties, especially if Christmas Eve is looked on as one holiday and Christmas Day as another.

Finding the trial court's judgment sound and recognizing that it is in a better position to gauge the credibility of the witnesses due to its observation of them, we affirm the trial court's decision not to modify visitation rights.

II.

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Appellant next asserts that the original decree should be modified so that he is awarded joint legal custody of the child. The question as to custody should be settled once and thereafter little disturbed. In re Marriage of Weidner, 338 N.W.2d 200, 205 (Iowa 1977) (" . . . once custody is fixed it should seldom be disturbed and only then for the most cogent reasons.").

The respondent asserts that he did not know he could ask for joint custody prior to the decree filed February 20, 1986. However, the answer filed by the respondent in that action specifically requested joint custody, and the evidence received at the hearing on the petition for modification shows that respondent expressly agreed that petitioner would have sole custody, that respondent understood the decree which approved the stipulation which provided for sole custody in petitioner, and signed the stipulation before a notary public.

Iowa Code section 598.41(2) states in pertinent part: "On the application of either parent, the court shall consider granting joint custody in cases where the parents do not agree to joint custody" (emphasis added). From the above-stated facts, it is clear the respondent agreed to the custody arrangement. Under these circumstances and with the applicable law in mind, we affirm the trial court's decision not to award joint legal custody to the appellant.

III.

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Appellant asks that he have the child as an exemption for income tax purposes. Because there is virtually no evidence in the record nor in appellant's brief justifying such a modification, we affirm the trial court's denial of the income tax exemption to the appellant.

AFFIRMED.