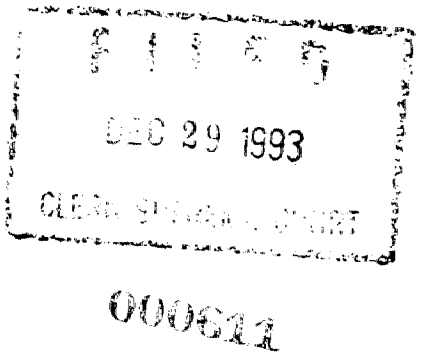
IN THE COURT OF APPEALS OF IOWA

No. 3-415 / 92-1345



IN RE THE MARRIAGE OF DAWN ELAINE SWIPIES AND KENNETH HAROLD SWIPIES

Upon the Petition of
DAWN ELAINE SWIPIES-BRUNING,
Petitioner-Appellee/Cross-Appellant,

And Concerning
KENNETH HAROLD SWIPIES,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Plymouth and Woodbury Counties, Dewie J. Gaul, Judge.

The husband challenges the district court order denying his application for modification of dissolution decree and upholding, in part, an order enjoining him from contact with the parties' minor daughter. **AFFIRMED.**

Kenneth H. Swipies, Oto, pro se.

Kendra M. Zirbel Olson, Sioux City, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

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OXBERGER, C.J.

This is an appeal by Kenneth Swipies from an order denying his request for change of custody in a dissolution and denying his request to dissolve an injunction requiring supervised visitation.

On March 12, 1990 the marriage of Dawn and Kenneth Swipies was dissolved. Dawn was awarded sole custody of the parties' only child, Kendra. Kendra was born in October 1987. Kenneth was awarded limited visitation.

On April 25, 1991, a Petition for Relief from Domestic Abuse was filed, alleging that Kenneth had sexually abused Kendra. The district court ruled that Kenneth had sexually abused his daughter and enjoined contact between Kenneth and Kendra. The court subsequently ruled that Kenneth would not be allowed contact with Kendra until he completed a sexual offender's therapy program and Kendra's therapist approved visitation.

On April 22, 1992, a hearing was held on Kenneth's petition to modify the dissolution decree and his petition to dismiss the injunction. The district court refused to modify custody but modified the injunction to allow supervised visits between Kenneth and Kendra.

Kenneth appeals.

In this equity action, our review is de novo. Iowa R. App. P. 4. We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented.

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In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981). We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

The fighting issue in this case is whether the district court presiding in the modification action, (Equity No. 26181), was correct in refusing to allow Kenneth unsupervised visitation or physical care of Kendra.

The modification court determined it was bound by the order of the court presiding in the domestic abuse action, which required Kenneth to receive assessment and treatment as a sex offender. Resolution of the question of whether the modification court was actually bound by the order of the domestic abuse court is not required for our disposal of the issue on appeal.

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa

1983) (citing In re Marriage of Mikelson, 299 N.W.2d 670, 671 (Iowa 1980)).

We find there has been a substantial change in circumstances due to the numerous allegations, evaluations and rulings occurring since the original decree was filed. However, in our de novo review, we find ample evidence to support the requirement that visitation between Kenneth and Kendra be supervised and that change of physical care be denied. Kendra has reported sexual contact between herself and Kenneth. We acknowledge the dispute between the experts as to whether she is being coached to make such accusations. However, significant findings of experienced experts indicate she has, in fact, been sexually abused by Kenneth. We cannot ignore these findings, controversial as they may be in Kenneth's eyes.

Because of the evidence indicating Kenneth has sexually abused Kendra, we will not grant unsupervised visitation nor a change in physical custody. We affirm the district court.

AFFIRMED.

Hayden, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would remand this case to the trial court.

Because credibility is so important, I believe this decision is best made by a trial judge able to see the parties and not on a cold record.

The majority finds there is evidence indicating Kenneth sexually abused Kendra. They also acknowledge there is evidence to the contrary.

The evidence in this case presents no clear cut answers. A fact clearly illustrated by a finding of an administrative law judge hearing the issues in a proceeding to determine the parties' entry on the child abuse registry.

The administrative law judge found:

> Kenneth did not, based on a preponderance of evidence, sexually abuse Kendra.
>
> Dawn did not, based on a preponderance of evidence, deny critical care to Kendra by coaching Kendra falsely to accuse Kenneth of sexual abuse. However, there remains some credible evidence tending to substantiate abuse. (Emphasis supplied).

I feel strongly that the facts of this case and the best interest of this child call for a decision to be made on the issues of whether the father sexually abused the child, whether the mother fabricated the abuse, and whether someone else abused the child after a full hearing on all the evidence. There is a clear and convincing need for a

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new determination of these issues because of the potential adverse impact on the child.

First, unlike the majority, I would address the issue of the modification court giving preclusive effect to the domestic abuse order.

The marriage of Kenneth and Dawn was dissolved in March 1990, and custody of the parties' daughter, Kendra, was awarded to Dawn. Kenneth filed a petition to modify the custody and visitation provisions of his dissolution decree on September 21, 1990. On April 25, 1991, after Kenneth filed his petition for modification and before the petition for modification came on for hearing, Dawn filed a petition for domestic abuse alleging Kenneth had sexually abused Kendra. On May 17, 1991, less than a month after Dawn filed the domestic abuse petition, a hearing was held, and on May 22, 1991, the district court entered an order granting relief requested in the domestic abuse petition. The hearing on Kenneth's petition for modification of the dissolution decree was not held until April 22, 1992, nearly a year later.

Kenneth had asked the dissolution decree be modified to increase his visitation or to make him a custodian. The trial court did not grant Kenneth relief on either request.

Kenneth, on appeal, contends the modification court should have modified an injunction entered in a domestic abuse action and should have modified the custody arrangement.

The domestic abuse order was entered by Judge Dandos on May 22, 1991, and provided certain things Kenneth was to complete before he could have unsupervised visitation with his daughter.

In denying Kenneth's request in the modification action for unsupervised visitation, the modification court said:

> Therefore, this court may not order the Respondent to have unsupervised visitation or physical care of Kendra unless and until the conditions prescribed by Judge Dandos have been shown to have been fulfilled.

I do not believe the modification court should have given preclusive effect to the decision of the domestic abuse court, and I find the modification court was not without power to order unsupervised visitation until the provisions of the domestic abuse order were met. I agree with Kenneth that the district court had authority to amend the domestic abuse decree.

The domestic abuse order was entered under procedures prescribed by Iowa Code section 236, the Domestic Abuse Act. This Act is a protective statute designed to provide speedy access to the courts for persons abused or alleged to be abused by certain family and/or household members. See Christenson v. Christenson, 472 N.W.2d 279, 280 (Iowa 1991); see also Iowa Code § 236.

Iowa Code section 236.5(2)(d) and (e) provide, in applicable part:

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> d. [I]f the court finds that the safety of . . . the children will be jeopardized by unsupervised or unrestricted visitation, the court shall condition or restrict visitation as to time, place, duration, or supervision, . . .
> e. [T]he court may amend its order or a consent agreement at any time upon a petition filed by either party and after notice and hearing. (Emphasis supplied).

The Act itself clearly grants the district court authority to amend a domestic abuse order at any time on notice and with hearing.

A determination that the finding in the domestic abuse case has a preclusive effect in a subsequent modification action is contrary to the nature of the Act. Issue preclusion is a bar to further litigation of a specific issue. Harrison v. State Bank of Bussey, 440 N.W.2d 398, 399 (Iowa App. 1989).

Giving a finding in a domestic abuse action preclusive effect is not compatible with the scheme of section 236, the Domestic Abuse Act. The scheme is protection and speed is a part of protection. See Iowa Code § 236.4(1). Iowa Code section 236.4(1) provides: "Within ten days after commencing a proceeding and upon notice to the other party, a hearing shall be held . . . ." The ability of the court to decide a domestic abuse issue and grant protection quickly will be lost if parties to the action must be concerned about a domestic abuse order having preclusive effect in a dissolution action. And the court will find itself hindered in reaching speedy decisions by the demands for discovery and lengthy trials.

A finding that an issue adjudicated in a domestic abuse hearing should not have preclusive effect in another action is also in accord with the reason given for not giving preclusive effect to an issue adjudicated in a small claims action in a case within the regular jurisdiction of the district court. See Village Supply Co. v. Iowa Fund, Inc., 312 N.W.2d 551, 554 (Iowa 1981); Bagley v. Hughes A. Bagley, Inc., 465 N.W.2d 551, 553 (Iowa App. 1990).

In Bagley, we said:

> Small claims cases are governed by special statutes and rules. Iowa Code § 631.2. They are to be simple and informal without the technicalities of procedure. See Iowa Code § 631.2. They are to provide a simple, swift, and inexpensive procedure for hearing cases under its jurisdictional amounts. Wilson v. Iowa Dist. Court, 297 N.W.2d 223, 224-25 (Iowa 1980).
>
> A reason for denying issue preclusion exists when the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim. See Village Supply, 312 N.W.2d at 554; Restatement (Second) of Judgments 68.1. Giving preclusive effect to small claims adjudications in subsequent regular district court trials would be inconsistent with maintaining the simplicity and informality of small claims procedures. Village Supply, 312 N.W.2d at 554.

Bagley, 465 N.W.2d at 553-54.

Domestic abuse proceedings are governed by special statutes and rules. The statute that created them makes provision for the creation of forms to assist pro se litigants. See Iowa Code § 236.3. The procedures are to be simple, swift and inexpensive, and offer protection. The procedures and time frames are not totally appropriate

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to deciding the same issues in the context of a dissolution action.

In the domestic abuse action, only one expert witness appeared. She gave testimony that supported Judge Dandos finding Kenneth had sexually abused Kendra. At the modification hearing, there was considerable evidence not available to Judge Dandos. At the modification hearing, two experts challenged the conclusions reached by the first expert. There was also testimony Dawn had said she was going to make allegations of sexual abuse so Kenneth could not see his daughter.

It would have been difficult, if not impossible, for Kenneth to gather this evidence supporting his position in the ten days following the commencement of the proceeding when a hearing under section 236.4(1) is required to be held. The lack of an opportunity for a full adjudication negates against the domestic abuse order being given preclusive effect. See Restatement (Second) of Judgments § 68.1 (1982).

To understand the serious dilemma this case presents, I review its history. In the original decree entered in March 1990, it was provided that Kenneth have unsupervised visitation with Kendra, who was born on October 23, 1987, for four hours on alternating Sundays. When Kenneth and Dawn separated in August 1989, Kenneth sought a joint custody arrangement. In September 1990, Kenneth petitioned for an order to modify the decree to put the child in joint

custody and to extend his visitation. On December 2, 1990, Kenneth had visitation and was not able to take Kendra home because of inclement weather. Kendra spent the night with her father. In January and February 1990, Kenneth had unsupervised visits with Kendra. After the first unsupervised visit on January 19, 1990, Dawn, when Kendra returned home, took her to St. Luke's Hospital in Sioux City. At the hospital, Dawn gave a history that the child fifteen minutes after returning from visitation had started to cry and said her back hurt and it hurt between her legs and daddy hurt leg. After tests, x-rays, and examination at the hospital, the hospital record shows the assessment was "alleged abuse with no physical finding at this time." In January 1990, the Iowa Department of Human Services was advised the child was complaining of vaginal pain and she might have been abused by Kenneth. An investigation followed and the Department determined the report of abuse by Kenneth was "unfounded".

On January 9, 1991, a second sexual abuse complaint was filed with the Department of Human Services by Dawn who alleged that during the December visitation Kenneth had given the child a bath and touched her pubic area. Dawn said Kendra has since that time engaged in suggestive sexual behavior. Kendra was interviewed on January 10, 1991, by a licensed social worker. Kendra denied anyone had touched her private parts. On January 23, 1991, the

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Department of Human Services issued a report finding no sexual abuse of Kendra by Kenneth.

Then on February 19, 1991, Dawn met with a person called "a master social worker". Dawn told the social worker Kendra needed therapy because Kendra told Dawn she had taken a bath with Kenneth. Dawn also told the worker Kendra said Kenneth touched her "peepee" and asked Kendra to touch his "peter". Dawn related Kendra had simulated sexual intercourse while sitting on top of her and was french kissing family members. On February 24, 1991, Kenneth had his last unsupervised visit with Kendra.

After Kendra's initial meeting with the master social worker, sessions called "therapy sessions" between Kendra and the master social worker were scheduled. Notes of the master social worker, made during or after the sessions, reflect Kendra in the first session acted out her father urinating; said her daddy touched her peepee and her daddy asked her to touch his peter; and that while an anatomically correct doll Kendra called daddy urinated, Kendra grabbed the penis and stroked it indicating her daddy had had her do that.

In the second session, the worker's notes reveal that Kendra said Kenneth tried to touch her peepee and she says no and Kenneth wiped her bottom and she wiped his.

In the third session, after the anatomically correct male doll finished using the toilet, Kendra put her mouth on the doll's penis and wiped the doll's bottom and said

she had done this with daddy and later said she took a bath with Kenneth and kissed his peter.

The next session was videotaped, Dawn was in the room during the third session[1]. Kendra acted out Kendra doll and daddy doll going "potty" and said daddy touched my peepee; and she touched daddy's peepee. The worker's notes after that session were a finding of inappropriate touch of Kendra by Kenneth and possible digital penetration of Kendra while she was bathing or using the toilet and Kenneth forcing Kendra to have oral sex while bathing or after use of the toilet.

The next session was also videotaped. Kendra said repeatedly she had taken a bath with daddy. Kendra put her mouth on the penis of an anatomically correct daddy doll when asked to demonstrate how she took a bath with daddy.

This same kind of dialogue continued in further sessions between Kendra and the master social worker. In subsequent sessions, Kendra added information that she had kissed daddy's peter; that he had put his index finger in her vagina and smelled it; and that daddy had kissed her peepee and that daddy had come to her house with a gun and threatened to kill her mommy.

On March 3, 1991, Kenneth's attorney had been told

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1. Whether Dawn was in the room during the earlier session is not clear.

Kenneth would not be allowed to visit his daughter, and on March 8, 1991, the Department was advised Kendra may have been sexually abused by Kenneth.

On April 15, 1991 the child was examined by a doctor at the Marian Health Center in Sioux City. Kendra told the doctor daddy had kissed her peepee and she had kissed his. In response to the doctors's question if her daddy's peepee was different than hers, Kendra said, "no it was not".

The doctor noted a small abrasion on the left labia minora and at the very posterior end of the left labia majora. The doctor also noted Kendra was scratching her vaginal area vigorously during the examination.

The doctor found there was no evidence of penetration and abrasion along the left labia majora/minora; etiology is undetermined.

On May 3, 1991, Kendra's sessions with the master social worker were concluded. The domestic abuse petition was filed and came on for hearing on May 17, 1991. Dawn, a friend of Dawn's, and the master social worker testified. Kenneth testified and denied the abuse, but presented no other evidence.

Nearly a year later, on April 22, 1992, Kenneth's petition for modification came on for hearing. There was evidence at the modification hearing that was not available at the domestic abuse hearing.

A licensed Clinical Psychologist who had experience in interviewing children who had been sexually abused reviewed

the videotapes of the interview between Kendra and the master social worker. The psychologist was of the opinion Kendra was not lead in answering, but she knew a little too much about oral sex and on occasions her answers seemed a bit too "pat". The psychologist had a question as to coaching and a question as to whether the mother had made it clear to Kendra what Kendra was supposed to tell the social worker. The psychologist felt something was going on because the child knew too much and oversight should take place.

A licensed psychologist in the State of Iowa also had reviewed the tapes. It was his opinion there was no credible evidence on the videotapes Kendra had been abused by Kenneth. He was of the opinion the master social worker when going in to these sessions already believed Kendra had been sexually abused by her father based on information given by Dawn. He found the master social worker repeatedly focused on the kissing and bathroom behavior and was leading. He also noted there was no clarification between "daddy" and "papa" and Kendra was pressured and there was no focus on any purposed abuser but Kenneth. He was of the opinion that reporting simultaneously as this was with the dissolution matter is suspect. He also based his opinion on the medical results. He interviewed the child. He was of the opinion the visitations be resumed.

I note the trial court in the modification action found visitations between Kendra and Kenneth had been

running smoothly until Kenneth filed for additional visitation and joint custody.

The dilemma is the child should not be in the care of an abuser, but a parent possessing the mind set to formulate and coach the child in sexual abuse allegations is also dangerous to a child's well being.

I find the trial court should not have given preclusive effect to the finding in the domestic relations proceeding that Kenneth had sexually abused Kendra.

I would remand to the trial court to determine from the evidence at the modification if Kenneth is the abuser, if Dawn has coached Kendra or if, as the administrative law judge found, Kendra has been abused by someone else. Only then, in my opinion, can the modification be addressed.