IN THE COURT OF APPEALS OF IOWA

No. 3-380 / 12-1775
Filed May 30, 2013

IN RE THE MARRIAGE OF BRANDON CHRISTOPHER KILFOYLE AND RAEGAN LEE KILFOYLE

Upon the Petition of
BRANDON CHRISTOPHER KILFOYLE,
Petitioner-Appellant,

And Concerning
RAEGAN LEE KILFOYLE, n/k/a RAEGAN LEE BIRCHMIER,
Respondent-Appellee.

Appeal from the Iowa District Court for Monroe County, Daniel P. Wilson, Judge.

Brandon Kilfoyle appeals from the modification of the visitation provisions of the decree dissolving his marriage to Raegan Kilfoyle, n/k/a Raegan Birchmier.

REVERSED.

Stacey N. Warren and Kodi A. Brotherson of Babich Goldman, P.C., Des Moines, for appellant.

Debra A. George of Griffing & George Law Firm, P.L.C., Centerville, for appellee.

Considered by Eisenhauer, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

Brandon Kilfoyle appeals from the modification of the visitation provisions of the decree dissolving his marriage to Raegan Kilfoyle, n/k/a Raegan Birchmier. He argues no material change in circumstances has occurred to warrant modification, the court lacked personal jurisdiction to modify the financial aspects of the visitation provisions of the decree, and modification was not in the child's best interests. We reverse; finding no material change in circumstances existed to modify the visitation portion of the decree. We therefore do not reach the remainder of Brandon's claims.

I. Facts and Proceedings.

Brandon and Raegan were married in 2003 in Iowa. The parties' child was born later that year. The parties resided in North Dakota where they divorced in 2007. Raegan and the child moved to Iowa, and Brandon was stationed overseas. He petitioned to modify the visitation provisions of the divorce decree prior to moving. Raegan and Brandon agreed to amend visitation as follows:

> Commencing with Christmas 2008, the Plaintiff shall have visitation with the parties' minor son every Christmas for a period of two weeks while he is stationed overseas. Travel arrangements for [the child] for 2008 have already been made, and hereafter shall be made by September 30th of each year. This year, Brandon shall be responsible for transportation costs for [the child] from Des Moines, Iowa to Germany and back. In the following years, Raegan shall be responsible for bringing [the child] to Minneapolis, Minnesota, for the flight to connect to Germany. Brandon has the responsibility for all the transportation costs for [the child] from Minneapolis to Germany and back to Minneapolis. He shall also be responsible for his own transportation costs to accompany [the child]. In the event that his job precludes him from picking up [the child] in Minneapolis or bringing him back, his wife, Monica, can act in his behalf. Brandon shall maintain possession of [the child]'s

> passport at all times except when Raegan takes [the child] on vacation. After the vacation trip, the passport shall be returned to Brandon.
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> By April 30th of each year, the travel arrangements for summer visitation for [the child] to visit [Brandon] shall be made and conveyed to Raegan. Brandon shall be entitled to parenting time with [the child] for a period of four weeks in the summer of 2009, six weeks in the summer of 2010, and likewise thereafter until [the child] is ten years of age. At that time and thereafter, Brandon shall have his parenting time with [the child] from three weeks after school is out until five days before school resumes. The same travel arrangements apply for Brandon's parenting time in the summer as for Christmas with Raegan bringing [the child] to Minneapolis and Brandon assuming the travel arrangements and costs from Minneapolis to Germany, or other location where he may be stationed, and back for [the child] and himself or his designee. He shall provide to Raegan a copy of the air fare as well as all the information needed for the flight. . . .
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> This above schedule shall apply for so long as the parties are at a distance which makes every other weekend and weekday visitation not feasible. If the parties are to reside within five hours of each other, Brandon shall be entitled to every other weekend with [the child] from Friday after school is out until the following Monday morning, at which time Brandon would take [the child] to school.

Brandon and Raegan followed the amended visitation provisions between 2008 and 2011, when Raegan filed a petition seeking modification of the visitation provisions. At this time, the Air Force had moved Brandon back to the United States to Las Vegas, Nevada. The parents had not moved to locations within five hours of each other, and had never lived close enough to make weekend visitation feasible.

Trial was held July 24, 2012. The court found a significant change in circumstances had occurred and thus modification was warranted. The changes identified by the court were Brandon's move to Las Vegas, the child being four years older, continuing difficulties in travel, preferences of the child, summer visitation dates tracking the beginning or end of the school year being not

workable because of snow days, the ready availability of Skype contact, and the child's ability to use a cell phone.

The court reduced Brandon's parenting time in the following ways pertinent to the current appeal: six weeks of visitation in the summer, seven days over Christmas vacation, four days during spring break, and providing that if Brandon misses his visitation through no fault of Raegan's he is not entitled to make up the days. The court also added financial obligations for Brandon: Brandon would be responsible for all visitation costs, and, if Brandon chooses to have the child fly out of an airport other than Des Moines, he will reimburse Raegan for the costs of transportation to that alternative airport.

Brandon appeals, arguing no change was warranted and that the court lacked jurisdiction to modify the costs of travel.

II. Analysis.

Our review of a district court's modification of a dissolution of marriage decree is de novo. *In re Marriage of Salmon*, 519 N.W.2d 94, 95 (Iowa Ct. App. 1994). We give weight to the findings of the trial court, especially those findings regarding the credibility of witnesses. *Id.* "Thus, we recognize the reasonable discretion of the trial court to modify visitation rights and will not disturb its decision unless the record fairly shows it has failed to do equity." *Id.*

Brandon argues a substantial change in circumstances had not taken place to warrant alteration of the decree. "To constitute a substantial change in circumstances, the changed conditions must be material and substantial, not trivial, more or less permanent or continuous, not temporary, and must be such as were not within the knowledge or contemplation of the court when the decree

was entered." *In re Marriage of Pals*, 714 N.W.2d 644, 646 (Iowa 2006) (internal citations and quotations omitted). "This standard follows the criteria used in actions to modify child custody, except a much less extensive change in circumstances is generally required in visitation cases." *Salmon*, 519 N.W.2d at 95–96 (internal citations omitted). At the time of the 2008 modification, Brandon was on active duty serving abroad. Visitation required international travel through a major airport. He is now stationed for the foreseeable future domestically. This change, however, was contemplated at the time of the 2008 stipulated modification decree, as provisions were included for his residence within different distances from Raegan's home. Therefore, this does not represent a material change in circumstances unforeseen at the time of the decree. *See Pals*, 714 N.W.2d at 646.

Further, the aging of the parties' child was also clearly contemplated at the time of the parties' dissolution—the decree itself provided for changing duration of visitation as the child matures. *See id.* The modified decree was written to work around the child's future school schedule. The potential for snow days and school activities would also have been within the knowledge or contemplation of the court at that time. *See id; see also Mears v*. *Mears*, 213 N.W.2d 511, 516 (Iowa 1973) (finding the normal additional needs of children as they grow older did not constitute a change in circumstances to warrant modification of a child support order).

The district court also cited the preference of the child in its change of visitation. We give less weight to such a preference during a modification action than in an original custody proceeding. *In re Marriage of Hunt*, 476 N.W.2d 99,

101 (Iowa Ct. App. 1991). This weight is further diminished considering the child's young age and that he did not express a desire for decreased visitation to the guardian ad litem. We conclude no material change in circumstances occurred to warrant alteration of the amended decree.

We reverse the district court's modification of the dissolution decree. We need not reach the additional issues raised by Brandon. Costs on appeal are assessed equally between the parties.

REVERSED.