IN THE COURT OF APPEALS OF IOWA

No. 1-042 / 00-988
Filed February 28, 2001

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CLERK SUPREME COURT

IN RE THE MARRIAGE OF JOHN DAVID PECK AND PAULA ANNE PECK

Upon the Petition of
JOHN DAVID PECK,
Petitioner-Appellant,

And Concerning
PAULA ANNE PECK n/k/a PAULA DAVIS,
Respondent-Appellee.

Appeal from the Iowa District Court for Crawford County, John D. Ackerman, Judge.

The petitioner appeals a district court order granting the respondent's petition to modify the child custody provisions of the parties' dissolution decree. **AFFIRMED IN PART AND REVERSED IN PART.**

Ken Sojka of Buckley & Sojka Law Offices, Harlan, for appellant.

Kermit Dunahoo and Jennifer A. Russell of the Dunahoo Law Firm, Des Moines, for appellee.

Heard by Streit P.J., and Hecht and Vaitheswaran, JJ.

VAITHESWARAN, J.

Paula Peck Davis applied to modify the portion of her divorce decree with John Peck awarding physical care of the parties' two daughters to John. The district court granted the application and John appealed, contending their younger daughter should remain with him. We agree with John and, accordingly, affirm in part and reverse in part.

I. Background Facts and Proceedings

John and Paula are the parents of Machelle, born in 1984, and Kayla, born in 1987. The parties divorced when Machelle was four and Kayla was not yet one. The divorce decree awarded physical care of both children to John, subject to reasonable visitation. With the exception of six months immediately after the divorce, Paula lived in Mapleton. John moved to Cumberland for three months, then to Atlantic briefly, and finally to the Harlan area, where he remained until the time of trial.

For almost ten years after the decree was entered, Paula had virtually no contact with the children, claiming she did not know where they were. She reestablished contact with them in 1996 or 1997 and began periodic visitation at that time. In the summer of 1998, Machelle moved in with her mother, citing a difference of opinion with her father concerning house rules and her older boyfriend. Kayla remained with John.

Paula applied to modify the dissolution decree to award her physical care of both children. At trial, she called John as her first witness and, over strenuous objection, introduced his mental health records from 1997 that she had obtained from John's second former wife Debra without his knowledge or consent. The

district court considered these records and other evidence, then transferred physical care of both children to Paula. John sought and obtained a stay of the ruling pending resolution of the appeal. On appeal, John maintains the court: (1) should not have admitted his mental health records; (2) should not have granted Paula's application to change physical care of Kayla; and (3) should have imputed a portion of the income of Paula's live-in boyfriend to her for child support purposes. He also seeks an award of appellate attorney fees.

II. Mental Health Records

Paula called John as her first witness. Her attorney immediately questioned him about hospitalizations for mental health treatment, suicide attempts, and drug usage since 1988. When John equivocated in his answers, the attorney impeached him with his mental health records. The exhibits were then offered into evidence, over objections they were confidential and privileged. The district court initially reserved ruling on the exhibits but considered them in its findings of fact and conclusions of law. In a post-trial ruling, the court provided the following explanation of why it did so:

> Mr. Peck was not forthcoming in his testimony as to his prior drug and mental instability problems. Exhibits used for impeachment do not need to be disclosed at a pre-trial conference. In addition, petitioner's counsel questioned John regarding the exhibits during his case-in-chief. That in effect waives any objection to the exhibits. What John doesn't like is that he was caught in a lie. That's not an appropriate basis to keep out relevant evidence. Certainly the documents were relevant in that they go to John's ability to be a physical care custodian. They also are relevant on whether there has been a substantial change in circumstances since the entry of the original dissolution decree.

John takes issue with this reasoning. He maintains the records are inadmissible because: (A) they are confidential and privileged under Iowa Code section

622.10; (B) Paula obtained them improperly; (C) Paula failed to disclose in discovery that she had them; (D) John did not waive the privilege by attempting to explain the exhibits after they were introduced; (E) they were used for more than impeachment; (F) the method of introduction denied John an opportunity to prepare for trial; and (G) they were not reliable. We find his first contention dispositive. Because the question is whether the district court correctly interpreted Iowa Code section 622.10, our review of this issue is for errors of law. *Chung v. Legacy Corp.*, 548 N.W.2d 147, 149 (Iowa 1996).

Iowa Code section 622.10 affords mental health professionals a testimonial privilege for any "confidential communication properly entrusted to the person in the person's professional capacity." Iowa Code § 622.10(1). This privilege has been extended to mental health records. *See Chung,* 548 N.W.2d at 149 (holding Iowa R. Civ. P. 122(a) extended statutory testimonial privilege to the discovery of confidential communications); *State v. Eldrenkamp*, 541 N.W.2d 877, 881 (Iowa 1995) (holding privilege extended to medical records as well as testimony). This privilege also applies to parties other than the health care professionals generating the medical records. *See* Iowa Code §338.2(3) (prohibiting a recipient of mental health information from disclosing mental health information, subject to certain limitations not applicable here). However, the privilege does not apply if the patient waives it. Iowa Code § 622.10(2). In addition, the privilege does not apply "in a civil action in which the condition of the person in whose favor the prohibition is made is an element or factor of the claim or defense of the person...." *Id.*

The first question is whether John waived the privilege either by giving the mental health records to his second wife or by testifying about the records.[1] It is undisputed John gave the records to Debra during their marriage for "safekeeping." We are not convinced this act amounted to a waiver. There is no indication John gave the records to Debra in the presence of third parties or otherwise indicated to Debra that he was waiving the privilege. *Cf. Shepherd v. Pacific Mut. Life Ins. Co.*, 230 Iowa 1304, 1306, 300 N.W. 556, 559 (1941) (noting marital privilege did not apply to words spoken in presence of third parties); *Leyner v. Leyner*, 123 Iowa 185, 186, 98 N.W. 628, 629 (1904) (noting husband expressly waived attorney client privilege).

We also are not convinced John waived the privilege by testifying in court about the records. John testified only after Paula introduced them. Our highest court has held a patient's testimony on cross-examination regarding privileged matters will not be construed as a waiver. *Howard v. Porter*, 240 Iowa 153, 155, 35 N.W.2d 837, 838 (1949); *accord Donovan v. Donovan*, 231 Iowa 14, 16, 300 N.W. 656, 659 (1941) (holding confidential communications not admissible for purpose of proving patient testified falsely); *Reutkemeier v. Nolte*, 179 Iowa 342, 344, 161 N.W. 290, 292 (1917) (holding improper to lay pretended foundation for introduction of privileged information as impeaching testimony). Therefore, John's testimony in Paula's case did not amount to a waiver. Additionally, we conclude his testimony concerning the records during his case-in-chief did not amount to a waiver, as it was merely an attempt to explain answers he had given

[1] We do not determine whether the spousal privilege set forth in Iowa Code section 622.9 also protected the records in the hands of Debra, as this argument was not raised by the parties.

earlier. *Cf. Cabrera v. Cabrera*, 580 A.2d 1227, 1237 (Conn. Ct. App. 1990) (suggesting without deciding that wife was entitled to call expert to rebut confidential medical information introduced by husband); *Schaffer v. Spicer*, 215 N.W.2d 134, 137 (S.D. 1974) (finding wife's testimony not sufficient to amount to waiver of privilege).

The next question concerning the privilege is whether John's condition was an "element or factor of the claim or defense of the person", preventing John from invoking the privilege. Iowa Code §622.10(2). Our highest court has held this language runs to the claim or defense of the person claiming the privilege. *In re Marriage of Hutchinson*, 588 N.W.2d 442, 447 (Iowa 1999). Therefore, the denial of an element of the opponent's case "does not make that element or factor part of the case of the person making the denial." *Id.; Chung,* 548 N.W.2d at 147.

Iowa Code section 598.21(8) authorizes the court to consider the "physical, mental, or emotional health of a party" in determining whether there has been a substantial change in circumstances. However, in a modification proceeding, the applicant has the burden of establishing this change. *In re Marriage of Mayfield*, 577 N.W.2d 872, 873 (Iowa Ct. App. 1998). Because Paula had this burden, John's mental health was an element or factor of *her* claim or defense, not John's. There was no reason for John to raise his mental health as an issue. Accordingly, Iowa Code section 622.10(2) did not preclude John from asserting the patient-psychotherapist privilege. *See Hutchinson,* 588

N.W.2d at 447.[2] To hold otherwise would allow the exception to eat up the rule. *Hutchinson*, 588 N.W.2d at 447-48; *Chung*, 548 N.W.2d at 151; *Laznovsky*, 745 A.2d at 621.

For these reasons, we conclude John's mental health records should not have been admitted. We will accordingly disregard those records in deciding the physical care issue.

III. Physical Care

We review modification proceedings de novo. *In re Marriage of Knickerbocker*, 601 N.W.2d 48, 50 (Iowa 1999). While we give weight to the district court's fact findings, we are not bound by them. *Id.* The applicant must show there has been a substantial change in circumstances since the decree was entered that was not contemplated by the decretal court. *In re Marriage of Walton*, 577 N.W.2d 869, 870 (Iowa Ct. App. 1998). "The change must be more or less permanent and relate to the welfare of the children." *Id.* This is a heavy burden. *Mayfield*, 577 N.W.2d at 873. It is not sufficient to establish both parents are equally competent to minister to the child. *In re Marriage of Whalen*, 569 N.W.2d 626, 628 (Iowa Ct. App. 1997). The applicant must demonstrate a superior ability to minister to the child's needs. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 213 (Iowa Ct. App. 1994). Our foremost concern is the best

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[2] *Accord Laznovsky v. Laznovsky*, 745 A.2d 1054, 1066 (Md. 2000) (holding party claiming to be fit parent does not, without more, waive confidential physician-patient privilege for past treatment records in a proceeding to determine custody); *In re Marriage of Bonneau*, 691 N.E.2d 123, 132 (1998) (holding husband did not put health at issue by filing dissolution petition and wife accordingly not entitled to husband's medical records); *but see Owen v. Owen*, 563 N.E.2d 605, 608 (1990) (holding wife placed her mental health at issue when she petitioned for and was granted custody in the original decree and that condition remained an issue in subsequent custody proceedings).

interests of the children. *In re Marriage of Erickson*, 491 N.W.2d 799, 803 (Iowa Ct. App. 1992).

Paula alleged in her application that she should receive physical care of the children because: (A) John allegedly hid the children from her; (B) John was physically and verbally abusive to the children; and (C) the minor children wished to live with her. We are not convinced she satisfied her heavy burden of proving these allegations with respect to Kayla.

A. Hiding the Children. Paula concedes she had no contact with either of the children for almost ten years following entry of the dissolution decree. She maintains she could not have contact because John purposefully hid the children from her. We find scant evidence to support this contention. After the divorce, John moved to a house in Cumberland next to Paula's sister for approximately three months. Paula conceded she knew he was at this location. Nevertheless, she only visited the children once at that location for approximately two hours. After leaving Cumberland, John lived in Atlantic for approximately one year, a town in which Paula's brother lives, and in the Harlan area the remainder of the time. John testified his brother-in-law came to his house in Harlan to negotiate a sale of the Cumberland home and he saw Paula's brother at the racetrack several times. Paula did not contradict his testimony. She also admitted she did not ask her sister or brother if they knew where John lived. She claims she did not discover where John lived until 1996 or 1997, when her niece told her Machelle went to the same school. This testimony defies credibility. Even John's former second wife, called by Paula, refused to admit John kept Machelle and Kayla away from Paula, stating "I believe he told me he tried to make them go

and see her and–I don't remember." The evidence credibly establishes John did not hide the children from Paula.

Having concluded John did not hide the children, we further conclude Paula's extended absence casts serious doubt on her claim she is the superior caretaker. As the district court stated, Paula's failure to make "any real effort to have a relationship with the two girls during the nine-year period . . . was not indicative of good parenting capability."

Even after Paula reentered the children's lives, she provided minimal parenting to either child. Although Machelle ultimately moved in with her, the record reveals Paula did little to supervise her. She began her shift as a waitress approximately half an hour after Machelle came home from school and did not return home until 9:00 P.M. at the earliest. She also maintained only sporadic contact with Kayla, electing not to exercise regular visitation with her despite the proximity of their respective homes. This factor, therefore, militates against a transfer in physical care.

B. Physical and Verbal Abuse. Paula's modification application also alleged John physically and verbally abused the children. The evidence supporting this allegation is the most troubling. Paula elicited testimony from Debra concerning injuries John inflicted on her on five or six occasions over the course of their seven-year marriage. This testimony was graphic and compelling and John's denials of domestic abuse ring hollow.[3] Nevertheless, the evidence that John subjected the children to similar acts of violence was hotly disputed. Although Paula testified Machelle left her father's home after he pushed her

[3] The court noted there was no evidence that John abused Paula. We agree.

against a wall, the Department of Human Services made an unfounded determination of child abuse with respect to this incident. Additionally, John testified that Machelle's move was not precipitated by violence on his part but by the prospect of less supervision at Paula's home, testimony that is supported by other record evidence.

What is more troubling is Debra's testimony that John beat the children with belts. Although Debra's father, testifying on behalf of John, refuted this assertion, we cannot discount it in light of John's admitted history of violence against Debra. Nevertheless, Machelle mentioned nothing about beatings. Additionally, John testified that while he spanked the children when they were little, he had discontinued the practice as they grew older and instead used the threat of losing privileges as a means of discipline. Because Debra had not lived with John for two years and John denied the use of any corporal punishment at the time of trial, we conclude Paula did not establish she was entitled to physical care based on physical abuse by John.

As for verbal abuse, Debra stated John did not call the children names very often and "'[l]azy' was probably one of the harshest ones." On this record, we conclude Paula has not proven she is entitled to physical care of Kayla based on verbal abuse by John.

C. Children's Preferences. Paula's modification application alleged the children wanted to live with her. We may consider the wishes of children who are of sufficient age, intelligence and discretion to exercise enlightened judgment, although these wishes are not controlling and will be examined with other

relevant factors. *In re Marriage of Hunt*, 476 N.W.2d 99, 101 (Iowa Ct. App. 1991).

Machelle expressed a desire to live with Paula and John has acquiesced in this wish. Therefore, we affirm the district court's ruling modifying the dissolution to decree to transfer physical care of Machelle to Paula.

Kayla was twelve years old at the time of trial. She told the court she wished to stay with her father. When asked why, she stated, "Well, I would not want to go through the trouble of switching to new schools, meeting new friends and everything else." She also stated, "I think my dad would miss me a lot." The district court discounted Kayla's preference on the ground her final reason for wishing to stay with her father "gives the Court concern that Kayla feels compelled to be a 'caretaker' of her dad." However, the record reveals John performed most of the housework. In addition, he picked Kayla up from school four times a week, required her to do her homework, provided dinner, and then spent time with Kayla. The only evidence that Kayla assumed a caretaking role was Kayla's testimony that she was the first to awaken in the mornings and she woke up her father after she had used the bathroom. We find this evidence insufficient to reject Kayla's expressed preference.

Given Kayla's age, we conclude her preference is entitled to significant weight. Combined with the fact that her father has been her exclusive caretaker for virtually all her life and testimony that Paula has taken little interest in maintaining a relationship with Kayla, we conclude Kayla should remain with John.

In reaching this conclusion, we are cognizant of our preference to keep siblings together. *In re Marriage of Will*, 489 N.W.2d 394, 398 (Iowa 1992). However, this rule is not ironclad. *Id.* One of the factors we consider is the relationship between the siblings. *Id.* The relationship between Machelle and Kayla was strained at best. After Machelle moved to Paula's house, she did not initiate contact with Kayla either by phone or in person. The sisters were not particularly close nor did they share the same interests or friends. Therefore, we conclude separation of the sisters would not prove inequitable.

IV. Child Support

John contends the district court should have imputed to Paula the income of her live-in boyfriend which was used to cover a portion of their expenses. Iowa Code section 598.21(8) authorizes a court to consider possible support of a party by another person. Iowa Code § 598.21(8); *accord In re Marriage of Gehl*, 486 N.W.2d 284, 287 (Iowa 1992).

It is true Paula had a long-term relationship with a man who lived with her and shared in their living expenses. However, we cannot conclude his contributions to the household were substantially more than was necessary to meet his own needs. *See In re Marriage of Ales*, 592 N.W.2d 698, 703 (Iowa Ct. App. 1999). Therefore, we are reluctant to impute his income to Paula for purposes of determining child support. We conclude Paula should pay the amount of child support specified in the child support guidelines worksheet filed with the district court. For a split custody arrangement, this amounts to $37.60 per month.

V. Appellate Attorney Fees

John seeks appellate attorney fees. Such an award rests within the court's discretion. *In re Marriage of Benson*, 545 N.W.2d 252, 258 (Iowa 1996). After considering the relative financial positions of the parties and the relative merits of the parties' positions on appeal, we conclude Paula should pay $500 of John's appellate attorney fees.

VI. Disposition

John's mental health records are inadmissible. Physical care of Kayla shall remain with John. Paula shall pay John child support of $37.60 per month. Paula shall pay $500 of John's appellate attorney fees. Costs are taxed to Paula.

AFFIRMED IN PART AND REVERSED IN PART.