

IN THE COURT OF APPEALS OF IOWA

No. 0-500 / 09-1638
Filed August 25, 2010

IN RE THE MARRIAGE OF MATTHEW P. WEICHERS AND THERESA A. WEICHERS

**Upon the Petition of
MATTHEW P. WEICHERS,**
Petitioner-Appellant,

**And Concerning
THERESA A. WEICHERS,**
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Matthew Weichers appeals an order refusing to find Theresa Weichers in contempt for allegedly violating provisions of the dissolution decree. **AFFIRMED.**

Matthew Weichers, Cedar Falls, appellant pro se.

Theresa Weichers, Cypress, Texas, appellee pro se.

Considered by Sackett, C.J., Potterfield and Tabor, JJ.

TABOR, J.

Matthew Weichers appeals an order refusing to find his ex-wife in contempt for allegedly violating provisions of the dissolution decree involving the custody and physical care of their three children. Because the district court did not grossly abuse its discretion in determining Matthew failed to meet his burden of proof, we affirm.

Background Facts and Proceedings.

The Weichers were divorced in March 2004. In the dissolution decree, the court granted the parents joint legal custody of their three children and placed the children in the physical care of their mother, Theresa. In 2005, Theresa moved with the children to Cypress, Texas, a suburb of Houston, so that she could work in her father's business. Matthew unsuccessfully sought physical care of the children following Theresa's relocation. In 2006 and again in 2007, Matthew filed applications for "emergency relief and temporary placement" of the children with him. These applications did not result in a modification of the physical care arrangement.

On April 27, 2009, Matthew applied for an order to show cause why Theresa should not be held in contempt for "willful and wrongful violation" of the decree. The application alleged that Theresa (1) failed to allow Matthew "equal participation in decisions affecting the minor children" as required by the original decree; (2) failed to allow him access to medical and education records as required by the original decree; and (3) failed to allow the children telephone contact with him as required by an August 2005 court order. On July 10, 2009,

Matthew amended his application to add a claim regarding Theresa's obligation to pay a spousal support award.

On September 25, 2009, the trial court ruled that Matthew did not meet his burden to show beyond a reasonable doubt that Theresa willfully and intentionally violated court orders regarding shared decision-making responsibilities, access to school and medical records, or telephone contact. See Iowa Code § 598.23 (2009). The court set for additional hearing Matthew's claim regarding spousal support, along with an unresolved counterclaim by Theresa regarding medical expenses. On October 6, 2009—eleven days after the court's order—Matthew filed a motion to enlarge or amend the findings and conclusions. The court overruled the motion to enlarge on October 19, 2009. Matthew filed a notice of appeal on October 23, 2009.

Legal Standards for Contempt of Dissolution Decree

Contempt proceedings under chapter 598 are primarily punitive in nature. *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995). A court may cite and punish a person who willful disobeys a provision of a final decree for contempt under Iowa Code section 598.23, but is not required to do so in every case where the elements of contempt are met. *Id.* A court has broad discretion to consider all the circumstances surrounding the claimed violation and unless that discretion is grossly abused, we will not disturb the contempt decision. *See id.*

The party applying for the rule to show cause bears the burden to prove beyond a reasonable doubt that the alleged contemner had a duty to obey a court order and willfully failed to perform the duty. *In re Marriage of Jacobo*, 526

N.W.2d 859, 866 (Iowa 1995). To establish willful disobedience, the applicant's evidence must demonstrate

conduct that is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not.

Gimzo v. Iowa Dist. Ct., 561 N.W.2d 833, 835 (Iowa Ct. App. 1997).

Trial Court Properly Exercised its Discretion in Denying Contempt

Matthew first contends Theresa willfully disobeyed the joint legal custody provision of the decree by not allowing him equal participation in decision-making for the children. In particular, he complains she had the children baptized in Texas without his input in the process. Theresa explained at the contempt hearing that the baptisms were the culmination of a two-year religious training program that the children had discussed with their father. She also testified that Matthew was invited to the baptisms.

Without specifically addressing the baptism issue, the district court made the following observations:

While there is an obligation to discuss with one another the important decisions regarding the children, it is clearly not practical that this can occur under all circumstances. This is due in large part to the geographic distances between the parents, and the practicality of discussing all issues that may affect the children at their current ages. Clearly the parties have substantial communication with one another through email and telephone contacts involving the children. While the Court would certainly encourage both parties to improve on their communications with one another, this Court cannot conclude that Theresa has willfully and intentionally violated her obligation with regard to these joint decision-making responsibilities.

We find the district court's sentiments and conclusion to be practical and realistic, not a gross abuse of its discretion.

Matthew next asserts that Theresa should have been held in contempt for not notifying him about the children's medical, dental, and vision appointments, and for not providing equal access to medical and educational records. Theresa testified that she notifies Matthew concerning significant health issues faced by the children, but doesn't contact him about "every sniffle" or booster shot. She also testified that Matthew is free to obtain records from the children's medical providers by requesting them himself. The children's school records are available through an internet connection.

The district court agreed with Theresa's position: "As a joint custodial parent, he is equally entitled to all of these records. It is not Theresa's responsibility, however, to provide such records when they are equally accessible to Matthew."

Iowa Code section 598.41(1)(e) guarantees both parents legal access to a child's medical records. See *Harder v. Anderson, Arnold, Dickey, Jensen, Gullickson & Sanger, L.L.P.*, 764 N.W.2d 534, 538 (Iowa 2009) (noting, however, that statute does not give either parent absolute right to records or absolute right to direct child's medical care). Matthew did not refute Theresa's assertions that he could directly contact the children's doctors or schools to obtain any of their records. For that reason, Matthew did not carry his burden to show that Theresa willfully violated the provision of the decree guaranteeing equal access to medical and school records.

In support of his third claim of contemptuous behavior, Matthew points to a passage in the court's August 4, 2005, ruling on his petition to modify, stating: "[E]ach party shall enjoy the right of telephone contact with the children at all reasonable times and permit the children to call the other parent" He claims when Theresa confiscated the children's cellular telephones as a means to punish them, she willfully violated this provision. Theresa acknowledged she has denied her children the privilege of using their cellular telephones on occasion, but rejected the notion that it inhibited Matthew's ability to contact them. She testified that Matthew could reach them by calling her telephone. She also testified that Matthew has called the children as late as 11:30 p.m. on school nights.

The district court was "not convinced that Theresa has willfully and intentionally prevented telephone contacts between Matthew and the minor children of the parties." The court found her method of discipline was a "matter of logistics and practicality" that limited Matthew's ability to contact the children "when he desires" but did not rise to the level of willful disobedience. We find no abuse of discretion in this finding. The August 2005 provision confined the parental telephone contact to "reasonable times." Matthew did not present evidence to show he was unable to reach his children by telephone at reasonable times.

Matthew raises a fourth claim, asserting that the district court abused its discretion in not finding Theresa in contempt for failing to pay a judgment for spousal support. But the district court postponed hearing and resolution of that issue for another day. Matthew's motion to enlarge and amend sought a ruling on that ground, but the motion was not timely. The court issued its contempt ruling on Friday, September 25, 2009. Matthew filed his motion to enlarge on Tuesday, October 6, 2009. Iowa Rule of Civil Procedure 1.904(2) provides that a motion to amend or enlarge a court's findings and conclusions must be filed within the time allowed for a motion for new trial. Iowa Rule of Civil Procedure 1.1007¹ provides that a motion for new trial must be filed within ten days after the filing of the decision with the clerk. Because Matthew waited eleven days to file his motion, it did not constitute a timely challenge to the absence of a finding concerning the spousal support issue. Because the district court did not rule on the spousal support issue, we have nothing to review. See *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 167 (Iowa 2003).

Constitutional Challenge Not Preserved

On appeal, Matthew challenges the constitutionality of Iowa Code sections 598.23 and 598.41(5). He cites the privileges and immunities clause of the state constitution, the equal protection clauses of the state and federal constitutions, the due process protections of the fifth and fourteenth amendments of the federal constitution, as well as various other constitutional provisions. As we understand

¹ The amendment of this rule to provide fifteen rather than ten days in which to file a post-trial motion does not apply to motions filed in response to rulings entered before August 9, 2010.

his argument, he believes chapter 598 violates his rights by creating a class of “non-custodial parents” whose only means of enforcing the custody provisions in a dissolution decree is to meet the high standard of proof beyond a reasonable doubt that the custodial parent is willfully disobeying a court order. We cannot reach the merits of this argument.

While Matthew raised similar constitutional claims in his trial brief, he did not secure a ruling on them in the district court. Matthew asked the district court to address the constitutional claims in his motion to enlarge and amend, but as we previously found, that post-trial motion was untimely. Without a timely motion to enlarge or amend, a party may not challenge the absence of any particular conclusion of law on appeal. *Nowlin v. Scurr*, 331 N.W.2d 394, 396 (Iowa 1983). Matthew’s constitutional claims are not properly preserved for our review.

Supplemental Appendix Not Considered

On May 7, 2010, Theresa filed a motion for leave to amend the appendix, accompanying the motion was a supplemental appendix. Our supreme court, on its own motion, questioned whether the papers included in the supplemental appendix were outside the record and ordered her motion to be submitted for consideration with the appeal. Many of the papers included in the supplemental appendix do not appear to be original papers or exhibits filed in the district court, see Iowa R. App. P. 6.801, and two of the documents were filed after Matthew’s notice of appeal from the September 25, 2009 ruling. Theresa’s motion is denied; we do not consider outside-the-record documents in deciding this appeal.

Conclusion.

We hold the district court did not grossly abuse its discretion in concluding that Matthew fell short of proving Theresa willfully violated the custody and physical care provisions of the dissolution decree.

AFFIRMED.