IN THE COURT OF APPEALS OF IOWA

No. 0-095 / 09-1081
Filed March 10, 2010

WENDEE MOLANO, Individually and as Next Best Friend to SOPHIE MOLANO, A Minor,
Petitioner-Appellant,

vs.

HECTOR MOLANO,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Petitioner appeals from the district court's dismissal of this declaratory judgment action. **AFFIRMED.**

Wendee Molano, Des Moines, pro se.

Joey T. Hoover of Kragnes & Associates, P.C., Des Moines, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Wendee Molano appeals from the district court's dismissal of her declaratory judgment action. We affirm.

I. Background Facts and Proceedings.

On March 18, 2009, Wendee filed a petition for declaratory judgment asking the district court to declare that: (1) "Hector Molano was an abusive husband and father"; (2) "Sophie Molano has the right to due process before being forced to submit to contact with a person of whom she is highly fearful"; (3) "Sophie Molano has the legal right to object to and refuse contact with a person of whom she is highly fearful"; (4) Hector cannot "legally compel Sophie to submit to visits with her abuser"; and (5) Wendee should not be "held in contempt in the event that her daughter Sophie continues to refuse contact with her abusive father." The petition also recites:

> This is not a petition for the modification of a custody and visitation order and Petitioner is not requesting this Court to make any judgment concerning the custody of her minor daughter, Sophie Molano. Rather, this Court is asked to declare whether Respondent HECTOR MOLANO was an abusive husband and father and whether Sophie Molano has, of her own accord and volition, the legal right to refuse contact with her alleged abuser if she should so desire or if Hector's rights as a father supercede Sophie's rights as an individual and as a victim of Hector's past abuse.

This latter statement appears to be the gist of the complaint as Wendee's reply brief also states:

> [T]he fighting issue in the declaratory judgment action is Sophie's right to reject contact with Hector, making relevant Sophie's and Wendee's assertions of Hector's prior conduct—especially as to the points where the court issued ambiguous, inconclusive findings of fact.

Wendee's petition also asked the court to temporarily and permanently enjoin compulsory contact between father and daughter until such time as the father completes a course of counseling in anger management.

On March 23, Hector answered and moved to dismiss the petition asserting a res judicata defense. He asserted the parties were also parties in case number CE54576,[1] wherein the matters had already been considered and decided.

On April 8, the district court entered an order setting for hearing Hector's motion to dismiss, and Wendee's requests for declaratory judgment and injunction.

Wendee filed a resistance to the motion to dismiss, and Hector then filed a supplemental motion to dismiss. Wendee thereafter filed a resistance to the supplemental motion to dismiss, a supplemental memorandum of law, and jury demand.

On May 6, a hearing was held. Hector argued that even if the motion to dismiss was improper, the grounds asserted were sufficient to deny the request for declaratory judgment. He asserted the matters alleged in the petition were raised in CE54576, a proceeding for custody of the parties' child, and could not be re-litigated. Wendee argued that the motions to dismiss were procedurally defective. She also contended the decree entered in CE54576 did not address the rights of Sophie Molano. The district court, without objection of either party,

[1] *Wendee Molano v. Hector Molano*, Polk County No. CE54576, is described more fully in the following footnote.

took judicial notice of the proceedings in CE54576.[2] Hector's counsel noted that in CE54576 Hector's application to show cause was rejected as the district court found nothing in the resulting custody decree which required Wendee to encourage Sophie to speak with her father.

On June 11, 2009, the district court entered its "Ruling on Respondent's Motion to Dismiss." The court concluded that because the respondent did not file the motion to dismiss before his answer, his motion was untimely pursuant to Iowa Rule of Civil Procedure 1.441(1). The court thus denied the motion.

However, the court dismissed the declaratory judgment action sua sponte, finding the petition "amounts to a collateral attack on a previous judgment in

---

[2] That action commenced with Wendee's petition for child custody, visitation, and support pursuant to Iowa Code section 598B.204 (2005), which in subsection one provides:

> A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

A "Decree of Custody, Visitation and Support" was filed in July 2008 wherein the court found, among other things, that "Hector has difficulty with his frustration, tolerance, and impulsivity at times and is prone to be emotionally expressive"; "Hector can be frequently moody and unpredictable in his reactions to Wendee and Sophie, and they have both developed a fear of Hector"; "While Sophie's counselors have recommended no contact at this time between Hector and Sophie, the court finds that the fear Sophie has of contact with Hector, while real for Sophie, is quite likely as much a product of Wendee's actions as it is Hector's behaviors"; "Wendee has not carried her burden with respect to establishing domestic abuse by Hector"; the "parties now live a considerable distance from each other" (Wendee and Sophie reside in Iowa, Hector resides in Florida); both parents love their child and have provided her care for extended periods; "Wendee is better able to provide for Sophie's physical needs presently and in the foreseeable future." The court awarded joint custody to the parties and primary physical care to Wendee. Noting Sophie's counselors' recommendation that Sophie have no contact with her father, the court ordered "Hector shall initially have only supervised phone contact and supervised in-person contact with Sophie. . . . At such time [as] Sophie's counselor authorizes, Hector shall have unsupervised phone contact with Sophie . . . [and] the following unsupervised visitation." Hector was to pay child support of $369.12 per month.

Wendee did not appeal from the decree.

CE54576." The court rejected Wendee's claim that the issues presented were not precluded because they were brought on behalf of Sophie, who was not a party to the prior action. "Judge Phipps has already considered Sophie's interests in CE54576." The court further stated:

> The district court has an interest in seeing that its decrees and judgments are followed. Associated with this is upholding of the integrity of those decrees and judgments. The Court will not permit a litigant in one case, dissatisfied with the Court's ruling, to raise the same issues in a newly filed action and have another bite of the proverbial apple. For this Court to grant the Petitioner's requested relief in the presently filed Petition would re-litigate those same issues tried before Judge Phipps and upon which he has meritoriously ruled—though not to Ms. Molano's liking. Any ruling granting Ms. Molano's requested relief would have to be contrary to Judge Phipps' Decree in CE54576. Her remedies were restricted to an appeal in that case—not a newly filed petition raising the same issues with the hope that another judge would find in her favor contrary to Judge Phipps.

Wendee now appeals.

II. Discussion.

The declaratory judgment action is a remedy that can be invoked to secure a declaration of rights, and Iowa Rule of Civil Procedure 1.1101 specifically provides it is available for the determination of "rights, status, and other legal relations whether or not further relief is or could be claimed." Yet, the court has authority to sua sponte dismiss a case, though that authority is to be used sparingly. *Teleconnect Co. v. Iowa State Commerce Comm'n*, 366 N.W.2d 515, 519 (Iowa 1985). We thus review for an abuse of discretion. *See Wright v. Thompson*, 254 Iowa 342, 350, 117 N.W.2d 520, 525 (1962) (rejecting defendant's claim that it was error for the district court to overrule his motion to

dismiss declaratory judgment and concluding "arbitrary exercise or abuse thereof does not appear").

In *Wright*, the supreme court wrote:

> The trial court may well have concluded its discretion to deny declaratory relief should not be exercised upon the motion to dismiss. It is recognized it is better not to exercise such discretion until evidence is heard. 26 C.J.S. Declaratory Judgments § 11, is the most recent discussion of the entire subject to come to our attention. We quote: "The discretion to grant or refuse declaratory relief is broad in nature, and should be liberally exercised to effectuate the purpose of the statute, ... This discretion may be exercised only at such time during the trial when the court has the evidence before it and can properly make such a final determination, and can be exercised only on the record as it exists when the entry of a judgment would be appropriate. Such *discretion should not be exercised on motion to dismiss . . . unless the court is fully satisfied that on its allegations the bill must be dismissed after a hearing on the merits.*"

Id. (emphasis added).

We find no abuse of discretion in the district court's dismissal here. The district court had before it the pleadings of the declaratory judgment, as well as the record of the proceedings in CE54576. The court concluded the declaratory judgment action was an improper collateral attack of the decree entered in CE54576. *See Sanford v. Manternach*, 601 N.W.2d 360, 364 (Iowa 1999) (holding that a final judgment "is not subject to collateral attack on jurisdictional grounds").

Wendee relies upon *Whitworth v. Heinzle*, 246 Iowa 1155, 1157-58, 70 N.W.2d 536, 538-39 (1955), in support of her contention that declaratory judgment is available here. In *Whitworth*, the petitioner asked the court to construe the terms of an agreement of separation and settlement of property rights, which was incorporated into a subsequent dissolution decree. 246 Iowa at

1155, 70 N.W.2d at 537. The *Whitworth* court concluded the action was "not a collateral attack on the divorce decree." *Id.* The court opined that though the remedy sought "is obtainable by other means,"[3] under the circumstances, the declaratory judgment was proper. *Id.* at 1158, 70 N.W.2d at 539.

> We carry out the spirit of the declaratory judgment act when we say it is not necessary for plaintiff to take a position which might place him in contempt of the court before a determination of his rights could be had.

Id. at 1159, 70 N.W.2d at 539. However, here Wendee has not requested that the custody decree be interpreted or construed.

Wendee contends "Sophie's right to reject a relationship with her alleged abuser is an issue that was not litigated in the custody dispute." She asserts that Judge Phipps "completely disregarded the opinion of Sophie's counselors that she not have contact with Hector." Not only is this statement belied by the decree in CE54576 (Judge Phipps specifically refers to the counselors' recommendation and orders only supervised telephone calls and visits), but it also shows Wendee's petition is, in fact, a collateral attack on the judgment.[4]

Moreover, Wendee is not in the same position as the petitioner in *Whitworth*. Hector has already sought to have Wendee found in contempt in the custody proceeding. He was unsuccessful. There is no prophylactic purpose to be served in entertaining the declaratory judgment petition, wherein Wendee

---

[3] [Petitioner] might have breached the contract and thereby placed himself in such a position as to be chargeable with contempt of court. If such a course had been pursued, the divorce court would have been compelled to construe the terms of the agreement of which it approved.

246 Iowa at 1158, 70 N.W.2d at 539.

[4] We also observe that Wendee cites no authority for the proposition that Iowa law recognizes a child's right to determine if and when to visit a parent. *See* Iowa R. App. P. 6.903(2)(*g*)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue.")

asks the court to declare she should not be "held in contempt in the event that her daughter Sophie continues to refuse contact with her abusive father."[5]

Finally, we note the district court in CE54567 continues to have jurisdiction to consider any petitions for modification of the custody and visitation provisions of its decree. *See* Iowa Code § 598B.202(1) (providing that "[e]xcept as otherwise provided . . . , a court of this state which has made a child-custody determination consistent with section 598B.201 . . . has exclusive, continuing jurisdiction over the determination").

The district court did not abuse its discretion in dismissing the petition for declaratory judgment and injunctive relief.[6]

AFFIRMED.

[5] Moreover, declaratory relief that Wendee not be found in contempt would serve to benefit only Wendee, although this action was styled as a petition initiated by Sophie by and through her next friend, Wendee.

[6] Although not the subject of this appeal, injunctive relief, as a corollary to the declaratory relief sought, is also properly dismissed. We note the record does not reflect that any modification is pending.