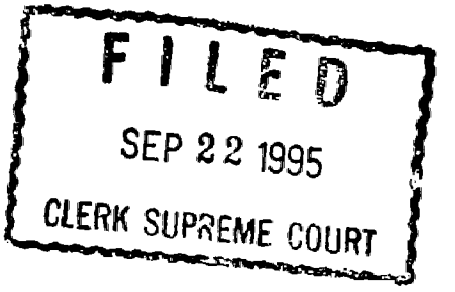
**IN THE COURT OF APPEALS OF IOWA**




No. 5-391 / 94-1347

**IN RE THE MARRIAGE OF DONNA SUE HAMILTON AND ROGER PAUL HAMILTON**

Upon the Petition of
**DONNA SUE HAMILTON,**

Appellant,

And Concerning
**ROGER PAUL HAMILTON,**

Appellee.

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Appeal from the Iowa District Court for Appanoose County, Dan F. Morrison, Judge.

Petitioner appeals a district court ruling transferring custody of the parties' minor children to respondent. **RULING OF THE DISTRICT COURT VACATED.**

Roberta Chambers, Corydon, for appellant.

Gregory G. Milani of Orsborn, Bauerle, Milani & Neary, Ottumwa, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

**PER CURIAM**

At issue is whether the district court had jurisdiction to grant a father's request for modification of custody when an appeal was already pending on the father's previous request for modification in a prior contempt action. We find the district court did not have jurisdiction to modify custody and vacate its ruling.

## I. PROCEDURAL BACKGROUND

The parties, Donna and Roger, were divorced pursuant to a Texas dissolution decree in 1989. Donna was awarded the physical care of the parties' children. Donna subsequently moved to Iowa and Roger moved to Illinois. Numerous contempt actions have been filed in which it was alleged Roger had failed to pay child support and Donna had failed to allow Roger to have visitation with the children. This opinion addresses only those contempt actions relevant to the disposition of this appeal.

On April 15, 1993, Roger filed an "Application for Finding of Contempt and Change of Custody." In his application Roger asserted Donna had interfered with his right to visitation with their children. As a remedy for her allegedly contemptuous conduct, Roger asked the court to place custody of the children with him. Donna resisted the application and sought to have Roger found in contempt for failing to pay court-ordered child support, attorney fees, and expenses related to the children's health insurance and medical expenditures.

A hearing was held on these applications and a ruling was filed on June 29, 1993, ("Judge Rielly ruling").[1] In its ruling the district court found Donna in contempt for failing to allow Roger to have visitation with their children. However, the court concluded it would not be appropriate at that time, or in the children's best interests, to transfer custody of the children as punishment for the contempt. Instead, it imposed a jail sentence as punishment. Both Donna and Roger appealed from this ruling. Roger specifically appealed the district court's refusal to transfer custody of the children.

On December 14, 1994, this court filed an opinion on the appeal from the Judge Rielly ruling. Among other things, this court addressed the standards for modifying custody and affirmed the district court's decision to deny Roger's request for a change in custody.

Prior to our disposition of the appeal of the Judge Rielly ruling, Roger had filed an application for modification of custody.[2] Donna resisted Roger's application and filed an application for a finding of contempt. On August 23, 1994, the district court ruled on these applications ("Judge Morrison ruling"). Among its findings, the

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[1]Judge Rielly filed a ruling on September 7, 1993, which enlarged the findings and conclusions of his June 29, 1993, ruling. Those enlarged findings and conclusions have no affect on this appeal.

[2]He initially filed an application to modify his support obligation on November 10, 1993, and subsequently amended this application on May 16, 1994, to include a request for modification of custody.

court concluded the best interests of the children warranted a modification of custody and the children were placed in Roger's physical care. It is Donna's appeal from this ruling which is now before this court.

## II. SUBJECT MATTER JURISDICTION

Donna contends the district court was without jurisdiction to modify custody when it entered its August 23, 1994, ruling. She relies on the fact the appeal from the Judge Rielly ruling was pending at the time Judge Morrison entered his order modifying custody.[3]

Ordinarily, the filing of a notice of appeal from a final decision divests a district court of jurisdiction until some part of the case is remanded. *Kirk v. Iowa Dist. Court for Jefferson County*, 508 N.W.2d 105, 108 (Iowa App. 1993). However, a trial court retains jurisdiction to proceed on issues collateral to, and not affecting, the subject matter of the appeal. *Id.*

An appellate court has no jurisdiction of subject matter over which the trial court lacked jurisdiction. *In re Adoption of Gardiner*, 287 N.W.2d 555, 559 (Iowa 1980). The want of subject matter jurisdiction may be raised for the first time on

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[3]Donna also relies on the pendency of an appeal from a February 8, 1993, ruling ("Judge Jenkins' ruling") as a basis for alleging Judge Morrison had no jurisdiction to modify custody on August 23, 1994. However, this court's opinion affirming the Judge Jenkins' ruling was filed on April 26, 1994, prior to the entry of Judge Morrison's ruling. The appeal from Judge Jenkins' ruling was resolved prior to the filing of Judge Morrison's decision and has no bearing on whether the district court had jurisdiction to modify custody.

appeal. *Hutcheson v. Iowa Dist. Court for Lee County*, 480 N.W.2d 260, 262 (Iowa 1992). Contrary to Roger's assertion in his brief, subject matter jurisdiction cannot be waived or vested by the parties' consent. *S.S. v. Iowa Dist. Court for Black Hawk County*, 528 N.W.2d 130, 132 (Iowa 1995).

In the action before Judge Rielly, Roger had sought a transfer of custody as punishment for Donna's contemptuous conduct. The remedy of modification of custody as a punishment for contempt is statutorily authorized. Iowa Code § 598.23(2)(b) (1995). A district court is required to consider the long range best interests of the children before entering any order modifying a dissolution decree, regardless of whether the request for modification occurs in a contempt or modification proceeding. *Kirk*, 508 N.W.2d at 109.

Roger's appeal of Judge Rielly's refusal to transfer custody was pending when he filed his May 16, 1994, request for modification of custody. That appeal was still pending when Judge Morrison granted his request on August 23, 1994. In both actions Roger sought a modification of custody, and we cannot find the modification request raised in this action was a "collateral" issue. Roger relied on events subsequent to Judge Rielly's ruling to justify his later request for modification. However, such changed circumstances did not vest the district court with jurisdiction to reconsider a transfer of custody while the issue of custody was on appeal. *See In re Marriage of Courtney*, 483 N.W.2d 346, 347-48 (Iowa App. 1992) (changed

circumstances since entry of decree did not vest district court with jurisdiction to modify alimony when direct appeal of alimony issue was pending).

The practical effect of Judge Morrison's ruling, if allowed to stand, would be to substantially alter the custody issue already pending before this court in the appeal from Judge Rielly's ruling. "The result would be the very result sound jurisprudence seeks to avoid: two conflicting decisions on the same issue--one by the district court and one by the appellate court." *Courtney*, 483 N.W.2d at 348.

At the time of entry of the August 23, 1994, district court order modifying custody, the issue of custody was pending on appeal. The district court was without jurisdiction to modify custody at that time, and we vacate its order to transfer custody. In vacating the August 23, 1994, ruling, we express no opinion on the merits of the district court's ruling. The ruling is vacated solely because the district court lacked jurisdiction to modify custody when the issue of transferring custody was already on appeal. With the disposition of this appeal, the issue of custody will no longer be on appeal and may be considered by the district court in any future modification or contempt proceedings.

**RULING OF THE DISTRICT COURT VACATED.**