IN THE COURT OF APPEALS OF IOWA

No. 0-306 / 99-0530
Filed August 16, 2000

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF JEFFREY W. WULF AND TERESA L. WULF

Upon the Petition of
JEFFREY W. WULF,
Petitioner-Appellant,

And Concerning
TERESA L. WULF,
Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County, Mark Cleve, Judge.

The petitioner appeals a district court ruling denying his application to modify the child custody provisions of the parties' decree and the court's ruling denying his motion to reopen the case. **AFFIRMED.**

John C. Stevens of Lewis and Stevens, Muscatine, for appellant.

Roland M. Caldwell, Muscatine Legal Services, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

HECHT, J.

Jeffrey Wulf appeals a district court ruling denying his application to modify the child custody provisions of the parties' decree and the court's ruling denying his motion for new trial. We affirm.

I. **Factual Background and Proceedings.** Jeffrey W. Wulf and Teresa L. Wulf married on May 16, 1992 and were divorced in July of 1994. They are parents of Christopher Wulf who was born April 18, 1991. The decree awarded joint legal custody of Christopher to the parents, but placed the minor child in Teresa's primary care. At the time of the decree, Christopher was three years old.

Jeff currently lives in a three bedroom home with his fiancée, Tonya Jordan. He works full-time at his father's refuse disposal business. Teresa lives in a similarly sized home a few blocks away with her friend, Todd Hartman. She works as a cashier and attends community college. She has a son from a previous relationship, Nickolas Fowler, who was ten years old at the time of trial.

On September 26, 1995, Jeffrey and Teresa agreed Jeffrey would provide physical care for Christopher during a time when Christopher's schooling made it more appropriate for him to live with his father. Jeffrey agreed to continue to pay child support payments as ordered in the decree of dissolution. The agreement was not placed in writing or filed with the district court as a stipulation, and did not result in a modification of the decree.

In April of 1996, Jeffrey sought modification of the custodial arrangement. The district court entered an order granting temporary custody of Christopher to

Jeffrey. On May 29, 1996, the district court vacated the temporary order and returned primary care of Christopher to Teresa. The requested modification was denied by a court order filed February 7, 1997. In its decision, the district court found Jeffrey and his relatives had harassed Teresa. The district court found little laudable in their parenting, and noted Christopher, who was then five years old, was "almost out of the control of either parent." Both parents acted immaturely in their relationships with each other and their son. The court further found primary care should remain with Teresa because Jeffrey had failed to meet his burden to prove a greater ability to provide for the boy's needs.

In May of 1998, Jeffrey sought an extension of his summer visitation to enable Christopher to attend a summer school program. On June 4, 1998, the dissolution decree was modified to extend Jeffrey's 1998 summer visitation to permit Christopher to attend a remedial reading program at St. Ambrose University.

On June 16, 1998, Jeffrey again sought modification of the decree to gain primary physical care of his son. On January 6, 1999, the district court denied Jeffrey's application for modification of the custody provisions of the decree. Jeffrey appeals. He claims the district court erred: (1) by failing to allow him to examine an expert witness's file during deposition cross-examination; (2) by failing to find a substantial change in circumstances justifying a transfer of physical care; and (3) by denying him a new trial to present "newly discovered evidence."

II. Standard of Review. Evidentiary matters are generally within the trial court's discretion. The trial court's decision will not be overturned unless there has been an abuse of discretion. *State v. Hubka,* 480 N.W.2d 867, 868 (Iowa 1992). We review dissolution decrees de novo. *In re Marriage of Knickerbocker,* 601 N.W.2d 48, 50-51 (Iowa 1999); Iowa R. App. P. 4. Motions for new trial based on a discretionary ground are reviewed for abuse of discretion. *In re Marriage of Wagner,* 604 N.W.2d 605, 608 (Iowa 2000); *Boehm v. Allen,* 506 N.W.2d 781, 784 (Iowa App. 1993).

III. Discovery and Evidentiary Issues. Jeffrey sought pre-trial access to the file of Cheryl James, a licensed social worker who had provided mental health services to Teresa, Christopher, and Nickolas. A stipulation in the record indicates Ms. James refused attorneys for both parties access to her file and declined to voluntarily appear to provide deposition testimony. Jeffrey served a subpoena duces tecum on Ms. James who, according to Jeffrey's brief, then sought a protective order. We are unable to find a motion for protective order in the record, and do not know what arguments were advanced in support of the motion. In an order compelling witness testimony filed November 18, 1998, the district court ordered Ms. James to appear for a deposition, and to bring her notes, memoranda, correspondence, and other written materials with her. However, the district court expressly denied the parties access to the documents brought by Ms. James to the deposition. The order further ordered only one transcript of the deposition be prepared, and that it be sealed. Jeffrey and Teresa were excluded from the deposition, but their attorneys were permitted to

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attend, pose questions, and make notes during the deposition. The district court placed no limitation on the subject matter into which the attorneys could inquire.

Jeffrey claims he elected not to take a discovery deposition of Ms. James because of the court-imposed restrictions on access to the witness's file. However, counsel for Jeffrey appeared at the deposition of Ms. James taken pursuant to the protective order, and cross-examined the witness. Jeffrey does not argue his attorney was precluded by the court's order from inquiring into any specific subject matter. He contends instead his cross-examination of Ms. James was hampered by his inability to examine the file and documents of the expert witness before or during the deposition.

The scope of cross-examination is within the trial court's discretion. *Campbell v. Van Roekel,* 347 N.W.2d 406, 410 (Iowa 1984). Limitations on cross-examination constitute reversible error only if it appears that prejudice resulted. *State v. Clark*, 325 N.W.2d 381, 383 (Iowa 1982); *State v. Berry,* 549 N.W.2d 316, 319 (Iowa App. 1996). The limited record obstructs our review of this issue. We do not know what specific legal and factual arguments Ms. James advanced in support of the protective order. The motion for protective order does not appear in the record and no record was made of the telephonic hearing on the motion. The court's order compelling the witness to testify does not disclose the legal rationale for the restriction of counsels' access to the deponent's file and prohibition of the parties' attendance at the deposition. Teresa's brief suggests the district court may have reasoned the ongoing relationship built on trust between Ms. James, Christopher, and Nickolas might have been compromised if

unrestricted access to the counselor's notes had been permitted or if the parties were permitted to hear her testimony. Jeffrey cites no controlling authority for the proposition it is reversible error to restrict access to a mental health therapist's file or to seal such a therapist's testimony under the circumstances of this case. Although we do not generally approve of limitations upon a litigant's access to the file of an adversary's expert witness, the record before us is simply not sufficient to find either abuse of discretion or resulting prejudice in this case.

Cross-examination of Ms. James was actually conducted by Jeffrey's counsel in this case, and no restrictions were imposed by the court as to the length or subject matter of the examination. Parties generally have a right to attend depositions. *See* Iowa R. Civ. P. 140(g) (1999). Although we have concerns about the district court's exclusion of the parties from Ms. James's deposition without explanation on the record, we find no resulting prejudice that would require reversal here.

IV. The Modification Issue. The next issue for our review is whether Jeffrey established by a preponderance of the evidence that conditions have substantially changed since the entry of the decision on application for modification filed February 5, 1997, such that it is in Christopher's best interests to be under Jeffrey's primary care. *See In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980). Original decrees are entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. *Mears v. Mears*, 213 N.W.2d 511, 514 (Iowa 1973); *Moore v. Kriegel*, 551 N.W.2d 887, 889 (Iowa App. 1996). Circumstances that have changed must be

those that were not within the contemplation of the trial court when the original decree was entered. *In re Marriage of Full*, 255 N.W.2d 153, 159 (Iowa 1977). Such changes must be more or less permanent or continuous, not temporary. *In re Marriage of Carlson*, 338 N.W.2d 136, 141 (Iowa 1983). Jeffrey's burden is thus a heavy one because custody of children, once fixed, should be disturbed only for the most cogent reasons. *In re Marriage of Melton*, 256 N.W.2d 200, 205 (Iowa 1977).

Jeffrey contends Teresa has failed to provide a safe and healthy environment for Christopher. The evidence established that at times during the winter of 1998-1999, the furnace in Teresa's mobile home was not working. During the same time period, a water pipe apparently froze and ruptured, interrupting water service to the home and compromising the toilet facilities in the home. In its ruling on Jeffrey's motion to reopen the record to receive newly discovered evidence, the district court found although these residential shortcomings were undesirable, they were short-term problems that had been repaired. Child abuse investigators observed when the premises could not be warmed with auxiliary electric heaters, Teresa removed the children to other quarters. We agree with the district court's finding the residential heat and utility problems are not permanent or continuous.

A child abuse investigator testified Teresa's house cleaning skills are lacking in some respects. Witnesses described a cluttered and dirty environment with strong odor emanating from a cat's litter box. However, a family service provider testified she found the home to be spotless on several occasions.

Though the record certainly discloses considerable room for improvement in Teresa's home hygiene, Jeffrey failed to meet his burden to prove the cleanliness of Teresa's home deteriorated so markedly since February 5, 1997, so as to justify a modification.

Jeffrey also claims Christopher's school performance and behavior have been poor while under Teresa's care. Our analysis begins with the fact Nickolas, Teresa's older son, and Christopher have both been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). Jeffrey testified he blames Teresa for the disorder and for Christopher's placement in a special education class. Dr. John Harston, a pediatric psychologist testified, and we find ADHD is a medical condition. As such, we reject Jeffrey's assertion Christopher's school performance and conduct are solely attributable to Teresa's parenting skills or lack thereof. We note Christopher is now taking medication for the disorder and this gives us reason to believe his behavior will be more manageable and his school performance will be enhanced in the future.

Several educators established Teresa failed to consistently require Christopher to complete and return assigned homework. One teacher testified thirteen out of twenty-eight assignments were not returned in compliance with instructions. The evidence shows, in contrast, Jeffrey and his girlfriend, Tonya, took laudable steps to assure Christopher completed and returned homework to school. The record also reflects Christopher had a higher than normal record of school absenteeism and tardiness while in Teresa's care. Teresa's apparent inattentiveness to Christopher's educational needs is of concern to us. However,

we note Teresa has utilized family services to aid her in dealing with the behavioral challenges of her sons. The service provider testified Teresa was attentive and cooperative with respect to the services and reached a "successful potential." We acknowledge Teresa's efforts to improve the family's modest economic circumstances through employment outside the home and attendance at a community college. We expect Teresa will be better able to manage Christopher with the assistance of medication. We also expect medication will help Christopher conform to educators' expectations with regard to completion of homework and school attendance.

We find Christopher and his half-brother, Nickolas, have a close relationship. Although they have had some significant sibling conflicts, the record clearly indicates the boys generally relate very well together and would suffer from separation. We have expressed a strong interest in keeping children of broken homes together. *See In re Marriage of Jones*, 309 N.W.2d 457, 461 (Iowa 1981). Separation of Christopher from Nickolas would not promote Christopher's long-range best interests.

Our evaluation of the circumstances must also take into consideration Jeffrey's conduct. He admitted his guilt in connection with physical violence against Todd Hartman who lives with Teresa and her children. In the process of confronting Todd and Teresa about Todd's use of soap to wash Christopher's mouth as punishment for using foul language, Teresa allegedly struck Jeffrey several times. Jeffrey claims he retaliated by punching Todd once for each blow landed by Teresa. We also note the district court's finding Jeffrey's girlfriend,

Tonya Jordan, has accused him of assaulting her. Jeffrey's behavior on these occasions does not convince us he is better suited than Teresa to minister to Christopher's best interests.

Our decision is also affected by the fact Jeffrey filed three modification actions in four years. Although we find the May of 1998 action was in Christopher's best interests because it facilitated his attendance at a summer reading program, the frequency of custodial litigation initiated by Jeffrey since entry of the dissolution decree borders on harassment. As noted above, the court found him responsible for other forms of harassment when it denied a previous application for modification on February 5, 1997. We urge Jeffrey to devote his future energy to more constructive methods of advancing Christopher's best interests. We refer specifically to continued interest in his educational performance, and consistent, timely financial support to assist Teresa, a person with limited financial means, in raising Christopher to his fullest potential.

In its ruling, the district court found Jeffrey had "not met his heavy burden of proving . . . a change in primary physical care is warranted." We reach the same conclusion, and accordingly affirm the district court's denial of Jeffrey's application for modification.

V. Ruling on Motion For New Trial. Jeffrey contends the district court abused its discretion in denying his motion for new trial to permit him to offer newly discovered evidence relevant to: (1) Teresa's failure to provide appropriate residential utilities; (2) medical records of Nickolas disclosing a physical

altercation with Christopher; (3) Teresa's impending plan to change Christopher's school; (4) medical records of Christopher evidencing a prescription for Ritalin and Teresa's failure to timely fill it; (5) repossession of a quantity of Teresa's furniture; and (6) evidence that Teresa is employed only part-time rather than full-time as found by the district court.

Rule 244 of the Iowa Rules of Civil Procedure provides in relevant part:

> On motion, the aggrieved party may have an adverse verdict, decision, or report or some portion thereof vacated and a new trial granted if any of the following causes materially affected movant's substantial rights:
> *****
> (g) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial.

Iowa R. Civ. P. 244. Motions for new trial based on newly discovered evidence are not favored primarily because "there must be repose to litigation." *Mays v. C. Mac Chambers Co., Inc.*, 490 N.W.2d 800, 804 (Iowa 1992) (quoting *Yoder v. Iowa Power & Light Co.*, 215 N.W.2d 328, 334 (Iowa 1974)). Movant must make the following showing in support of a motion for new trial based upon newly discovered evidence:

> [T]hat the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; that it is material and not merely cumulative or impeaching; and that it will probably change the result if a new trial is granted.

In re D.W., 385 N.W.2d 570, 583 (Iowa 1986).

We find no merit in Jeffrey's claim the district court abused its discretion in denying the motion for new trial. The interruption of residential utilities to Teresa's home was temporary. Heat and water were restored prior to the

hearing on Jeffrey's post-trial motion. Any additional evidence on this subject would have been merely cumulative or impeaching. The medical records Jeffrey sought to offer were for treatment rendered before trial. Jeffrey offers no sufficient explanation as to why the documents could not have been discovered before trial with reasonable diligence. Evidence a rent-to-own company removed an unidentified quantity of furniture from Teresa's home six weeks after trial was not material evidence likely to change the result in this case. Evidence with respect to whether Teresa was employed part-time would be calculated primarily to impeach evidence supporting the district court's finding of full-time employment. Furthermore, the fact Teresa may have chosen to work part-time while attending college classes and parenting two active youngsters would not likely affect the outcome of this modification proceeding.

The district court did not address Jeffrey's claim the record should be reopened for the presentation of evidence on Teresa's plan to move Christopher to a different school. Jeffrey failed to file a motion pursuant to rule 179(b) of the Iowa Rules of Civil Procedure to obtain a ruling on whether evidence of Teresa's intention to change schools was newly discovered evidence that would justify a new trial. Issues must ordinarily be presented to and passed upon by the trial court before they can be raised and decided on appeal. *Johnston Equip. Corp. of Iowa v. Industrial Indem.*, 489 N.W.2d 13, 16 (Iowa 1992). Therefore, we conclude the district court did not abuse its discretion by denying Jeffrey's motion for new trial.

AFFIRMED.