IN THE COURT OF APPEALS OF IOWA

No. 9-711 / 09-0159
Filed November 25, 2009

IN RE THE MARRIAGE OF
MICHAEL SOLOMON HASSIS
AND MICHELLE DAWN HASSIS

Upon the Petition of
MICHAEL SOLOMON HASSIS,
Petitioner-Appellee,

And Concerning
MICHELLE DAWN HASSIS,
Respondent-Appellant.

Appeal from the Iowa District Court for Union County, Douglas F. Staskal, Judge.

Michelle Hassis appeals the district court's refusal to modify custodial provisions of the parties' dissolution decree. **AFFIRMED.**

Jeffrey T. Mains of Mains Law Office, P.L.C., Des Moines, for appellant.

Catherine K. Levine, Des Moines, and Douglas D. Daggett of Douglas D. Daggett, P.C., Creston, for appellee.

Heard by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

POTTERFIELD, J.

Michelle Hassis appeals the district court's refusal to modify the custodial provisions of the parties' dissolution decree. We affirm.

I. Background Facts & Proceedings.

Michael and Michelle Hassis were married in 1998. On June 6, 2003, a dissolution decree approved the parties' stipulation. Michael and Michelle were awarded joint legal custody of their two children: a son, born in 1995, and a daughter, born in 2000. Michael was awarded physical care "subject to extraordinary visitation" by Michelle.

Following the 2003 dissolution, Michael and the children remained in the family home in Lorimor, Iowa. Michelle lived in Creston.[1] The distance from Creston to Lorimor is about twenty-five miles. The parties settled into a fairly consistent visitation schedule in which the children spent every other weekend with Michelle, as well as two evenings a week.

In the early part of 2008, Michael informed Michelle he was thinking of moving to the Des Moines area. In August, Michael and the children moved to Grimes, about seventy-five miles from Creston. They reside in a home with Rachel Volz and her son from a prior relationship. The house is owned by Volz's father. Michael and she have plans to purchase the house when their respective, former properties sell.

On July 30, 2008, Michael filed a petition to modify the visitation terms of the decree. Michelle filed an answer and cross-petition for modification of the

[1] Michelle currently shares a house with Mark Battaglia. At the modification hearing, Battaglia testified that he and Michelle had lived together about two years.

physical care provisions of the dissolution decree. Both alleged that Michael's move to Grimes constituted a material and substantial change in circumstances warranting modification.

The district court filed its findings of fact, conclusions of law, and decree of modification on January 5, 2009. The court denied Michelle's petition to modify the custodial provisions of the dissolution decree, but determined that the original visitation provisions would be modified. Noting that the question was whether the move "render[ed] the original visitation scheme impractical," *In re Marriage of Salmon*, 519 N.W.2d 94, 96 (Iowa Ct. App. 1994), the court wrote:

> Given the indefinite terms of the visitation provisions of the original decree, it is hard to say that anything would be impractical. It depends entirely on the cooperation and agreement of the parties, which, commendably, they have carried out very well so far. Nevertheless, it is obvious that the parties had settled into a fairly rigid visitation schedule which included Michelle seeing the children on two weeknights every week. . . . The court will order a change in the visitation schedule that affords Michelle an opportunity to make up some of the time lost on account of the move. The court believes this can be accomplished by affording Michelle three, instead of two, weekend visitations every other month and by affording her three full weeks of visitation with the children during their summer break from school. In addition, Michelle will be allowed to visit the children one mid-week day during weeks when she will not have the children on the weekend.

The court then noted that the visitation schedule is "the minimum visitation" and the parties were free to agree to any other schedule they choose. The court set forth a specific visitation schedule and the transportation responsibilities of the parties.

Michelle appeals, contending the best interests of the children require their placement in her physical care. On appeal, Michael asks for an award of appellate attorney fees.

II. Scope and Standard of Review.

We review de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of Salmon*, 519 N.W.2d 94, 95 (Iowa Ct. App. 1994). We examine the entire record and adjudicate anew rights on the issues properly presented. *Id.* We are not bound by the district court's fact findings, but we give them deference because the court had a firsthand opportunity to view the demeanor of the parties and evaluate them as custodians. Iowa R. App. P. 6.904(3)(*g*). "We recognize that the district 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 Walters*, 575 N.W.2d 739, 741 (Iowa 1998) (citation omitted).

III. Modification of Custody.

We start our discussion noting that in filing their petitions, both parties assert that there has been a material and substantial change in circumstances warranting modification of the dissolution decree. Michael contends the change in circumstances warrants a change in visitation only. Michelle argues that the change in circumstances warrants a change in physical care.

A much less extensive change in circumstances is generally required in visitation cases than physical care cases. *See In re Marriage of Spears*, 529 N.W.2d 299, 302 (Iowa Ct. App. 1994); *Salmon*, 519 N.W.2d at 95.

> A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983).

As the parent seeking to modify physical placement, Michelle bears a heavy burden. She must prove conditions affecting her children's welfare have so materially and substantially changed that it is in their best interests to alter their physical care. *Spears*, 529 N.W.2d at 301. The change cannot have been contemplated by the district court when the order was entered, and must be more or less permanent in nature. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). Michelle must also prove that she has a superior ability to minister to her children's well-being. *Dale v. Pearson*, 555 N.W.2d 243, 245 (Iowa Ct. App. 1996).

A relocation of the custodial parent's residence of 150 miles or more statutorily may be deemed a substantial change of circumstances. *See* Iowa Code § 598.21C(1)(f) (2009). The implication of the statutory provision is that a move of less then 150 miles is not to be deemed a substantial change of circumstances. This implication is borne out by our case law. *See Frederici*, 338 N.W.2d at 160 (finding move of 700 miles, which was not motivated by desire to defeat non-custodial parent's rights did not warrant change of custodial provisions); *see also Spears*, 529 N.W.2d at 302 (recognizing the mobility of our society and the court's reluctance to limit a custodial parent to a geographic area where there is a valid reason to move).

Michael moved from Lorimor to Grimes, which allowed a shorter commute to his employment. The district court found that the move did not warrant a custody modification because it was the only change of circumstances between the parties and could have been reasonably foreseen by the court when the decree was entered. Our de novo review leads us to the same conclusion.

Michael was awarded physical care of the children. The evidence shows that prior to Michael's move, Michelle was more active in the children's everyday life and had primary responsibility when it came to healthcare appointments and daytime school activities. However, this appears to have been due to Michael's work situation. The parents coordinated well concerning the children's care prior to the move. The district court found that, "the evidence suggests that because he is closer to his job and because he does not have Michelle nearby to rely on, Michael has become a better parent than he was before the move." This record shows that both parents are equally capable of ministering to their children's well being. We encourage them to continue to work together for the benefit of their children.

IV. Appellate Attorney Fees.

Michael seeks an award of appellate attorney fees. An award of appellate attorney fees is not a matter of right but rests within this court's discretion. *In re Marriage of Drury*, 475 N.W.2d 668, 672 (Iowa Ct. App. 1991). We consider the parties' financial positions. *Id.* We look to 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 action on appeal. *Id.* Upon our review of the parties' circumstances, we find equity does not warrant an award of appellate attorney fees.

The costs of this appeal are assessed to Michelle.

V. Conclusion.

Michelle did not meet her heavy burden to establish that Michael's relocation of his residence as custodial parent warranted a modification of the custodial provisions of the dissolution decree. We therefore affirm.

AFFIRMED.