IN THE COURT OF APPEALS OF IOWA

No. 1-105 / 10-1372
Filed March 30, 2011

IN RE THE MARRIAGE OF
NAREN CUNNINGHAM AND
SCOTT CUNNINGHAM

Upon the Petition of
NAREN CUNNINGHAM,
n/k/a NAREN D. COXE,
Petitioner-Appellee,

And Concerning
SCOTT CUNNINGHAM,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

The respondent challenges the district court's authority in a contempt action. **WRIT SUSTAINED.**

Eric G. Borseth and Lynn C.H. Poschner of Borseth Law Office, Altoona, for appellant.

Anjela A. Shutts and Diana L. Miller of Whitfield & Eddy, P.L.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

VOGEL, P.J.

Naren Coxe and Scott Cunningham's marriage was dissolved by stipulated decree on January 26, 2005. They have one daughter, Jordan. The parties were granted joint legal custody, with Naren having physical care and Scott visitation. In 2008, the visitation schedule was modified to add Easter to the holiday schedule and summer visitation as follows,

> Five weeks during the child's summer school vacation, consisting of five one-week periods, none of which shall be consecutive unless agreed by the parties. [Scott] shall notify [Naren], in writing, by May 1 of each year, of the weeks he expects to exercise visitation. [Naren] shall also be entitled to five weeks with the child, none of which shall be consecutive unless agreed by the parties. [Naren] shall provide notice, in writing, by May 15 of each year, of the weeks she expects to have the child with her. During these one-week periods, regular weeknight and weekend visitation will be suspended.

See In re Marriage of Cunningham, No. 08-0557 (Iowa Ct. App. Jan. 22, 2009).

Following the modification, the parties continued to have disagreements over visitation, resulting in both parties filing applications for rule to show cause in April (Scott) and May (Naren) 2010. Scott requested Naren be held in contempt for preventing him from exercising his Easter visitation in 2010 and Naren requested Scott be held in contempt for violating the summer visitation schedule in 2008 and 2009. Following a hearing, the district court entered its ruling. As to Scott's application, it found that Naren had willfully violated the court's prior decrees or orders by failing to follow the Easter visitation schedule. As a remedy for the contempt finding, Scott was awarded one additional overnight visit. As to Naren's application, the court found,

> [Naren] has failed to prove beyond a reasonable doubt that [Scott] has willfully failed to allow [Naren] her summer visitation in 2008

> and 2009. [Scott] has merely followed a strict interpretation of the provision of the decree dealing with summer visitation. That being said, while [Scott] has followed the letter of the decree in this regard, the court does not believe he has followed its spirit. That spirit can only be achieved by providing for a standard of measure of what a "one week period" over the summer actually is. The court believes that the best way to proceed on this issue is to provide that each one-week period called for in the provision dealing with summer visitation shall begin on Sunday at 6:00 p.m. The first such available week shall be the week which ends the last Sunday before school resumes. As the parties have agreed on the 2010 summer visitation schedule, the schedule called for by this order shall become effective beginning with the summer of 2011.

Both Scott and Naren filed motions to amend. Scott asserted "[t]he Court lacked the authority to enter an Order amending the summer visitation provisions as there was no finding of contempt." On July 21, 2010, the district court denied both motions, and as to Scott's stated, "The court was not amending that previous visitation schedule, but merely clarifying how the visitation was to be exercised in order to avoid disagreement and allow each party the full summer visitation contemplated."

Scott filed a notice of appeal and asserts the district court did not clarify the visitation schedule, but actually modified it and did not have authority to do so because he was not found in contempt.[1] Because he challenges the district court's authority, we will consider his appeal as a petition for a writ of certiorari and grant the writ. *See* Iowa Rs. App. P. 6.107(1) (providing that any party claiming a judge exceeded its authority may file a petition for a writ of certiorari); 6.108 (providing that if the appellate court determines another form of review is the proper one, the case shall proceed as though the proper form of review had

[1] See Iowa Code section 598.23 (2009) citing punishments available to the court when a person is found to be in contempt.

been requested). Our review is for correction of errors at law. *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007).

The district court understood the weakness with the current summer visitation provision as there was no designated start day and time, defining the parameters of a "one week period." Therefore, while Scott "followed a strict interpretation" of the schedule and could not be held in contempt, the district court perceived Scott to have violated the "spirit" of the schedule. Perhaps to ward off future disagreements between the parties, the district court went one step further, and added a start day and time for each week of summer visitation. While we fully appreciate the district court's desire to avoid future problems with the current visitation schedule, its ruling actually modified the decree. This is prohibited under *Gilliam v. Gilliam*, 258 N.W.2d 155, 156 (Iowa 1977) (holding the "trial court overreached in converting a contempt citation into a modification proceeding"). *Compare McDonald v. McDonald*, 170 N.W.2d 246, 248 (Iowa 1969) ("The court interpreted the decree and fixed the obligations of the parties. It properly went no further."). Rather, a petition for modification is the appropriate vehicle to modify the terms of the decree. *See Gilliam*, 285 N.W.2d at 156.

The provision added by the district court should be stricken from the ruling. Additionally, we deny Naren's request for appellate attorney fees. We sustain the writ.

WRIT SUSTAINED.