

IN THE COURT OF APPEALS OF IOWA

No. 7-111 / 06-1392

Filed April 25, 2007

**IN RE THE MARRIAGE OF KRISTINA M. CURTIS,
AND SPENCER A. CURTIS**

**Upon the Petition of
KRISTINA M. CURTIS, n/k/a KRISTINA M. DONALDSON,**
Petitioner-Appellant,

**And Concerning
SPENCER A. CURTIS,**
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Joel D. Novak (trial)
and Robert J. Blink (ruling), Judges.

Kristina Donaldson appeals from ruling on a motion for temporary
emergency jurisdiction and an application to modify a dissolution decree.

AFFIRMED.

Jane White of Parrish, Kruidenier, Moss, Dunn, Boles, Gribble & Cook,
L.L.P., Des Moines, for appellant.

Linda Channon Murphy of the Law Office of Linda Channon Murphy,
P.L.C. and Bob Siddens of the Siddens Law Office, Des Moines, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

This is an appeal from the ruling on a motion to dismiss a temporary emergency jurisdiction order and an application to modify a dissolution decree. We affirm.

I. Background Facts and Proceedings.

In February of 2003, Kristina Curtis, n/k/a Kristina Donaldson, and Spencer Curtis stipulated to the terms of the decree dissolving their marriage. In pertinent part, the decree provided that Kristina would have physical care of the parties' two children, KeiLey and Nathan. Spencer was granted visitation rights.

On March 30, 2005, Kristina filed a "Motion for Temporary Emergency Jurisdiction for Suspension of Visitation," in which she alleged that Spencer had sexually abused their son Nathan. The Iowa Department of Human Services (DHS) was contacted by Nathan's pediatrician. A police investigation ensued, which included interviews with Nathan. In an effort to prove his innocence, Spencer voluntarily took and reportedly passed a lie detector test that was administered by a police officer.

On April 6, 2005, the district court entered an order based on an agreement between the parties in which visits with Spencer would be supervised, "pending the completion of the investigation" and the parties and children would seek counseling with therapist Janice Hill. At the close of the investigation, the detective determined there was insufficient evidence to file criminal charges against Spencer. Working with the police, DHS reached a similar conclusion, issuing a "not confirmed" report. Spencer then filed a motion seeking the court's guidance in how to follow the April 6, 2005 order. The district court ordered

continued counseling and essentially expanded the authority of Janice Hill to determine when unsupervised visits may occur. Either party could request a review of the temporary visitation arrangements after sixty days.

On March 24, 2006, Spencer moved the court to dismiss the “emergency proceedings” altogether. The court first entered an order providing Spencer with visitation supervised by a mutual friend of the parents. A short time later, Kristina filed an application to modify the parties’ dissolution decree, seeking to limit Spencer to supervised visitation. These two motions came on for hearing on May 10, 2006 before Judge Joel D. Novak, who heard five days of testimony. However, Judge Novak became ill while the matter was still under advisement, and the file was turned over to Judge Robert Blink, under the authority of Iowa Rule of Civil Procedure 1.1802(2) (providing that in the event of the disability of a judge, a separate judge may be appointed to consider the matter).

Both Spencer’s motion to dismiss the emergency proceedings and Kristina’s application to modify arose from the allegations of sexual abuse and the subsequent events. Spencer sought dismissal of the emergency proceedings asserting (1) the original decree, which was never modified or appealed from, constitutes the law of the case, and (2) there is no authority under chapters 598 (dissolution of marriage) or 598B (Uniform Child-custody Jurisdiction and Enforcement Act) to issue a temporary order after a final decree is entered. The district court agreed, citing a lack of authority under both chapters 598 and 598B. It therefore dismissed the temporary order that restricted Spencer’s contact with his son. The court next rejected Kristina’s application to modify the decree, finding that she had not proven by a

preponderance of the evidence that Spencer sexually abused Nathan. Accordingly, it ordered that the “terms of the original decree remain in force and effect.” Kristina appeals from this ruling.¹

II. Appointment of Substitute Judge.

Kristina first maintains the “court erred in rendering opinion without retrial based upon disability of trial judge.” She advances this is a deprivation of due process and posits that the trial judge is the only individual who can judge the credibility of witnesses. She requests that this matter be remanded for a full retrial on the merits.

We conclude that Kristina has failed to preserve this issue for appellate review. Even though all parties were fully aware of the temporary unavailability of Judge Novak and the substitution of Judge Blink for purposes of ruling on the matter,² at no point in the proceedings below did Kristina either object to the appointment of a substitute judge to rule on the issues or request that a new trial be held. It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)

¹ Following oral argument, counsel for Spencer filed "Appellee's Notice to Clarify Record," in which counsel attempts to clarify "at least three serious misstatements of the record" made by opposing counsel during oral arguments. Kristina has responded by filing a motion to strike this document. Because we agree with Kristina that no rule of appellate procedure provides for a post-submission filing to correct alleged misstatements made during oral arguments, we grant the motion to strike. Accordingly, we do not consider the matters asserted in Spencer's Notice to Clarify Record, but confine our review to the facts in the record.

² The parties were first informed by letter on June 27, 2006, that Judge Blink was taking over this case. A second letter from Judge Blink, written July 26, 2006, requested communication from the parties regarding any “issues you believe should be addressed.” It does not appear that Kristina responded in any fashion to this offer. The ruling was entered approximately one month later.

("issues must be presented to and passed upon by the district court"); *see also In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) ("Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal."). Finally, Kristina did not raise any due process concern or seek a retrial in a post-trial motion. *See* Iowa R. Civ. P. 1.904(2). We therefore decline to address this issue.

III. Temporary Modification Order.

The district court concluded that neither chapter 598 nor 598B provide for a temporary visitation order following a final decree based upon the allegations of sexual abuse.³ It therefore granted Spencer's request to dismiss the April 6, 2005 emergency order, under which he was ordered to have only supervised visitation.

On appeal, Kristina maintains the court "erred in determining it was without jurisdiction, under the circumstances, to enter a temporary modification order." While we believe such an emergency order may be appropriate in rare circumstances under *In re Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005), we nonetheless decline to reach the merits of this issue, finding it has become moot. Mootness "refers to cases which no longer present a justiciable controversy because the issues involved have become academic or nonexistent." *Jenkins v. Branstad*, 421 N.W.2d 130, 133 (Iowa 1988). "The test is whether a judgment, if rendered, would have any practical legal effect upon the existing controversy." *Id.*; *see also Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 183 (Iowa 2005).

³ We note Spencer stipulated to the entry of the initial April 6, 2005 order.

Here, the only basis for the *temporary* order was the allegation of sexual abuse. As will be explained in the next division of this opinion, we affirm the district court's conclusion that the abuse allegations are insufficient to justify a *permanent* modification. Having so concluded, it would only be an academic exercise to determine whether the type of temporary modification, as entered in this case, is appropriate under Iowa law.

IV. Application to Modify Decree.

As noted, the district court also declined Kristina's request to modify the parties' dissolution decree, based on Spencer's alleged sexual abuse. In doing so the court cataloged the evidence both in support of a finding of abuse and those facts mitigating against such a finding. After examining and weighing that evidence, it determined that Kristina had "not demonstrated by a preponderance of the evidence that [Spencer] sexually abused Nathan." It accordingly held that it could not "on this record, enter a decree of modification based on that claim."

Upon our *de novo* review of the record, see Iowa R. App. 6.4, we concur in the court's judgment that Kristina did not advance sufficient evidence to prove Spencer sexually abused Nathan. Significantly, both the Des Moines Police and the DHS found the evidence insufficient for their purposes.⁴ The police detective who investigated the case declined to charge Spencer, while DHS determined the sexual abuse claims were unfounded. Moreover, there were troubling inconsistencies in Nathan's account of the abuse, while no physical evidence

⁴ We acknowledge that the burden of proof in bringing criminal charges is probable cause to believe a crime has been committed. *State v. Iowa Dist. Ct.*, 463 N.W.2d 885, 887 (Iowa 1990).

corroborated the abuse. Moreover, Spencer has no prior criminal record of any kind. The court therefore properly declined to modify on this ground.

However, Kristina further maintains that even if the evidence is insufficient to establish that Spencer sexually abused Nathan, the evidence taken in its entirety still supports a modification of Spencer's visitation rights. In a footnote, the district court advised:

First, some type of counseling for the children and the parents is critically necessary. The record is persuasive that [Spencer's] behavior might justify some type of supervised visitation. Even Dr. Rypma noted this might be appropriate: if not because of the sexual abuse, because of inappropriate conduct. [Spencer's] intense and intimidating conduct is described in the record too often from too many witnesses for a Court to ignore it. The angry outbursts in the presence of the children is also disconcerting. The concerns about [Kristina's] tendency to alienate the affections of [Spencer] have sufficiently been described in this ruling.

While this record may certainly suggest that some degree of supervision of Spencer's visits is necessary based upon his inappropriate demeanor and conduct, we agree with the court's resolution of this issue. Kristina's application to modify the dissolution decree was quite narrow in scope. The only ground advanced in the application for modifying was Nathan's allegations of sexual abuse by Spencer. Having affirmed the district court's finding that Kristina had not demonstrated by a preponderance of the evidence that Spencer abused Nathan, we must also affirm its refusal to modify the decree based on other grounds. It appropriately noted that to the extent Kristina believes "there are other triable issues justifying a modification" those issues should be addressed in a separate action.

We deny Kristina's request for appellate attorney fees and assess the costs of this appeal to her.

AFFIRMED.