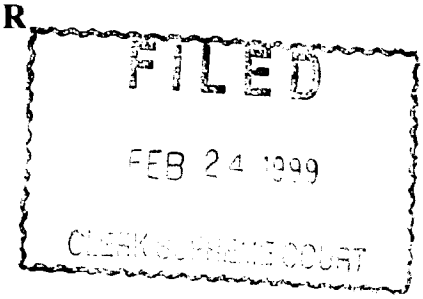
IN THE COURT OF APPEALS OF IOWA

No. 8-614 / 97-1496
Filed February 24, 1999

IN RE THE MARRIAGE OF KIMBERLY I. DWYER AND JAMES COLE DWYER



Upon the Petition of
KIMBERLY I. DWYER,
Appellant,

And Concerning
JAMES COLE DWYER,
Appellee.

Appeal from the Iowa District Court for North Lee County, William L. Dowell, Judge.

Kimberly Dwyer appeals a district court ruling denying her application to modify the visitation provisions of the parties' dissolution decree. **AFFIRMED.**

Margaret E. Haessler of Hoth, Ellerhoff & Haessler Law Offices, Burlington, for appellant.

James Cole Dwyer, Linden, Texas, pro se, appellee.

Considered by Sackett, C.J., and Streit and Mahan, JJ.

STREIT, J.

Kimberly Dwyer appeals the trial court's denial of her application to amend the visitation provisions of her Texas divorce decree. Because she has not proven a substantial change of circumstance since the time of the decree, we affirm.

I. Background Facts & Proceedings.

James and Kimberly Dwyer were divorced in Texas in May 1996. They had one child, Sheila Cheyenne, born January 13, 1995. The Texas court awarded Kimberly primary physical care of Cheyenne and set up visitation provisions; one of which provided for visitation in the circumstance the parties lived more than one hundred miles apart. In that case, James would have visitation on the first weekend of each month, three weekly visitations throughout the year, and thirty days during summer.

Kimberly moved back to Iowa with Cheyenne in 1996. In December 1996, she sought to modify the visitation provisions of the Texas decree. She requested all visitation between James and Cheyenne occur in Iowa, under her supervision. The district court denied her application to modify the Texas decree, finding Kimberly had not shown a substantial change of circumstances since the time the decree was entered. She appeals.

II. Standard of Review.

We review a district court's modification of a dissolution decree de novo. *In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa App. 1996); Iowa R. App. P. 4.

We give weight to the findings of the trial court, but are not bound by them. *Id.* at 37; Iowa R. App. P. 14(f)(7).

III. Modification of Visitation Provisions of the Divorce Decree.

To justify a change in visitation, a party must show there has been a change of circumstances not contemplated by the trial court at the time the decree was entered. *See In re Marriage of Rykhoek*, 525 N.W.2d 1, 3 (Iowa App. 1994). The burden in a modification of visitation rights is different than the burden in a child custody case. *Id.* Generally, a much less extensive change in circumstances need be shown in visitation rights cases. *Id.*

Kimberly raises the following as constituting substantial changes which justify a modification of the visitation provisions of the decree: (1) she has moved from Texas to Iowa; (2) both she and James have remarried; (3) she alleges Cheyenne is physically abused during visitations with James; and (4) she alleges James harassed her at her place of work and harassed Cheyenne's day care provider.

Kimberly's first alleged substantial change, her move from Texas to Iowa, was known to the parties and the court at the time of the divorce proceedings.[1] Kimberly continued her residency in Texas only to complete the divorce and custody proceedings. With this knowledge, the court specifically set out visitation provisions

[1] Since the time of trial on the modification action, on July 24, 1997, our legislature has enacted a statute stating when "a parent awarded joint legal custody and physical care or sole legal custody is relocating the residence of the minor child to a location which is one hundred fifty miles or more from the residence of the minor child at the time that custody was awarded, the court may consider the relocation a substantial change in circumstances." Iowa Code § 598.21 (1997). The statute became effective July 1, 1998 and, for that reason, we have not considered it in making our determination.

applicable in the event the parties would live more than one hundred miles apart. For this reason, Kimberly's move to Iowa is not a substantial change in circumstances since the time the decree was entered.

It is true both Kimberly and James have remarried since the time of the divorce decree. Although likely to have been contemplated by the trial court at the time of the decree, there are no specific provisions regarding remarriage of the parties. Even so, the remarriage of the parties is not a *substantial* change justifying modification in this case. Kimberly has not shown James' remarriage harms Cheyenne or affects the visitation provisions of the divorce decree in any way.

The most serious allegation made by Kimberly is that Cheyenne has been abused during her visitations with James. Kimberly contends Cheyenne is not properly taken care of while with James; she is not fed nutritious meals, bathed, or having her diaper changed regularly. She claims James returned Cheyenne from Easter visitation with cigarette burns on her body. One burn was between her toes and the other was on the inside of her hand. She contends Cheyenne had diaper rash to the extent her bottom was bleeding. This is the only specific incident of abuse Kimberly has alleged.

We do not find Kimberly's allegation Cheyenne suffered intentional abuse during visitations with James credible. Kimberly claims she picked up Cheyenne from her Easter visit; discovered her injuries and took her to the hospital in Haleyville, Alabama, the next morning. There is no record of Cheyenne ever visited a doctor for these injuries. Kimberly explained the lack of documentation by

testifying the nurse refused her treatment because Kimberly had already properly treated the burns and diaper rash and the nurse refused to document Kimberly bringing Cheyenne to the hospital because it was a divorce matter. At trial, James and another witness testified Cheyenne did not have burns on her hand and foot when he returned her from Easter visitation.

If James has abused Cheyenne, a restriction on his visitation would be justified, even though there are no criminal charges. *In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa App. 1998). However, if Kimberly's allegations are false, a restriction is not justified. There are no clear indicators or direct evidence of abuse by James other than Kimberly's testimony. We are unable to restrict James' visitation rights based solely on Kimberly's allegations of abuse when her allegations are not supported by direct evidence on the record and lacks credibility. The visitation provisions of the decree cannot be modified on this ground.

Kimberly's last contention supporting her application to modify the visitation provisions of the decree is, since the time of the decree, James harassed her with threatening phone calls telling her that if she did not follow the provisions of the Texas decree "she would never see the light of day" and he would come down and get Cheyenne and Kimberly would never see her again.

There are several reasons these allegations cannot serve as a substantial change to modify the visitation provisions of the decree. First, Kimberly has belied any notion James intends to harm her by testifying that she was not afraid he would do so. Second, in regard to James' alleged threat he would take Cheyenne and not return her,

the record does not support this being a true risk. James has always returned Cheyenne from her visits when scheduled to do so. He has followed the visitation provisions of the Texas decree. It is Kimberly who has denied James' visitation with Cheyenne. Third, there is not support in the record James has placed harassing phone calls to Kimberly in Iowa. His phone calls to her in Iowa have been attempts to reach her regarding visitation of Cheyenne which Kimberly was denying him.

Kimberly has not proven a substantial change of circumstance sufficient to justify modification of the visitation provisions of the Texas decree. For this reason, we affirm the ruling of the trial court.

AFFIRMED.

Sackett, C.J., concurs specially without opinion.