IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 1-388 / 00-1854
Filed June 13, 2001

**IN RE MARRIAGE OF DAN J. SCHAU
AND RHONDA L. SCHAU**

**Upon the Petition of
DAN J. SCHAU,
Petitioner-Appellant/Cross-Appellee,**

**And Concerning
RHONDA L. SCHAU,
Respondent-Appellee/Cross-Appellant.**

Appeal from the Iowa District Court for Cedar County, Max Werling, Judge.

Dan Schau appeals, and Rhonda Schau cross-appeals, from the district court's ruling on the parties' applications for modification or their dissolution decree. **AFFIRMED.**

John E. Wunder, Muscatine, for appellant.

Justin A. Teitle, Davenport, for appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

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ZIMMER, J.

Dan Schau appeals, and Rhonda Schau cross-appeals, from the district court's ruling on the parties' applications for modification of their dissolution decree. Dan contends the district court erred in refusing to transfer primary physical care of the parties' children to him. Rhonda maintains the court erred in refusing to modify the child support provisions of the decree. We affirm.

I. Background Facts and Proceedings. The district court dissolved the marriage of Dan and Rhonda Schau in a decree filed on February 25, 2000. The court approved the parties' stipulation, which included a provision awarding them joint legal custody of their children, Brittany, born in July 1989, and Joshua, born in March 1991. The decree granted primary physical care to Rhonda and required Dan to pay child support.

On June 14, 2000, Dan filed an application for modification of primary care and child support due to Rhonda's proposed move from Bennett, Iowa to New Boston, Illinois, and then Joy, Illinois. Rhonda filed an answer and a counter-application for an increase in child support, based on an alleged deviation from the child support guidelines of over ten percent. Following trial in August 2000, the district court concluded that neither application was warranted.

Dan appeals, contending the district court erred in finding there was no substantial change in circumstances warranting modification of the dissolution decree. In her cross-appeal, Rhonda claims the court erred in not modifying the child support provisions of the decree.

II. Modification of Custody. We review the record de novo in proceedings to modify the custodial provisions of a dissolution decree. *Dale v.*

Pearson, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996). We give weight to the findings of the trial court, although they are not binding. *Id.*

The court can modify custody only when there has been a substantial change in circumstances since the time of the decree that was not contemplated when the decree was entered. *In re Marriage of Walton,* 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). The change must be more or less permanent and relate to the welfare of the child. *Id.* Additionally, the parent seeking custody must prove an ability to minister more effectively to the child's well-being. *Dale,* 555 N.W.2d at 245. This strict standard is premised on the principle that once custody of a child has been determined it should be disturbed for only the most cogent reasons. *Id.*

The district court did not find Rhonda's move of approximately forty-five miles was a substantial change in circumstances warranting modification of the dissolution decree. We agree. As this court has previously stated, a move of this distance, standing alone, is not the type of change in circumstances contemplated by either statute or case law. *In re Marriage of Howe,* 471 N.W.2d 902, 903 (Iowa Ct. App. 1991). Although Dan will not live as close to the children, he testified that he would still be able to attend their activities and will remain active in their lives. In addition, the record does not indicate Rhonda's move was motivated by a desire to defeat Dan's visitation rights or undermine his relationship with the children.

On appeal, Dan contends the move is not the sole reason for making his application for modification. He alleges that in the six months between the entry of the dissolution decree and trial of his application for modification, Rhonda's

priorities had changed so that the children were not her primary focus. Our de novo review of the record does not reveal sufficient evidence supporting this allegation to make the requested change in physical care. The evidence does not support the conclusion Rhonda has failed to adequately care for the children in any significant way. By all accounts, the children were content, well adjusted and thriving at the time of trial. To this point in time, it does not appear Rhonda's relocation has had any detrimental affect on the children's best interests. We agree with the trial court's conclusion that Dan is an excellent father who would obviously be a competent primary caretaker for the children. However, the evidence falls short of demonstrating a material and substantial change in circumstances in the short time since the decree was entered making it expedient and in the children's best interests to change primary care to Dan. We affirm denial of the application to modify custody.

III. Modification of Child Support. Our review of orders on applications to modify child support provisions is de novo. *State ex rel. Pfister v. Larson,* 569 N.W.2d 512, 514 (Iowa Ct. App. 1997). However, the trial court has reasonable discretion in determining whether a modification is warranted and we will not disturb its discretion on appeal unless there is a failure to do equity. *Id.*

Iowa Code section 598.21(8) (1999), allows a court to modify the child support provisions of a dissolution decree when there has been a substantial change in circumstances. Rhonda must prove this change in circumstances by a preponderance of the evidence. *In re Marriage of Rietz,* 585 N.W.2d 226, 229 (Iowa 1998). The following principles may be considered when ruling on a petition for modification:

> (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.

Id. (quoting *In re Marriage of Walters*, 575 N.W.2d 739, 741 (Iowa 1998)).

Rhonda contends the trial court erred in denying her application to modify child support because Dan's income has increased from $44,968 at the time the dissolution decree was entered, to approximately $51,000. She claims modification is warranted because the amount of child support required by the child support guidelines at the time of trial would deviate by ten percent or more from the amount set in the decree. *See* Iowa Code § 598.21(9). In its order denying Rhonda's request, the district court stated:

> Respondent has petitioned for an adjustment in child support. Nothing in this record supports an adjustment. As I have indicated, I don't believe the tax return reflects an accurate representation of Respondent's income and there's no showing that there's a 10 percent variance from the guidelines.

Rhonda argues the record supports modification, even if it was found that the tax records were not an accurate representation of her income.

Upon de novo review of the record, we find that Rhonda has not met her burden of proving a substantial change in circumstances exists to warrant modification of Dan's child support payments. The $51,000 figure that Rhonda uses to determine the ten percent variation was based on projected earnings, not actual earnings. At trial Dan testified that his base salary was $32,000 per year. Anything Dan earned above that amount was based on overtime and profit

sharing. He testified that the bonuses he had been getting were not guaranteed and could not be anticipated from year to year. Therefore, there is no indication that any change in circumstances resulting from Dan's profit sharing would be permanent. Furthermore, there is no suggestion that this change in circumstances was not contemplated at the time the original decree was entered as Dan had the same earning arrangement with his employer at the time the dissolution decree was entered only six months earlier. As a result, we affirm the district court's order denying Rhonda's application for modification of child support.

IV. Appellate Attorney Fees. Dan requested an award of appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Benson,* 545 N.W.2d 252, 258 (Iowa 1996). 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 district court's decision on appeal. *In re Marriage of Wood,* 567 N.W.2d 680, 684 (Iowa Ct. App. 1997). We award Dan no attorney fees on appeal.

We affirm the decision of the district court. Costs of this appeal are taxed one-half to each party.

AFFIRMED.

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