IN THE COURT OF APPEALS OF IOWA

No. 6-448 / 05-0701
Filed November 16, 2006

IN RE THE MARRIAGE OF LINDA M. BERNS AND TERRY D. BERNS

Upon the Petition of
LINDA M. BERNS,
n/k/a LINDA M. TACKETT,
Petitioner-Appellant,

And Concerning
TERRY D. BERNS,
Respondent-Appellee.

Appeal from the Iowa District Court for Carroll County, Gary L. McMinimee, Judge.

Petitioner appeals a district court decision which declined to modify a provision regarding transportation costs. **AFFIRMED.**

Linda M. Tackett, Waterloo, pro se.

Julie G. Mayhall of Green, Sieman & Greteman, P.L.C., Carroll, for appellee.

Considered by Vogel, P.J., and Vaitheswaran, J., and Nelson, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

NELSON, S.J.

I. Background Facts & Proceedings

Linda Tackett and Terry Berns were formerly married. A dissolution decree was entered for the parties on February 12, 2002, based on their stipulation. The decree provided that Linda would have physical care of the parties' two children. Terry was granted visitation with the children. At the time of the dissolution, both parties lived in Carroll County. The decree provided, "If either party moves out of Carroll County, all transportation shall be the responsibility of the moving party." Terry was then unemployed, and his child support was set at seventy-five dollars per month.

In November 2002, Linda filed an application to modify the decree based on an increase in Terry's income. On April 17, 2003, the district court determined Terry was employed and had annual income of $12,000. Linda was also employed, and had annual income of $14,560. The court increased Terry's child support obligation to $267 per month for the two children.

Linda moved to Waterloo in September 2003 to marry Joel Tackett. In October 2003, Terry filed an application for rule to show cause, claiming Linda had failed to provide transportation for visitation after she moved away from Carroll County, as required by the terms of the dissolution decree. Linda stated that she intended to file an application for modification of the decree, and the contempt proceedings were continued with the understanding that Linda would "transport the children for visitation as directed by the previous court order."

In September 2004, Linda filed an application to modify the decree, seeking to increase Terry's child support obligation and to modify the provision for transportation costs. She represented herself throughout the modification proceedings. In December 2004, Linda sent Terry a request for production of documents and several interrogatories. Terry objected to some of Linda's discovery requests on the ground of relevancy. In January 2005, Linda filed a motion for order compelling discovery. The matter was set for a hearing.

Rather than wait for a court ruling on her discovery motion, Linda filed subpoenas on some third-parties to obtain the documents she sought. In February 2005, Terry filed a motion to quash, stating Linda had failed to give him notice of the subpoenas, as required by Iowa Rule of Civil Procedure 1.1701(6). Terry also filed a motion in limine, seeking to prevent Linda from presenting evidence based on the documents obtained from improper subpoenas. The district court determined that the outstanding motions should be considered the morning of the trial, which was set for March 1, 2005.

At the hearing, the district court determined Terry had produced all documents requested by Linda. The motion to compel discovery was denied. Linda admitted she had not sent notice of the subpoenas to Terry or his counsel prior to serving them on the third-parties. She sent Terry's counsel an e-mail which stated, "I will continue to subpoena evidence as it relates to this case," but she did not send copies of the subpoenas, or specifically state where subpoenas had been sent. The court informed Linda that she had failed to comply with rule 1.1701(6) because she had failed to give Terry an opportunity to object before

the documents were produced. The court also determined that the documents could not be used in the modification proceeding.

At the modification hearing, Linda presented evidence that her father lived with her and he had health problems which required monitoring ever two or three hours. She stated this made transportation of the children difficult because it was about a six hour round trip to drive from her home to Terry's home. The district court determined Linda had failed to show a substantial change in circumstances regarding transportation costs. The court found that Linda's move was within the contemplation of the court at the time of the dissolution decree. The court determined Terry's child support obligation should be increased to $381.80 per month. Linda was ordered to pay $500 towards Terry's attorney fees. Linda has appealed.

II. Standard of Review

In this equitable action our review is de novo. Iowa R. App. P. 6.4. In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the district court, but are not bound by them. Iowa R. App. P. 6.14(6)(*g*).

III. Bias by Court

Linda first claims the district court was biased against her because she appeared without counsel. We do not apply different standards for litigants represented by counsel than we do for litigants who represent themselves. *Colvin v. Story County Bd. of Review*, 653 N.W.2d 345, 347 n.1 (Iowa 2002).

Linda takes several phrases out of context to support her claim that the court was biased. The court did not simply state pro se litigants were "difficult," or that "it's easy if persons have an attorney." In fact, the court stated:

> I will tell you a pro se litigant it is difficult. It's difficult to be an attorney and to be a litigant. Whether you happen to be an attorney or not happen to be an attorney, it's just difficult to do it.

The court then explained that Linda's statements in the witness stand under oath were considered evidence, while her statements as her own counsel were not evidence. The court concluded:

> Because it's easy if persons have an attorney, I know what the attorney says is not evidence. I don't worry about it. But when you're doing – playing both roles, it becomes more difficult and so those will be the ground rules.

Our review of the record shows the court carefully explained the proceedings to Linda, but did not exhibit any bias against her because she was pro se.

IV. Subpoenas

Linda asserts that the district court should not have suppressed the evidence she received from the subpoenas. Iowa Rule of Civil Procedure 1.1701(6) provides:

> Prior notice of any commanded production of documents and things or inspection of premises shall be served on each party in the manner prescribed by rule 1.442(2) and in a manner reasonably calculated to give all parties an opportunity to object before the commanded production or inspection is to occur.

Rule 1.442(2) provides that notice must be by hand delivery, mailing or fax to a party, or the party's attorney if represented by an attorney. Delivery may be by e-mail if the person consents in writing to delivery in that manner. Iowa R. Civ. P. 1.442(2).

Linda did not send any notice to Terry or his attorney prior to sending out subpoenas. At the modification hearing, Linda admitted that she was unaware of the requirement that she provide this notice. Terry did not have any opportunity to object before the documents were produced. We agree with the district court's conclusion that Linda improperly issued subpoenas in this case because she failed to comply with rule 1.1701(6).

We then turn to the question of whether the district court properly quashed the subpoena and granted the motion in limine to exclude the evidence received by the improper subpoenas. A court has wide discretion in determining whether to quash a subpoena. *Morris v. Morris*, 383 N.W.2d 527, 529 (Iowa 1986). We find no abuse of discretion under the facts of this case. The subpoenas were improperly issued, and we believe they should be quashed. *See State ex rel. Hager v. Carriers Ins. Co.*, 440 N.W.2d 386, 389 (Iowa 1989) (finding a subpoena which had been issued without proper notice to other parties could be quashed).

A motion in limine is a pretrial motion to determine whether certain evidence should be admissible at trial. *See Jensen v. Sattler*, 696 N.W.2d 582, 586 (Iowa 2005). Such a motion must be made in a civil or criminal case. *See, e.g., In re S.D.*, 671 N.W.2d 522, 529 (Iowa Ct. App. 2003) (civil); *State v. Frazier*, 559 N.W.2d 34, 39 (Iowa Ct. App. 1996) (criminal). If a ruling on a motion in limine is unequivocal, as it was here, then no further objections need to be made to preserve error. *See Kalell v. Petersen*, 498 N.W.2d 413, 415 (Iowa Ct. App. 1993). We find the district court properly granted Terry's motion in limine. The evidence had been improperly obtained and the court acted within its

discretion to conclude the evidence could not be produced at the modification hearing.

On appeal, Linda asserts that the motion to quash should have been denied as a sanction against Terry for failing to produce financial documents. We first determine that this issue had not been preserved for our review. Linda did not raise this issue before the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting an appellate court does not consider issues raised for the first time on appeal). Even if the issue had been raised, however, the district court specifically found that Terry had produced all of the documents requested by Linda in her interrogatories. The record does not demonstrate any reason to impose a sanction against Terry for failure to produce documents.

V. Transportation Provision

Linda contends there was a substantial change of circumstances sufficient to modify the transportation provision of the parties' dissolution decree. Linda presented evidence that it took between two and one-half to three hours to drive from her home to Terry's home. It thus takes her about five or six hours to drive to Terry's, drop off the children, and return home. She states that she now cares for her father, who has health problems, and cannot be left alone for more than two or three hours at a time. Linda asks that Terry be made responsible for the transportation costs, or that he be required to share in transporting the children.

A party seeking modification of a dissolution decree must establish there has been a substantial change in circumstances since the entry of the decree or any subsequent modification. *In re Marriage of Maher*, 596 N.W.2d 561, 564-65

(Iowa 1999). The change of circumstances must not have been within the contemplation of the district court when the original decree was entered. *Id.* at 565. Where there has been not substantial change in circumstances, no modification of a transportation expense provision is necessary. *Id.* at 568; *In re Marriage of Colby*, 569 N.W.2d 157, 159 (Iowa Ct. App. 1997).

In the present case, the parties' dissolution decree clearly anticipated that one of the parties might move from Carroll County. The decree was based on the parties' stipulation, and provided that, "If either party moves out of Carroll County, all transportation shall be the responsibility of the moving party." We concur in the district court's finding that there had not been a substantial change in circumstances in this case. Linda's move from Carroll County was within the contemplation of the court when the original decree was entered.

VI. Attorney Fees

Terry seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion. *In re Marriage of Kurtt*, 561 N.W.2d 385, 389 (Iowa Ct. App. 1997). We determine Linda should pay $500 for Terry's appellate attorney fees.

We affirm the decision of the district court.

AFFIRMED.