FILED
MAR 31 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN RE THE MARRIAGE OF RONALD G. GLUSAC
AND SUZANNE KAY GLUSAC

Upon the Petition of)
RONALD G. GLUSAC,)
Petitioner-Appellant,)
And Concerning)
SUZANNE KAY GLUSAC,)
Respondent-Appellee.)

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Filed March 31, 1987

6-535
86-600

Appeal from the Iowa District Court for Polk County (No. DM CD35-20970) - Luther T. Glanton, Judge.

Petitioner former husband appeals from the trial court's denial of his application to cite respondent wife for contempt for denying him the visitation he was allowed under a dissolution of marriage decree. He asserts that the trial court should not have modified the dissolution decree by placing conditions on his visitation. **REVERSED.**

Diane L. Dornburg of Waukon for appellant.

Anna I. Shinkle of Shinkle & Shinkle, Des Moines, for appellee.

Considered by Oxberger, C.J., Donielson and Snell, JJ.

OXBERGER, C.J.

The important question presented in this appeal is whether a trial court, in response to a petition for contempt, may upon its own motion restrict a noncustodial parent's visitation rights. We think that this action by the trial court in the matter sub judice ran afoul of the appellant's constitutional guarantees because he was afforded no notice or opportunity to be heard upon this issue. Accordingly, we reverse the trial court's judgment in this respect.

A brief recitation of the facts will aid in understanding how this matter arose. The record discloses that in March of 1982, a decree was entered dissolving the marriage of the parties, Ron and Sue Glusac. As part of the decree, Sue was given custody of her three minor children whom Ron had adopted during the marriage. In addition, the decree provided Ron visitation rights every Saturday from 1:00 p.m. to 6:00 p.m. The record reveals, however, that Ron exercised his visitation rights only once, in April of 1982; thereafter, he made no attempt to contact the children until October of 1985.

Ron testified that he did not attempt to maintain contact with the children because he knew that they were in the process of reestablishing a relationship with their natural father; Ron stated that he did not want to interfere. In 1985, however, Ron attempted to visit the youngest child, Todd.[1] When Ron discovered that Sue and Todd had moved, he commenced an action charging Sue with child concealment; a preliminary hearing was held, and the charge was subsequently dismissed. In 1986, Ron filed the underlying action alleging that Sue contemptuously prevented him from exercising his visitation rights with Todd. The trial court considered the conflicting testimony as to what transpired when Ron allegedly attempted to visit Todd in the Fall of 1986, and found that Ron had failed to establish that Sue was in contempt; Ron has

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[1]By this time, the other children had become emancipated.

not appealed this finding. Rather, the only provision of the trial court's order which Ron challenges is the following:

> The Court finds that no visitation should be allowed until Ron has a place where he can take Todd, and can furnish an address and phone number where he can be contacted by Sue and the children; and the parties providing therapy are consulted and approve the same as being in the best interest of Todd.[2]

Ron argues that the action of the trial court in restricting his visitation privileges was erroneous in that neither party had requested such action; he maintains that the court's order violated his due process rights because he was not given an opportunity to be heard upon this issue. We agree.

Recently, in Marriage of Frederici, 338 N.W.2d 156 (Iowa 1983), the supreme court considered a nearly identical issue. In Frederici, the court of appeals terminated a joint custody arrangement upon its own motion; neither party requested this action. Upon the aggrieved party's petition for further review, the supreme court explicitly held that, "when a court considers changing a decree in a case before it in a respect that has not been litigated, it should provide the parties an opportunity to be heard on the possible change." Frederici, 338 N.W.2d at 159. This holding is premised upon the well-established principle of procedural due process which mandates that "a person must ordinarily be informed somehow of the issue involved in order to prevent surprise at the hearing and allow an opportunity to prepare." Wedergren v. Board of Directors, 307 N.W.2d 12, 16 (Iowa 1982); see also Alsager v. District Court, 406 F.Supp. 10, 15-16 (S.D. Iowa 1975), (procedural due process must be complied with where fundamental parental rights are at issue), aff'd, 545 F.2d 1137 (8th Cir. 1976).

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[2]The record discloses that Ron has virtually no income and rents a room from a woman who will not allow Sue or Todd on the premises. In addition, Ron does not have a telephone, and his landlady will not accept calls from Sue or Todd on her phone.

In the present case, Ron invoked the trial court's jurisdiction because he sought to hold his former wife in contempt; he had no notice that his visitation rights might be restricted until the trial court put this provision in its decree. Had Ron timely been apprised of the possibility that his visitation was subject to restriction, he may have introduced testimony in his behalf relevant to that inquiry; again, however, he was never availed this opportunity. While we find no error in the action of a trial court restricting or conditioning visitation on its own motion, elemental fair play and procedural due process demand that the parties affected by this decision be given notice and an opportunity to be heard. See Frederici, 338 N.W.2d at 159.

Sue argues that Ron was provided sufficient notice because in his application for contempt he suggested that his visitation rights be increased. We cannot agree. The fact remains that Ron was never made aware of the restrictions ultimately imposed by the court, or allowed to present evidence contesting this possibility. Nor are we persuaded by Sue's argument that because Ron's visitation rights were not terminated but were merely restricted, the action of the trial court resulted in no error. A plethora of judicial decisions have recognized a parent's right to the protections of procedural due process where various aspects of family life less serious than the outright termination of the parent-child relationship have been threatened. See Alsager, 406 F.Supp. at 15; see also Cleveland Board of Education v. LeFleur, 414 U.S. 632, 639, 94 S.Ct. 791, 796, 39 L.Ed.2d 52, 60 (1974); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645, 652 (1944); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042, 1045 (1923).

In conclusion, we hold that the provision of the decree restricting Ron's visitation is reversed. In addition, Sue has requested that Ron be ordered to pay the costs and attorney's fees which she incurred in connection with this

appeal We have considered her request in light of both parties' relative financial positions and think that each should bear responsibility for their own obligations.

REVERSED.