

2005 WL 627153

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS NOT DESIGNATED  
FOR PERMANENT PUBLICATION AND MAY NOT  
BE CITED EXCEPT AS PROVIDED BY NEB. CT. R.  
APP. P. s 2-102(E).

Court of Appeals of Nebraska.

April B. SCHOENHOFER, appellee

v.

Bruce E. SCHOENHOFER, appellant.

No. A-04-713. | March 1, 2005.

Appeal from the District Court for Buffalo County: John P. Icenogle, Judge. Affirmed in part, and in part dismissed.

#### Attorneys and Law Firms

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellant.

Ryan C. Gilbride, of Legal Aid of Nebraska, for appellee.

CARLSON, MOORE, and CASSEL, Judges.

#### Opinion

CASSEL, Judge.

#### INTRODUCTION

\*1 After proceedings subsequent to the dissolution of the marriage of Bruce E. Schoenhofer and April B. Schoenhofer, Bruce appeals from two orders of the district court for Buffalo County, Nebraska, which modified his visitation and found him to be in contempt. For the reasons stated below, we affirm the court's orders with respect to visitation. We conclude that the district court's finding of contempt alone was not a final, appealable order, and we therefore dismiss that portion of the appeal.

#### BACKGROUND

The parties are parents of four minor children, whose names and ages at the relevant hearing were: Dakota, age 14; Schuyler, age 11; Reese, age 9; and Bailey, age 7. By a decree entered November 16, 2001, the district court dissolved the parties' marriage.

In the initial dissolution proceeding, the parties agreed that April should be awarded custody of the children, subject to Bruce's rights of visitation. In its initial decree, because the parties lived approximately 420 miles apart at that time, the district court granted Bruce an extended summer visitation with the children beginning on July 1 and continuing through August 8 of each year, with April entitled to have a weekend visitation during such time, at or near Bruce's town. The court found that Bruce should be entitled to visitation for any periods during the school year where the children had 4 consecutive days without school. The court further found that Bruce was allowed to designate five weekends (excluding Mother's Day) for the purpose of weekend visitation, which was to occur at a halfway point between his residence and that of April. The court granted Bruce certain holiday visitation.

Afterward, April filed a motion for new trial and a motion to alter or amend the decree. In an order filed February 5, 2002, the district court overruled the motion for new trial, made numerous findings not pertinent to this appeal, but granted the motion to alter or amend the decree to provide that the Thanksgiving vacation would alternate between the parties, with April having such vacation in odd-numbered years.

We now discuss the subsequent proceedings leading to the instant appeal. On July 17, 2003, April filed three motions. The first motion requested a modification of child support. The next motion sought a modification of the visitation schedule, alleging that the "last week of [Bruce's extended] summer visitation makes it impossible for Dakota ... to show his 4-H swine," that the children likewise miss the free school physicals (which means April must pay for physicals), that the children want the autonomy to make choices regarding their activities on their vacation, and that Bruce tries to call the children late at night or at times when the children are not home, although the decree did not provide for telephone

Schoenhofer v. Schoenhofer, Not Reported in N.W.2d (2005)

---

visitation between Bruce and the children. April requested that the court modify Bruce's extended summer visitation to be from July 1 to August 1 of each year, require Bruce to travel to Kearney, Nebraska, for at least half of the children's visitation periods and half of the weekends, and order telephone visitation between Bruce and the children at a specific time or order Bruce to provide the children with a cellular telephone. Finally, she filed a motion and affidavit for an order to show cause, alleging that Bruce was in violation of a number of provisions of the November 2001 decree.

\*2 Bruce timely filed a responsive pleading which admitted that since Dakota was of sufficient age and maturity, the court should consider any preference of Dakota, and requested that April's motion for modification of the visitation schedule be dismissed. The responsive pleading denied the allegations that the decree did not provide for telephone visitation between Bruce and the children and that Bruce tends to call late at night or at times when the children were not home.

Bruce also filed a cross-petition wherein he stated that he moved to Grand Island, Nebraska, in order to be closer to the children; that Dakota had expressed a preference to live full time with Bruce; that it would be in Dakota's best interests for Bruce to have sole custody of Dakota; that April had constantly restricted Bruce's access to the children and frustrated his relationship with the children, such that it would be in the best interests of the children for Bruce to have custody; and that April's subsequent act of having a child out of wedlock and failing to establish a relationship with the child's father indicated that April was unstable and incapable of making decisions in the best interests of the children. Accordingly, Bruce requested that custody of the parties' children be awarded to him and that April be ordered to pay child support. On April 6, 2004, Bruce filed an amended responsive pleading and cross-petition which changed only the cross-petition's prayer for relief to request that if Bruce was not awarded custody, the court then modify Bruce's visitation schedule.

The motions came on for hearing on April 8, 2004. The parties stipulated that custody of the children should remain with April. With regard to summer visitation, April testified that she desired Bruce's summer visitation be changed from July 1 through August 8 to July 5 through August 12 because the children miss a reunion of April's family that is held every July 4. Bruce expressed frustration that April had scheduled extracurricular

activities for the children to occur during Bruce's extended summer visitation and that such scheduling had required him to make an additional trip to Nebraska. A psychologist who had visited with the parties and the children opined that Dakota should have an additional 4 weeks of summer visitation with Bruce, and Bruce testified that he would like to spend an additional 4 weeks with all the children.

April took issue with Bruce's getting 4-day weekend visits when the children have vacation from school, because such 4-day weekends occur around Thanksgiving and Easter. Thus, April testified that the court's provision on the 4-day weekend visits conflicts with its February 5, 2002, order regarding Thanksgiving and gives Bruce visitation every Easter. April also asked that the provision giving Bruce visitation when the children have a 3-day weekend from school be eliminated because "[i]t's just too much confusion and travel time and everything." Bruce testified that he would like to have a rotation of the 3-day weekends and to have all the 4-day weekends, if there were any.

\*3 Regarding weekend visits, April requested that the court designate the first Friday through the first Sunday of each month as Bruce's designated weekend. With regard to weekend visitation during the school year, Bruce testified, "I think it's fair to move it to once every three weekends." Bruce asked the court to give some discretion regarding visitation to Bruce and Dakota for the purpose of allowing Dakota to continue certain activities, and to order April to provide alternate weekend visitation in the event that Dakota had a school function and could not go with Bruce.

When Bruce lived in Kansas, visitation required an 8-hour trip to the children's home in Elm Creek, Nebraska. Bruce testified that after he moved to Grand Island, he was able to see his children every other weekend, which was "[b]y far" more time than he was getting to see them when he lived in Kansas. At the hearing, Bruce testified that he had recently moved to Sidney, Nebraska, which is approximately 200 miles from Elm Creek.

Bruce testified that visitation exchanges usually did not go well and that April displayed hostility toward him unless someone else was with her. He stated that in some instances when April was visibly upset or directing profane language toward Bruce, the children would indicate that they did not want to go with Bruce. He further testified that April's refusal to take the children to

Schoenhofer v. Schoenhofer, Not Reported in N.W.2d (2005)

---

the designated dropoff point required him to drive an extra distance each time. On several occasions, according to Bruce, he had not been able to exercise his full visitation because April had made other plans for the children.

The parties also offered testimony and evidence with regard to the contempt issue. Due to our resolution of this issue, we shall only briefly summarize the evidence on that issue. In the original decree, the court ordered Bruce to pay April \$600 as part of a judgment and \$953 as a settlement. Bruce admitted that he never paid these amounts to the clerk of the district court, but evidence was adduced which indicated he offset such amounts by making other payments.

The court filed a journal entry on April 13, 2004. Therein, the court provided that Bruce's weekend visitation with the children during the school year (which the court defined as September 1 through May 30) was to begin at 6:30 p.m. on Friday and continue until 6:30 p.m. on the following Sunday. The court entitled Bruce to a weekend visitation on the third weekend of each month, which visitation would begin on Saturday from 10 a.m. until 9 p.m. and then resume Sunday from 10 a.m. until 4 p.m. As discussed below, the court clarified its provision on weekend visitation in a May 19 order.

In the journal entry, the court ordered that Dakota was to have summer visitation with Bruce beginning the first Saturday after school dismisses for the year and continuing through August 4 of each year. The court provided that the other children were to have extended summer visitation with Bruce beginning July 1 and continuing through August 4. In addition, April was to have the children in her home for visitation during the second weekend of June and July. The journal entry further specified holiday visitation, which does not directly pertain to the issues presented in the instant appeal.

\*4 With regard to the contempt issue, the court found that the \$600 obligation had been satisfied and that in equity, no contempt sanction could be or should be imposed. However, it found that Bruce had adequate funds to satisfy the \$953 judgment and failed to do so. It found him in contempt of court and directed that Bruce purge himself from contempt by paying a minimum of \$100 per month against the judgment and accruing interest, but the court imposed no sanction.

On May 19, 2004, the court overruled Bruce's timely filed motion for new trial but modified its April 13 journal entry to clarify that Bruce would receive a weekend visitation at his home on the first weekend of each month, that Bruce would also be required to exercise visitation on the third weekend of each month within a 25-mile radius of the children's home, and that the parties would be allowed by mutual written agreement to adjust the weekend visitation schedule to meet the activity needs of the children.

### ASSIGNMENTS OF ERROR

Bruce assigns, consolidated and restated, that the trial court erred (1) in determining visitation for Bruce and (2) in finding Bruce to be in contempt.

### STANDARD OF REVIEW

Visitation rights established by a marital dissolution decree may be modified upon a showing of a material change of circumstances affecting the best interests of the children. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001). Such modification is initially entrusted to the discretion of the district court, whose decision is reviewed de novo on the record and will normally be affirmed absent an abuse of discretion. *Id.* An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.*

### ANALYSIS

#### *Visitation.*

Bruce argues that the trial court erred in eliminating his 4-day weekend visitations and decreasing his extended summer visitation, in modifying his school year visitation to "one weekend at [his] home and one weekend in [April's] hometown," and in refusing to grant him the entirety of the summer as an extended summer visitation with all the children.

Schoenhofer v. Schoenhofer, Not Reported in N.W.2d (2005)

---

The purpose of visitation is to continue and foster the normal parental relationship of the noncustodial parent with the minor children of a marriage which has been legally dissolved. *Fine v. Fine, supra*. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights. *Id.* Neb.Rev.Stat. § 42-364(2) (Reissue 2004) provides in part:

In determining custody arrangements and the time to be spent with each parent, the court shall consider the best interests of the minor child which shall include, but not be limited to:

- (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;
- (b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;
- \*5 (c) The general health, welfare, and social behavior of the minor child; and
- (d) Credible evidence of abuse inflicted on any family or household member.

Visitation rights are to be determined on a case-by-case basis, and the Nebraska Supreme Court has explained that a court may consider many factors and circumstances in each individual case, such as the age and health of the child, the character of the noncustodial parent, the place where visitation rights will be exercised, the frequency and duration of visits, the emotional relationship between the visiting parent and the child, the likely effect of visitation on the child, the availability of the child for visitation, the likelihood of disrupting an established lifestyle otherwise beneficial to the child, and, when appropriate, the wishes of the child. *Fine v. Fine*, 261 Neb. 836, 626 N.W.2d 526 (2001); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987).

It appears that both parties have a strong relationship with the children. While each party desired a change in the decree's visitation provisions, the trial court was required to determine whether the best interests of the children warranted a change. The court modified the visitation

contained in the decree in certain respects, and we find nothing in the testimony or documentary evidence which would lead us to conclude that the court abused its discretion in making such modifications.

Bruce also argues that the court erred in failing to determine a day and time Bruce could contact the children by telephone. In her motion for modification of visitation, April stated that the decree did not provide for telephone visitation with the children, and she alleged that Bruce tends to call late at night or at times when the children are not home. Bruce denied these allegations in his responsive pleading. April requested the court order that telephone visitation between Bruce and the children occur at a designated time or, in the alternative, that Bruce provide the children with a cellular telephone. At the hearing, April did not offer any testimony regarding Bruce's contact with the children via telephone. Bruce testified that he is able to talk to the children on the telephone "once in a blue moon." He stated that although he calls four or five times a week, he is able to speak with the children about once a week. Bruce testified that when April has told him to call back at a certain hour, he does so but the children are not home. Although, during the hearing, he asked the court to set a certain date and time each week for him to call the children and testified that any time after 6 p.m. central standard time would be fine, he never amended his pleading to affirmatively request such relief. Thus, only April's request for such visitation was before the court, and she failed to adduce any evidence on the issue. Neither party adduced evidence supporting any specific day and time for such calls to occur; in effect, the parties invited the trial court to randomly pick a day and time. We cannot conclude that the court abused its discretion in declining to do so.

\*6 Bruce further argued that the court erred in failing to grant Dakota some discretion in exercising his visitation with Bruce. Initially, we note that under § 42-364, a child's preference is one of a number of factors for the court to consider, but we observe that Dakota did not testify at trial. In effect, Bruce is requesting that the court delegate to Dakota the court's judicial authority to determine visitation. The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). The authority to determine the custody and

Schoenhofer v. Schoenhofer, Not Reported in N.W.2d (2005)

---

visitation of a minor child cannot be delegated to a third party, because it is a judicial function. See, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988); *Deacon v. Deacon*, *supra*. Rather than allowing Dakota to determine his own visitation, in its order filed May 19, 2004, the court modified its April 13 journal entry “to allow the parties by mutual agreement and in writing to adjust the weekend visitation schedule to meet the activity needs of the children.” We cannot conclude the court abused its discretion on this issue.

**Contempt.**

In the absence of a final order from which an appeal may be taken, the appeal must be dismissed for lack of jurisdiction. *State ex rel. Keener v. Graff*, 251 Neb. 571, 558 N.W.2d 538 (1997). Before reaching the legal issues presented for review, it is the power and duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

In this case, the court found Bruce to be in contempt for failing to pay the \$953 settlement in accordance with the decree, directed Bruce to purge himself of the contempt by paying a minimum of \$100 per month against the judgment and the accrued and accruing interest, but made no reference to any sanction for Bruce’s failure to pay the

judgment as ordered. Similarly, in *Hammond v. Hammond*, 3 Neb.App. 536, 529 N.W.2d 542 (1995), the district court found the husband to be in contempt, gave the husband 30 days in which to purge himself of the contempt by paying a certain sum to the wife in accordance with the property settlement agreement, but did not mention any sanction to be imposed if the husband failed to comply with the order. Relying upon *Meisinger v. Meisinger*, 230 Neb. 37, 429 N.W.2d 721 (1988), and *State ex rel. Kant v. North Platte Baptist Church*, 225 Neb. 657, 407 N.W.2d 747 (1987), the *Hammond* court dismissed the appeal because a finding of contempt alone, without a noncontingent order of sanction, is not appealable. For those same reasons, we must dismiss the contempt portion of this appeal.

**CONCLUSION**

\*7 We find no abuse of discretion by the trial court in modifying visitation. Because the trial court did not impose any order of sanction, the contempt proceedings were not terminated in the trial court, and thus such order is not appealable. We therefore dismiss the portion of this appeal pertaining to the contempt proceedings.

AFFIRMED IN PART, AND IN PART DISMISSED.

---

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.