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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-279 / 92-1776

IN RE THE MARRIAGE OF DARICE CECIL DARROW AND DOUGLAS JOSEPH DARROW

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Upon the Petition of
DARICE CECIL DARROW,

Appellee,

And Concerning
DOUGLAS JOSEPH DARROW,

Appellant.

Appeal from the Iowa District Court for Johnson County, Larry J. Conmey, Judge.

Douglas appeals the district court's modification of the parties' dissolution decree. **AFFIRMED.**

Becky S. Knutson of Davis, Hockenberg, Wine, Brown, Koehn & Shors, P.C., Des Moines, and John C. Wagner, Marengo, for appellant.

Julie L. Pulkrabek and Bruce R. Walker of Phelan, Tucker, Mullen, Bright & Walker, Iowa City, for appellee.

Heard by Schlegel, P.J., Hayden, J., and McCartney, S.J.*

*Senior judge from the 2nd judicial district serving on this court by order of the Iowa Supreme Court.

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SCHLEGEL, P.J.

Douglas Darrow appeals the district court's modification of the parties' dissolution decree, arguing the court erred in: (1) denying his application for modification of child custody; (2) reducing his visitation; and (3) awarding Darice attorney fees. Darice seeks attorney fees on appeal.

Darice and Douglas Darrow were married in September 1978. Their one child, Lael Ann, was born January 9, 1981. The parties separated in December 1982, and the district court entered a decree dissolving the marriage in December of 1983. The dissolution decree incorporated the parties' stipulation regarding custody. The parties agreed to joint legal custody with Darice assuming physical care during the school year and Douglas assuming physical care during the summer. Each parent was to have liberal visitation while Lael was in the care of the other. The stipulation intentionally made no provision to cover either party moving from Iowa. The stipulation states "the parties intend to request that the court, if necessary, determine any issues arising out of a move."

At the time of the divorce, Douglas was twenty-seven years old and had an associate of arts degree. He worked for an excavator and worked in the cattle business, earning a total net income of $7016 per year. Darice was unemployed, but the court noted she expected to receive an inheritance of $58,000 and was attempting to become involved in raising horses.

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In 1985 Darice remarried. She and her second husband wanted to move to California. Darice and Douglas agreed Douglas would take Lael temporarily. After Darice had settled in California, Darice and Douglas filed a joint application to modify the dissolution decree. They agreed Darice would keep Lael in California during the school year and provide Lael's transportation to Iowa in May for the summer. No financial affidavits were filed, and Douglas's support obligation remained $100 per month.

Darice had a child by her second husband and used a substantial portion of her inheritance to make a down payment on a house in Anza, California. In 1989 Darice's second marriage ended in divorce. Darice was granted custody of the child, Eli, then three years old.

In 1989 Douglas married a wealthy widow. She had three children from her previous marriage, and the couple bought a 280-acre farm and began a farming and cattle raising operation.

In 1991 Darice started a small business in horse equipment. The business was unsuccessful. Darice had to seek outside employment and found a job beyond commuting distance from Anza. Lael was enrolled in school in Anza. From February to April 1991, Darice left Lael with friends during the week while she and Eli traveled to the town where she worked, returning every weekend to see Lael.

Douglas offered to take both Lael and Eli in Iowa temporarily. The children went to Iowa in April 1991 and

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were to remain there just until the end of the school year, a month and a half later. Darice continued to have economic difficulties, however, and different arrangements were agreed upon. Darice, Douglas, and Lael all agreed Lael would visit Darice in California in August and then return to Iowa for one more school year. According to the plan, Lael would return to California in the summer of 1992 and remain for the following school year and all subsequent school years.

When Douglas returned the children in the summer of 1991, Darice had moved into the home of her boyfriend's parents. In March of 1992 Douglas served Darice with an application to modify the dissolution decree. He sought primary physical care of Lael and a temporary injunction to stop Darice from removing Lael from Iowa. Darice filed an application to return the child, which was denied. Darice also filed a cross-application requesting an increase in child support, a contribution from Douglas for Lael's transportation costs between Iowa and California, and attorney fees.

After a two-day trial, the district court found that Lael wanted to live with her mother and that while Douglas's ability to provide financially for Lael was superior to Darice's ability, no showing had been made that Darice's "living situation . . . was in any way detrimental or harmful to Lael." The court denied the application for a change in custody.

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The court further found Douglas had a net worth in excess of $1 million and, with his wife, a joint annual gross income in excess of $100,000. The court found Douglas's "net income is difficult to determine due to various factors involved in the farming operation; however [Darice] is willing to accept $500 per month support." The court set child support at $500 per month, set visitation for six weeks in the summer, and awarded Darice $4000 in attorney fees and expenses. The parties were to share equally in transportation costs.

Douglas filed a rule 179(b) motion to challenge the award of attorney fees. Douglas argued the court had issued a pretrial order providing that the specific issues for trial were to be custody and child support and that the issue of attorney fees had therefore been a surprise to him. The court denied the application for enlargement. Douglas appeals, alleging Darice did not request attorney fees or a change in visitation in any pleading.

Our review in cases such as this is de novo. Iowa R. App. P. 4. Modification of a dissolution decree is only permitted when a material and substantial change in circumstances has occurred since the original decree. Mears v. Mears, 213 N.W.2d 511, 514-15 (Iowa 1973). "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

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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.

Having carefully considered the record in light of these guiding principles, we conclude the district court properly denied Douglas's application to modify the child custody provisions of the parties' dissolution decree. Douglas contends he has established by a preponderance of evidence that the geographical separation of the parties, Darice's history of relocation since moving to California, Darice's lack of definite plans for the future, and Douglas's improved financial situation constitute a material and substantial change in circumstances since the original dissolution decree was entered, necessitating an expedient change in child custody. We disagree.

We agree with the district court's conclusion that:

> [T]his alone is not sufficient to show that he [Douglas] has a superior ability to administer to his daughter's needs. [Douglas] has failed to

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> show that the past or present living situation of [Darice] and Lael is in any way detrimental or harmful to Lael or that because of [Douglas's] financial status, Lael would suffer or be denied the basic necessities of life.

The record indicates that a strong emotional bond continues to exist between Lael and Darice. Lael is happy living with her mother and testified at trial that she prefers to live with Darice. "Children's preferences, while not controlling, are relevant and cannot be ignored." In re Marriage of Gravatt, 371 N.W.2d 836, 840 (Iowa App. 1985). In addition, Lael and her half-brother, Eli, have been raised together and have developed a strong relationship as well.

While the record reflects Douglas's ability to more effectively minister to Lael's financial support, Douglas has failed to show that he possesses a superior ability to minister more effectively to Lael's well-being. Accordingly, we affirm the district court on the issue of child custody.

Next, Douglas contends the district court erred in reducing his visitation and in awarding attorney fees to Darice since these issues were not enumerated in the court's "Order Setting Trial (Modification) and for Updated Financial Statements." This order stated in relevant part:

> The issues for trial are: CUSTODY, CHILD SUPPORT
>
> No other issues shall be litigated unless this order is modified upon application of counsel at least one week before trial.

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Iowa Code section 598.36 (1991) controls the award of attorney fees in proceedings to modify a dissolution decree, providing:

> In a proceeding for the modification of an order or decree under this chapter the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court.

This section bestows upon the court the discretion to award attorney fees to the prevailing party, considering each party's ability to pay. In re Marriage of Kimmerle, 447 N.W.2d 143, 145 (Iowa App. 1989). We hold the court is not precluded from exercising its discretion to award attorney fees as a result of the failure to include this issue in a scheduling order.

Douglas claims that permitting the court to consider the issue of attorney fees when the issue was not included in the scheduling order constitutes "unfair surprise." However, the record reflects that counsel for Douglas knew of opposing counsel's intention to request attorney fees at trial. On the morning of the first day of trial Darice's counsel provided a copy of all of her exhibits to Douglas's counsel. Included in those exhibits was Darice's bill for attorney fees. Accordingly, we find this contention to be without merit and affirm the district court's award of attorney fees to Darice.

Similarly, Douglas claims the court should not have considered the issue of visitation since this issue was not mentioned in the scheduling order. We conclude the issue

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of visitation was necessarily opened for the court's consideration once the issue of child custody was scheduled for litigation. Furthermore, we find that Darice's and Lael's move from Iowa to California constituted a material and substantial change in circumstances requiring a modification of the original decree's summer visitation provisions. As a result, we find this argument to be unpersuasive as well.

Finally, Darice seeks attorney fees on 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 Kern, 408 N.W.2d 387, 390 (Iowa App. 1987). 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. In re Marriage of Castle, 312 N.W.2d 147, 150 (Iowa App. 1981). Douglas shall pay $4000 toward Darice's appellate attorney fees.

In accordance with the above discussion, we affirm the district court's modification of the parties' dissolution decree, the court's denial of Douglas's application to modify the child custody provisions of the decree, and the court's award of trial attorney fees to Darice.

AFFIRMED.