

IN THE COURT OF APPEALS OF IOWA

No. 7-311 / 96-1642

**IN RE THE MARRIAGE OF LINDA SCHMITZ
AND MICHAEL GENE SCHMITZ**

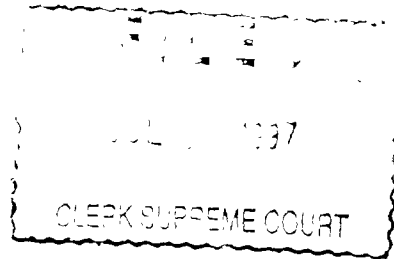
000445

Upon the Petition of
LINDA SCHMITZ,

Appellee.

And Concerning
MICHAEL GENE SCHMITZ,

Appellant.



Appeal from the Iowa District Court for Cerro Gordo County, Gilbert K.
Bovard, Judge.

Linda Schmitz appeals from the district court's dismissal of her application for
declaratory judgment. **VACATED AND REMANDED.**

Brian D. Miller of the Oltrogge Law Office, P.C., Clear Lake, for appellant.

Mark A. Young of the Young Law Office, Mason City, for appellee.

Considered by Sackett, P.J., Huitink, J., and Hayden, S.J.*

*Senior judge from the Iowa Court of Appeals serving on this court by order
of the Iowa Supreme Court.

HAYDEN, S.J.

Linda Schmitz filed an application for declaratory judgment seeking to resolve a conflict in the visitation provisions of the decree dissolving her marriage to Michael Schmitz. Before Michael filed an answer, the court dismissed the action sua sponte. The court ruled an application for declaratory judgment was not a proper proceeding under the existing record, the proper procedure being a petition to modify. Linda has since filed a petition to modify the decree and has appealed the court's dismissal of her application for declaratory judgment. The issues in this appeal are whether Linda may proceed with the declaratory judgment action and whether Linda's petition to modify renders this appeal moot.

Linda and Michael were married on April 20, 1989. They have a daughter, Rachele, born June 18, 1989. The decree awarded physical custody to Linda, with Michael to have visitation as provided in the decree. The court wrote the visitation schedule was suitable, "although providing only some thirty-five percent to Michael compared with sixty-five percent to Linda." The schedule referenced a stipulated agreement which provided Michael would have visitation two and one-half days per week. The decree further provided:

Michael shall also have six weeks extended visitation during the summer months when school is not in session which extended visitation may be exercised in three two week periods, two three week periods or any multiple including the full six weeks consecutively. During such times as Michael is exercising extended visitation, Linda shall have reciprocal visitation opportunities if Michael's visitation exceeds three consecutive weeks.

Michael elected to take his extended summer visitation in periods of two weeks. He interpreted the decree to mean he could have visitation two and one-half days per week in addition to the two weeks. Linda believed the provisions regarding extended summer visitation took priority over the weekly visitation, so Michael would not have two and one-half days per week in addition to the two weeks. Michael filed a contempt action, which he withdrew after Linda agreed to allow him visitation under his interpretation of the decree.

Linda filed an application for a declaratory judgment. She asserted if Michael exercised his summer visitation two weeks at a time, as he had for two summers, she would have no contact with Rachele for a period greater than two weeks under Michael's interpretation of the decree. She alleged she would be unable to take a week-long vacation with Rachele at any time during the year. She computed Michael would have visitation 45.5% of total yearly time under his interpretation of the decree, whereas under her interpretation Michael would have visitation for the 35% of time referred to in the decree. She also asserted under her interpretation of the decree she could take a week-long vacation with Rachele, as could Michael.

The district court dismissed Linda's application before Michael responded to it. The court ruled an application for declaratory judgment was not a proper proceeding under the existing record, the proper procedure being a petition to modify. The court reasoned the decree expressly reserved jurisdiction to modify the visitation provisions if the parties could not agree. Linda has appealed the court's dismissal.

000448

Linda ~~then~~ filed a petition to modify the decree. In count I, she requested the court ~~modify the decree~~ to (1) require Michael to provide Linda with copies of his federal income tax returns each year; (2) require Michael to pay half the transportation costs incurred by the visitation; (3) provide the parties would share the dependency exemption on an alternating yearly basis; (4) require Michael to give Linda notice if he intends to move; and (5) determine child support under the guidelines based on Michael's current income. In count II, she alleged the visitation schedule, as interpreted by Michael, constituted split physical custody.

Initially, we note the decree does not reserve jurisdiction to resolve any conflict between the parties on the issue of visitation. The court fashioned the visitation format to accommodate Michael's split-shift employment. The decree provided, "Should that work schedule change for any reason, the visitation schedule will be changed to provide Michael with equivalent visitation opportunities. If the parties cannot agree, the Court reserves jurisdiction to modify." Linda has not alleged Michael's work schedule has changed, but requested the court to interpret the decree and resolve the conflict over whether the decree awarded Michael ~~two~~ and one-half days of visitation ~~a week~~ in addition to his two week periods of summer visitation.

I. Dismissal.

We review a court's sua sponte dismissal of an action for an abuse of discretion. *Rush v. Sioux City*, 240 N.W.2d 431, 439 (Iowa 1976). Trial courts have the power to dismiss actions sua sponte, but use of this power should be restrained. *Id.*

Iowa Rule of Civil Procedure 261 provides, in part, courts “shall declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . . The existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Iowa R. Civ. P. 261. The test is whether the legislature has prescribed an exclusive remedy. *Ewurs v. Irving*, 344 N.W.2d 273, 276 (Iowa App. 1983). Rules providing for declaratory judgment are to be liberally construed in order to carry out their purpose. *Green v. Shama*, 217 N.W.2d 547, 551 (Iowa 1974).

Nothing in Iowa Code chapter 598, particularly the provisions addressing modification, indicates the legislature prescribed modification actions as the exclusive remedy. Linda presented the district court with a dispute concerning the inter-relationship of weekly visitation and extended summer visitation. The dispute would likely occur each summer, and Michael has been firm in pressing his interpretation of the decree. Linda’s application does not request modification, but interpretation of the visitation schedule. An application for declaratory judgment is a sanctioned remedy. The district court abused its discretion in dismissing the application.

II. Mootness

Michael contends this appeal is moot because Linda filed a petition to modify the decree. A case is moot when it no longer presents a justiciable controversy because issues have become academic or nonexistent and the judgment would have no practical legal effect upon the existing controversy. *Junkins v. Branstad*, 421

N.W.2d 130, 133 (Iowa 1988). The mere filing of the petition to modify does not render the issues in this appeal academic or nonexistent.

To prevail on her modification petition, Linda would have to prove by a preponderance of the evidence that a material and substantial change in circumstances has occurred since the date of the original decree that was not within the contemplation of the dissolution court. *In re Marriage of Feustel*, 467 N.W.2d 261, 263 (Iowa 1991). A court may not modify the decree simply because it was inequitable when entered; an appeal is the proper vehicle with which to achieve that remedy. *In re Marriage of Chmelicek*, 480 N.W.2d 571, 574 (Iowa App. 1991).

We express no opinion on whether Linda can show a material and substantial change in circumstances not within the court's contemplation when it issued the decree. If the district court found Linda did not meet her burden, it would not entertain the petition and the conflict over the interpretation of the visitation schedule would continue. The record does not indicate whether any proceedings have occurred on the modification petition.

We vacate the district court's order dismissing Linda's application for declaratory judgment. We reinstate her application for declaratory judgment and remand for further proceedings thereon. In light of our decision here, the appeal and the declaratory judgment action are not moot.

Costs on appeal are taxed to Michael.

VACATED AND REMANDED.