

**IN THE COURT OF APPEALS OF IOWA**

No. 3-918 / 13-0779  
Filed December 5, 2013

**Upon the Petition of**  
**ALBERT R. MEYERS,**  
Petitioner-Appellant,

**And Concerning**  
**JOHNA L. OLSON,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Boone County, Steven J. Oeth,  
Judge.

Albert Meyers appeals the district court ruling denying his application to  
modify placement, and the court's award of attorney fees. **AFFIRMED.**

Gina Badding of Neu, Minnich, Comito & Neu, P.C., Carroll, for appellant.

Steven Nalean of Nalean & Nalean, Boone, for appellee.

Considered by Potterfield, P.J., and Mullins and Bower, JJ.

**BOWER, J.**

Albert Meyers appeals the district court ruling denying his application to modify placement, and the court's award of attorney fees. Both parties request appellate attorney fees. We find Meyers has failed to prove a substantial change in circumstances warranting modification. We also find Meyers's substantially higher income merits partial payment of Olson's trial and appellate attorney fees. We affirm.

**I. Background Facts and Proceedings**

Meyers and Olson were never married, but have a six-year-old child together. The parties ended their relationship when Olson was six months' pregnant. In 2007, by agreement, the court approved joint legal custody of the child with Olson having physical care.

Meyers lives in rural Carroll on a farmstead with his wife, their child, and a step-child.<sup>1</sup> He also has a child from a previous relationship with whom he has regular visitation. Meyers is employed full-time by Union Pacific Railroad and farms part-time. The district court determined he earns \$50,148 per year.

Olson's life has been complicated since the birth of the child. She has maintained a number of residences and relationships over this time. Additionally, at the time of trial, Olson was married but in the process of a divorce. She is currently involved in another relationship and hopes to relocate with the child and her new boyfriend. Olson is presently employed at Lowes, taking as many hours as she can. The district court determined she earns \$17,553 per year.

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<sup>1</sup> At the time of trial, Meyers's wife was pregnant with their second child.

Two events of concern arose while the child was in Olson's care. First, the child was able to negotiate a childproof lock on an apartment door, allowing the child to be unsupervised by Olson's then boyfriend. The child went into the yard and was found a short time later, unharmed. Olson's relationship with the boyfriend ended soon thereafter. The other event occurred in March 2012. During a disagreement the child bit Olson, drawing blood and causing pain. In an ill-conceived attempt to teach the child a lesson, Olson bit the child leaving a mark which was later discovered by Meyers. Meyers contacted law enforcement, who notified the department of human services (DHS). DHS conducted an investigation and determined the incident was isolated, somewhat minor in seriousness, and unlikely to happen again. Olson met with DHS on multiple occasions convincing them she had learned from her mistake. All evidence indicates she has done so.

Meyers sought modification of physical care due to Olson's frequent moves, the abuse complaint, and concerns with her ability to parent the child safely. The district court declined to modify physical care, and awarded Olson attorney fees.

## **II. Standard of Review**

Our review of modification proceedings is de novo. *In re Marriage of Zabecki*, 389 N.W.2d 396, 398 (Iowa 1986). We review the district court's award of attorney fees for abuse of discretion. *In re Marriage of Guyer*, 522 N.W.2d 818, 822 (Iowa 1994).

### III. Discussion

#### A. Modification

A court should grant modification of a care arrangement only when the moving party can establish the conditions of the arrangement have changed in such a substantial and material way that the modification is in the best interests of the child. *In re Marriage of Grantham*, 698 N.W.2d 140, 146 (Iowa 2005). The moving party must also show they would parent in a more effective way than the custodial parent. *Id.* The changed circumstances must be both permanent and not contemplated at the time the decree was entered. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). A heavy burden is placed upon a party seeking modification. *Id.*

We agree with the district court that Meyers has failed to carry his burden. Olson has made mistakes as a parent; however the circumstances are not so serious as to require modification. The abuse complaint, while serious, was found to be an isolated incident. We also agree with the district court that Olson's frequent moves, while appearing unstable in the aggregate, are understandable and less concerning when viewed individually. Each move was an attempt to improve the child's living conditions, or was a temporary move to prepare for a more permanent living situation. The two exceptions are the move resulting from Olson's separation from her husband and the move necessitated by Meyer's reduction in child support, which left Olson unable to afford her rent. The moves do not require modification.

Meyers also presented evidence, mostly hearsay, regarding the child's behavior and state of mind. Meyers contends the child's behavior is negatively impacted by the mother. Olson presented evidence that the child is doing well in school, is sociable, and acts in a manner appropriate for the child's age. The district court was in the best position to assess the credibility of witnesses and was unconcerned with Meyers's allegations. We agree. The people with regular interactions with the child presented a picture that does not require modification. Having failed to show a substantial and material change in circumstances that requires modification, we agree with the district court that the present custody arrangement should continue.

**B. Attorney Fees**

The district court has considerable discretion in awarding attorney fees. *Guyer*, 522 N.W.2d at 822. The fees, which must be reasonable, depend primarily upon the relative abilities of the parties to pay. *Id.* We also consider whether the party was forced to come to court. *Id.* Our supreme court has upheld awards of attorney fees where one party dramatically out earns the other and the recovering party struggles to cover living expenses. See *In re Marriage of Geil*, 509 N.W.2d 738, 743 (Iowa 1993).

Meyers argues the district court abused its discretion by not explicitly stating the fees awarded to Olson were fair and reasonable. We find the fees awarded were fair and reasonable. Olson earns just more than one-third of Meyer's yearly income. She works every hour available to provide for the child, and has had to move in the past because she was unable to afford housing.

Despite her financial hardships, she was forced to defend a modification action. Meyers was ordered to pay only a portion of Olson's attorney fees. Though we recognize Meyer's ongoing financial obligations to his other children, we find the award of attorney fees by the district court was fair, reasonable, and justified.

Both parties ask for an award of appellate attorney fees. Our decision is guided by the relative needs, the ability to pay, and the relative merits of each party's position on appeal. *Id.* We find Meyers is able to pay a portion of Olson's appellate attorney fees. Requiring Olson to pay all of her appellate attorney fees or to pay Meyers's appellate attorney fees would work a further economic hardship on her. Meyers is ordered to pay \$2000 of Olson's appellate attorney fees.

**AFFIRMED.**