

**IN THE COURT OF APPEALS OF IOWA**

No. 2-437 / 11-1539  
Filed July 25, 2012

**Upon the Petition of  
WADE BROOKS,**  
Petitioner-Appellee,

**And Concerning  
NIKIE WEAR,**  
Respondent-Appellant.

---

Appeal from the Iowa District Court for Clayton County, Andrea J. Dryer,  
Judge.

A mother appeals a district court's modification order granting physical  
care of the parties' child to the father. **REVERSED AND REMANDED.**

Mark D. Fisher of Nidey, Wenzel, Erdahl, Tindal & Fisher, Cedar Rapids,  
for appellant.

James Burns of Miller, Pearson, Gloe, Burns, Beatty & Parrish, P.L.C.,  
Decorah, for appellee.

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

**MULLINS, J.**

Nikie Wear appeals the district court's modification order granting Wade Brooks physical care of the parties' daughter. Nikie contends the district court abused its discretion by refusing to allow her, as a self-represented litigant, to present any witnesses or exhibits after she failed to update her pretrial witness and exhibit lists. Nikie further contends that barring her from presenting evidence as well as the district court's treatment of her in other evidentiary decisions violated her due process rights to a fair trial and a meaningful opportunity to be heard. Nikie also argues there was insufficient evidence to establish a substantial change in circumstances not contemplated by the trial court, and thus, the joint physical care arrangement should have continued.

We find the district court abused its discretion when it did not allow Nikie to present any witnesses or exhibits at trial. Nikie filed a witness and exhibit list for an initial trial date that was then postponed. The district court should have allowed Nikie to introduce the exhibits and call the witnesses disclosed therein. Accordingly, we reverse and remand for a new trial.

**I. Background Facts and Proceedings.**

Nikie and Wade are the parents of Realei (born March 2005). Nikie and Wade never married, but lived together from approximately October 2003 until June 2006. Shortly after they separated, Wade filed a petition for custody, visitation, and support. This case was resolved by stipulation and decree entered June 27, 2007. Nikie and Wade were awarded joint legal and physical care of Realei with physical care exchanging weekly every Sunday at 6:30 p.m.

On February 22, 2010, Nikie filed for modification of the decree requesting she be awarded physical care of Realei. Wade answered and requested he be awarded physical care. The basis of the modification request was the parties' inability to agree on where Realei should attend school. Realei was preparing to go to kindergarten, but the parties lived thirty-five miles apart in two different school districts. Wade lived in Strawberry Point within the Starmont Community School District, while Nikie lived in Hopkinton within the Maquoketa Valley Community School District.

Pursuant to a standardized, mandatory trial scheduling order form, trial was originally set for January 12, 2011. The order required, among other things, that "[a]t least SEVEN (7) DAYS BEFORE TRIAL, counsel for the parties and self-represented litigants shall: a. File a WITNESS AND EXHIBIT LIST . . . ." On January 6, 2011, Wade's counsel filed a witness and exhibit list; and on January 7, 2011, Nikie's counsel filed a witness and exhibit list, identifying six witnesses (including herself) and listing three exhibits. Trial was subsequently continued.

On February 7, 2011, another standardized trial scheduling order was filed setting a new trial date for August 25, 2011. This order contained the same requirements that the parties shall file and exchange witness and exhibit lists at least seven days before trial. Said standardized order warns that failure to comply with any provisions of the order could result in sanctions.

In April 2011, Nikie's attorney withdrew from representation, and Nikie continued as a self-represented litigant. The order granting Nikie's attorney's request to withdraw stated, "If you are not represented, you will have to follow all

applicable Iowa Rules of Civil Procedure as you continue with this case. Neither the Court nor the Clerk can give you any legal advice about these matters.”

Prior to the August trial date, Wade filed and exchanged an updated witness and exhibit list, but Nikie did not. At the outset of the trial, Wade’s counsel requested that Nikie be barred from presenting evidence outside of her own testimony for her failure to file and exchange a witness and exhibit list, and stated: “Ms. Wear has not complied with the district court rules, including making no prior presentation of witness or exhibit lists.” After noting that Wade filed a witness and exhibit list as required by the order which set the trial for August 25, the district court had the following exchange with Nikie:

THE COURT: It does not appear that you’ve filed any list of your witnesses or exhibits that you would be submitting today; is that correct?

NIKIE: I did call the clerk and ask if I needed to do anything to have witnesses, and she said voluntary witnesses, no.

THE COURT: Well, ma’am, the clerk can’t give you legal advice. And there is an order in this case that told you what your responsibilities were and set out the deadlines for filing witness and exhibit lists when your attorney withdrew. And when [the court entered its order granting Nikie’s attorney request to withdraw], you were advised that you would have to follow all rules of court in this matter, that the court and the clerk could not give you legal advice.

So there was an order in this court file that provided that at least seven days before trial that self-represented litigants, including you, were to have witness and exhibit lists on file with the clerk and copies provided to the other parties. Did you do that?

NIKIE: No, ma’am.

THE COURT: Okay. In that event, [counsel for Wade] is correct. You will be permitted to testify yourself, but any exhibits that you did not give him notice of ahead of time as required by that order are not going to be admitted, they’re not going to be considered by the court, and I’m not going to hear testimony from anyone that you did not notify opposing counsel that you were going to call today.

There is no reference in the verbatim record to the witness and exhibit list that was filed on Nikie's behalf on January 7, 2011.

The trial then proceeded, and Nikie was allowed to testify and cross-examine witnesses, but was not permitted to call other witnesses or introduce exhibits into evidence.

On September 2, 2011, the district court determined that a material and substantial change in circumstance had been shown, and that Realei's long-term best interests would be better served by granting Wade physical care with liberal visitation by Nikie. Nikie appeals.

## **II. Sanction for Failure to Comply with Scheduling Order.**

The district court has inherent power to enforce its own scheduling order. *Fry v. Blauvelt*, \_\_\_ N.W.2d \_\_\_, 2012 WL 2865882, at \*6 (Iowa 2012); see also Iowa R. Civ. P. 1.602(5) (stating if a party fails to obey a scheduling or pretrial order, the court "may make such orders with regard thereto as are just"). In this appeal, Nikie contends the district court abused its discretion by excluding her witnesses and exhibits because she previously filed a witness and exhibit list for the January 2011 trial date. The question then is whether the witness and exhibit list filed January 7, 2011, pursuant to the first trial scheduling order, satisfied the requirements of the subsequently issued scheduling order that set the new trial date.

The obvious purpose behind the disclosure requirements of the witness and exhibit lists is to assist the parties and the court in having an orderly trial without surprises that can cause delay or even derailment. *Fry*, 2012 WL

2865882, at \*5. Pre-trial conferences and orders “contemplate trial, and are designed, not to prevent the presentation of a controversy to the court, but to expedite and simplify that presentation.” Iowa R. Civ. P. 1.602(5) cmt. For this reason, “[e]xclusion of evidence is the most severe sanction available under the rule, and is justified only when prejudice would result. Exclusion should not be imposed lightly; other sanctions are available such as continuation of the trial or limitation of testimony.” *Klein v. Chicago Cent. & Pacific R. Co.*, 596 N.W.2d 58, 61 (Iowa 1999).

In this case, Nikie filed a witness and exhibit list at least seven days before trial, and served it on Wade’s counsel by fax on January 6, 2011. The latest trial scheduling order did not state that it required resubmission of the witness and exhibit list already filed. Wade had notice of those witnesses and exhibits for seven months, and therefore, would not have been prejudiced or surprised by their admission at trial. Conversely, upon our review of the record and the resulting order, we determine that Nikie was prejudiced by the exclusion of those witnesses and exhibits. See *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000) (“[R]eversal is required unless the record shows a lack of prejudice.”). The trial court abused its discretion when it excluded the witnesses and exhibits as disclosed on Nikie’s January 7, 2011, witness and exhibit list. Finding this issue dispositive, we need not reach the other issues raised by Nikie. Accordingly, we reverse and remand for a new trial.

**REVERSED AND REMANDED.**