IN THE COURT OF APPEALS OF IOWA

No. 1-227 / 10-1752
Filed June 15, 2011

IN RE THE MARRIAGE OF
ALAN B. MULLIGAN
AND AMY S. MULLIGAN

Upon the Petition of
ALAN B. MULLIGAN,
Petitioner-Appellee,

And Concerning
AMY S. MULLIGAN,
Respondent-Appellant.

Appeal from the Iowa District Court for Plymouth County, Edward A. Jacobson (petitioner's motion to compel) and Jeffrey A. Neary (other motions and trial), Judges.

Amy Mulligan appeals from the district court's ruling releasing her mental health records, as well as the child custody and visitation provisions of the dissolution decree. **AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.**

Jennifer H. Cerutti of Iowa Legal Aid, Sioux City, for appellant.

Irene A. Schrunk, Sioux City, for appellee.

Heard by Potterfield, P.J., and Danilson and Tabor, JJ.

POTTERFIELD, P.J.

In this dissolution action, Amy Mulligan appeals the district court's order allowing Alan Mulligan access to her confidential medical and mental health records. She also appeals from the custody and visitation provisions of the dissolution decree. Amy has a statutory and constitutional right to privacy in her medical and mental health records, and Alan failed to override that right with a countervailing interest. The district court's order is reversed. We affirm the dissolution decree in part and remand to the district court for rehearing of the custody and attendant visitation and child support issues before a different judge.

I. Background Facts and Proceedings.

Amy Mulligan and Alan Mulligan are parents to seven-year-old A.M. Amy and Alan separated in December 2007 and Alan filed for dissolution of their marriage on February 27, 2008. In his petition, Alan asked that the parties be awarded joint legal custody of A.M., "with [Amy] having temporary and permanent physical care of the child with reasonable visitation to [Alan]."

On March 4, 2008, the district court entered an order approving the parties' stipulation placing A.M. in Amy's temporary physical care and granting Alan visitation. Alan moved to Michigan in June 2008 and did not exercise visitation with A.M. until March 2009.

On March 24, 2009, more than a year after the temporary order was filed and three days before the discovery deadline, Alan filed a motion to continue the trial date due to a conflict with his new attorney's schedule.[1] In his motion to continue, Alan also asserted a "need to amend petition" because "[o]n March 18,

[1] His new attorney filed an appearance on March 18, 2009.

2009, Alan first learned that [in] his Petition for Dissolution of Marriage he conceded primary physical care to Amy." Alan's motion for continuance asserts his prior attorney had failed to conduct discovery and that Alan was unaware of a prior court order imposing sanctions against him, including that "he was prohibited from calling any witnesses or objecting to any evidence on behalf of himself." He asked that he be allowed to engage in discovery and specifically requested, "[a]t a minimum":

> a. Amy's mental health records from Plains Area Mental Health Center. Alan believes that Amy's mental health records from this facility span many years going back to her minority and will reveal the severity of Amy's mental health condition.
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> b. Amy's 2007 mental health commitment Court file, including any and all reports, records, etc. submitted by Dr. Dean and/or Mercy Medical Center and/or Dr. K. Patra.
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> c. Amy's 2007 medical/mental health records from Mercy Medical Center.
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> d. Amy's 2008 mental health commitment Court file, including any and all reports, records, etc submitted by Dr. Dean and/or SLRMC and/or Dr. K. Patra.
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> e. Amy's 2008 medical/mental health records from SLRMC.
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> f. Amy's records from Jackson Recovery Center a/k/a Gordon Recovery Center to the present date.
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> g. All of Dr. Patra's records concerning Amy.
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> h. All of Dr. Dean's records concerning Amy.
>
> i. All records from CAHSA/Cathy Van Maanen concerning Amy.
>
> j. All records from CSADV concerning Amy.
>
> k. Relevant police reports.
>
> l. Live testimony from various persons with knowledge of Amy including; but not limited to: Amy's parents, Amy's counselor from Jackson Recovery and all of Amy's counselors from Plains Area Mental Health Center.
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> 8. There is a grandparent visitation companion case to this dissolution case: "In the Iowa District Court for Plymouth County,

> Jerry L. and Susan B. Ashenfelter, Plaintiffs,[2] v. Alan B. and Amy S. Mulligan, Defendants, Case No. DRCV 031730.
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> 9. The issue of the importance of Amy's mental health records was squarely before the Court by Plaintiffs' Motion to Compel and Defendant Amy S. Mulligan's Motion for Protective Order.
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> 10. By Ruling on Motion to Compel and for Protective Order, the Court, even in a grandparent visitation case, considered the child's best interest to be of paramount importance. Accordingly, the Court permitted the discovery of Amy's mental health and related records (That Ruling by the Court is now on appeal to the Iowa Supreme Court in Supreme Court No. 08-2075.).[3]

That same date, Alan also filed a motion to amend the temporary visitation and child support, as well as an amended petition for dissolution in which he sought joint legal custody and physical care of A.M.

On April 3, 2009, Alan filed a notice of service of subpoenas. Amy moved to quash the subpoenas on April 6, 2009, asserting "[t]hese exact same records were asked for in discovery" in *Ashenfelter v. Mulligan*, and "[t]he issue of whether these records can be released is the exact issue on interlocutory appeal."

On May 1, 2009, the district court (Jeffrey A. Neary, Judge) entered an order (1) granting the motion to continue trial and ordered the court administrator to reschedule discovery deadlines; (2) reconsidered its prior ruling on sanctions, ordered Alan to pay $1000 in attorney fees to Amy, and struck prior restrictions

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[2] Jerry and Sue Ashenfelter are Amy's parents. We first note that the Ashenfelters no longer have standing to seek grandparent visitation as the legislature struck Iowa Code section 600C.1 in its entirety and replaced it. 2010 Iowa Acts ch 1193, § 130. "The current section 600C.1 provides the right to petition for grandparent visitation 'when the parent of the minor child, who is the child of the grandparent or the grandchild of the great-grandparent, is deceased.'" *Ashenfelter v. Mulligan*, 792 N.W.2d 665, 669 (Iowa 2010). "Application of the current section 600C.1 is straightforward and precludes the Ashenfelters' petition." *Id.*

[3] *See Ashenfelter*, 792 N.W.2d at 668 (describing grandparents' discovery requests in their action for grandparent visitation).

as to Alan's ability to present evidence; (3) granted the motion to amend the petition; (4) granted the motion to quash the subpoenas "based upon its rulings on the other motions noted herein and will consider discovery disputes between the parties . . . as they arise"; and (5) modified Alan's visitation due to his move to Michigan.

Thereafter, Alan propounded numerous discovery requests to which Amy objected. Alan filed a motion to compel and Amy filed for a protective order asserting the records were confidential pursuant to Iowa Code section 622.10 (2009).[4] On August 11, 2009, the district court (Edward A. Jacobson, Judge) "deem[ed] that at least potentially this matter constitutes a civil action in which the condition of the 'the person in whose favor the prohibition is made is an element or factor of the claim . . .'" and ordered Amy to provide "all of the medical records requested to the court for an in camera review" after which it would determine "which records, if any, fit within the exception provided" in section 622.10(2).[5]

[4] Iowa Code section 622.10 is entitled, "Communications in professional confidence—exceptions—required consent to release of medical records after commencement of legal action—application to court." Paragraph one prohibits "[a] practicing attorney, counselor, physician, surgeon, physician assistant, advanced registered nurse practitioner, mental health professional, or the stenographer or confidential clerk of any such person, who obtains information by reason of the person's employment" from "giving testimony" or "disclos[ing] any confidential communication properly entrusted to the person in the person's professional capacity, and necessary and proper to enable the person to discharge the functions of the person's office according to the usual course of practice or discipline."

[5] Iowa Code section 622.10(2) provides:

> The prohibition [in paragraph 1] does not apply to cases where the person in whose favor the prohibition is made waives the rights conferred; nor does the prohibition 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 or of any party claiming through or

On October 23, 2009, Judge Jacobson ruled:

> The balance of the medical records primarily relate to inpatient treatment and diagnoses, both on a voluntary and involuntary basis of mental health and/or substance abuse conditions, *which the court deems to be both pertinent and discoverable.*
>
> In so saying, the court makes no decision on the admissibility of these records at trial, but for purposes of expert examination certainly they are discoverable records.
>
> IT IS ORDERED, ADJUDGED AND DECREED that the records referred to above be and the same are hereby provided to counsel for Mr. Mulligan, to be used only as follows:
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> a. For admission in court at the custody hearing, if deemed appropriate by the trial judge.
>
> b. For examination by [Alan's counsel] Ms. Schrunk, her client and her expert witness or witnesses.
>
> c. The records shall not be disclosed to any other person.
>
> The court is aware that the disclosure of these same records to the parents of Mrs. Mulligan is currently on appeal to the Iowa Supreme Court. The court specifically directs that these records are not to be provided to her parents, unless and until the Supreme Court orders them provided.
>
> Finally, the court orders that upon completion of the child custody litigation trial, the records not admitted into evidence shall be either a) returned to Mrs. Mulligan, or b) destroyed, in a verifiable manner.
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> The court is preparing an envelope in which to place the records that it orders discovered by counsel and will cause them to be delivered to the Woodbury County Courthouse where they may be picked up by Ms. Schrunk.

(Emphasis added.) Approximately 359 pages of Amy's medical records were thus released.

On March 19, 2010, Amy moved in limine to exclude from trial privileged and protected medical and mental health records, as well as Alan's expert witness testimony based upon that information.

Trial began on April 20, 2010. Amy objected to Exhibits 1, 2, and 46, because they were confidential, protected medical records. The district court (by

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> under the person. The evidence is admissible upon trial of the action only as it relates to the condition alleged.

Judge Neary) admitted the exhibits subject to the objections. Objection was also raised when Alan's counsel attempted to cross-examine Amy using those exhibits. The district court then stated:

> Do you wish to have a standing objection to the consideration by this Court of any of the mental health records that may be discussed and/or any area of inquiry made by Miss Schrunk?
>
> [Amy's counsel]: Yes, Your Honor
>
> THE COURT: Okay. I'll give you a standing objection with regard to any area of inquiry in the record or any documentation of testimony that relates to mental health records and/or treatment of Amy Mulligan. And I will reserve ruling on those individual objections and the standing objections as well.

No further objections on this ground were lodged.

Following trial, the district court dissolved the parties' marriage, distributed the marital property, awarded the parties joint legal custody, awarded physical care of A.M. to Alan, and ordered Amy to pay child support. The district court awarded Amy visitation during the school year "one weekend every other month" and four weeks during the summer. The court's findings of fact and conclusions of law were filed under seal.

In ruling on post-trial motions, the court authorized Alan to provide the sealed findings of fact and conclusions of law to A.M.'s child counselors and medical providers, as well as to the Ashenfelters. The court stated:

> As to disclosure to Jerry and Sue Ashenfelter, the Court is aware of pending litigation between [Amy] and Jerry and Sue Ashenfelter and since the Findings of Fact and Conclusions of Law may be of some value in the trial and/or resolution of that matter, disclosure of the Findings of Fact and Conclusions of Law may be disclosed to the Ashenfelters by [Alan].

The court rejected Amy's request to modify the decree as to custody or visitation. The court wrote: "Given all the matters addressed in the Findings of

Fact and Conclusions of Law and the distance between the parties, the current visitation setting is appropriate."

Amy now appeals. She argues Alan was not entitled to her private and confidential medical and mental health records; it is in A.M.'s best interests that he be placed in Amy's physical care; and should physical care not be modified, the "extremely limited visitation" should be expanded.

II. Standard of Review.

Discovery decisions are typically reviewed for abuse of discretion. *Ashenfelter v. Mulligan*, 792 N.W.2d 665, 668 (Iowa 2010). However, we review the interpretation of Iowa Code section 622.10 for correction of errors at law. *Id.* at 668–669. Constitutional claims are reviewed de novo. *Id.* at 669.

We review a custody order de novo. *In re Marriage of Murphy*, 592 N.W.2d 681, 683 (Iowa 1999). In doing so, we give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but we are not bound by them. *Id.*

III. Analysis.

A. Issues presented. We begin with the matters that are *not* at issue. The district court's dissolution of the parties' marriage and the property distribution are not contested. We also note that neither party contests the award of joint legal custody. Thus, with respect to those aspects of the dissolution decree, we affirm.

The central issue here is who should be awarded physical care.[6] Our objective in this case, and all cases involving the question of physical care, is to place the child in the environment most likely to bring the child to healthy physical, mental, and social maturity. *See Murphy*, 592 N.W.2d at 683.

The district court found "most instructive on the issue of custody" the opinions of Alan's expert witness, Dr. Paula Malin, a medical doctor, practicing psychiatrist, and associate professor of psychiatry. We note that Dr. Malin did not ever meet Amy or the child—and met Alan just prior to trial. Instead, Dr. Malin's opinions were based upon her review of numerous documents, including Amy's medical and mental health records. The district court also cited to matters in Amy's medical records on more than one occasion in its ruling. Since Amy's counsel was afforded a "standing objection," the record does not disclose which questions and answers were based upon Amy's confidential records.

Because Dr. Malin's opinions were crucial to the district court and were largely based upon documents Amy contends are privileged and confidential, we must first address whether the district court erred in requiring Amy to release those records over her objections.

B. Confidentiality of medical and mental health records.[7] As noted by the district court, the precise documents Amy sought to protect here were the subject

[6] Joint physical care was not requested by either parent. *See* Iowa Code § 598.41(5). Child support and visitation are also at issue as they are attendant matters impacted by a determination of physical care. *See In re Marriage of Hansen*, 733 N.W.2d 683, 704 (Iowa 2007).

[7] We reject Alan's contention that Amy did not adequately preserve this issue for review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (noting issues must be presented to and decided by the district court before we will decide them on appeal).

of an interlocutory appeal to our supreme court. In *Ashenfelter*, 792 N.W.2d at 670, the supreme court addressed the issue, despite the mootness of the Ashenfelters' grandparent visitation petition, because "we believe individual privacy interests in medical and mental health records presents an issue of great public interest" and because "we foresee this issue arising in the future in . . . civil contexts." The supreme court found that "because the medical records are privileged materials under section 622.10, they are not discoverable . . . ." *Id.* at 672.

The court then addressed whether the patient-litigant exception under section 622.10(2) was applicable. *See id.* The court agreed with Amy that her records are protected by the constitutional right of privacy. *Id.* The court wrote:

> Mental health and medical records are protected by a constitutional right to privacy. *See* [*State v.*] *Cashen*, 789 N.W.2d [400,] 407 [(Iowa 2010)] ("We recognize a patient's right to privacy in his or her mental health records. . . ."); *McMaster* [v*. Iowa Bd. of Psychology Examiners*, 509 N.W.2d 754], 758 [(Iowa 1993)] ("[T]he majority of [courts] hold that the right of privacy should extend to the patient records of mental health professionals. . . . We join those courts that extend constitutional protection to such records.").

Id.

However, that "constitutional right to privacy in medical and mental health records, is 'not absolute, but qualified.'" *Id.* (quoting *Cashen*, 789 N.W.2d at 406); *see also State v. Heemstra*, 721 N.W.2d 549, 562 (Iowa 2010). The court noted previously recognized counterbalancing public considerations. *See Cashen*, 789 N.W.2d at 408 (noting the protocol adopted "strikes the proper

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Amy objected to Alan's discovery of her mental health and medical records. She objected to their admissibility at trial and to questions pertaining to them. The district court granted her a standing objection and admitted them subject to objection. Being as the matter was fully submitted to the district court, it is properly before us. *See id.*

balance between a victim's right to privacy in his or her mental health records and a defendant's right to produce evidence that is relevant to his or her innocence"); *Heemstra*, 721 N.W.2d at 562 (recognizing "these privileges must be tempered by defendants' constitutional right to present a defense); *Chidester v. Needles*, 353 N.W.2d 849, 853 (Iowa 1984) (finding any privacy interests of patients yielded to "the societal need for information possessed by official investigators of criminal activity").

C. Has Alan asserted a counterbalancing interest sufficient to overcome the privilege? As recognized in *Ashenfelter*, Amy has a statutory privilege and a constitutional right to privacy protecting her medical and mental health records. 792 N.W.2d at 672. Alan asserts on appeal that Amy's rights "must be balanced against the best interest of the child." He argues the *Ashenfelter* court left open the question of whether the balancing test could be employed in a custody case. We disagree.

In *Ashenfelter*, the court concluded the Ashenfelters had "not asserted a counterbalancing consideration that would override Amy's privilege in her mental and medical health records. *This is a civil proceeding*. Unlike our recent decision in *Cashen*, the constitutional right to a fair trial is not implicated." *Id.* at 673 (emphasis added). This suggests that in a civil proceeding such as this custody action, there is no countervailing interest that would outweigh Amy's privacy rights.

This understanding of *Ashenfelter* is supported by the court's following statement:

> The United States Supreme Court has suggested that a balancing test will never be appropriate in a civil case. In *Jaffee v. Redmond*, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996), the Court expressly rejected the Seventh Circuit's use of a balancing test to determine whether the medical records of the defendant in a federal civil action were discoverable. *Jaffee*, 518 U.S. at 17, 116 S. Ct. at 1932, 135 L. Ed. 2d at 349. The court held that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Id.* Because we hold that even if we were to apply a balancing test, Amy's medical records must remain protected, we need not address whether the balancing test is inappropriate in all civil cases.

Id. at 672–73. The only civil case the court seemed to leave open was "regarding the ability of a court to order disclosure of medical or mental health records to the State in a CINA action." *Id.* at 674.

We find further support in the decisions of other courts. In *Leonard v. Leonard*, 673 So. 2d 97, 99 (Fla. Dist. Ct. App. 1996), the appellate court discussed whether a parent's mental health is at issue sufficient to waive the parent's right to privacy.

> In a child custody dispute, the mental and physical health of both parents is a factor that must be considered by the trial judge in determining the best interests of the child (or children). This does not mean that a spouse places his or her mental health in issue allowing a resulting waiver of psychotherapist-patient privilege, merely by seeking child custody. Further, "mere allegations of mental or emotional instability are insufficient to place the custodial parent's mental health at issue so as to overcome the privilege." By the same token, the custodial parent's denial of allegations of mental instability does not act as a waiver of the psychotherapist-patient privilege. "To hold otherwise would eviscerate the privilege; a party seeking privileged information would obtain it simply by alleging mental infirmity."
>
> A parent's implicit waiver of confidentiality as to his or her mental health becomes relevant with respect to a custody dispute, in circumstances such as those described in *Miraglia v. Miraglia*, 462 So. 2d 507 (Fla. 4th DCA 1984), and *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. 3d DCA 1977). In *Miraglia*, after being

> awarded custody of the children, and during the pendency of a request for rehearing, the mother attempted suicide. The court held this event made the wife's mental health vital to the proper determination of the custody issue. 462 So. 2d at 508. Similarly, in *Critchlow*, during the pendency of the dissolution proceeding in which the wife requested custody of the party's young child, the wife voluntarily entered a hospital for mental treatment. The husband then filed an amended petition, seeking custody of the child. The court held the wife's voluntary commitment made her mental health vital to a proper determination of permanent custody, and the psychiatrist-patient privilege cannot be invoked in such circumstances.
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> *A trial judge may balance competing interests with respect to best interests of the child, by directing both parties to submit to an independent psychiatric or psychological examination.* Such an approach provides the trial judge with information relevant to the child custody decision, *while preserving psychiatrist-patient confidentiality*.

(Some internal citations omitted) (emphasis added). The *Leonard* court found an appropriate balance in ordering independent psychiatric examinations of both parents. *Id.*

> In this regard, we reject the husband's meritless assertion that both he and the independent examiner are entitled to take depositions and examine the records of mental health professionals who treated the wife and her son. No evidence was presented that the wife was involved in a calamitous event during the pendency of these proceedings, which arguably could bring the child custody dispute in this case within the *Miraglia/Critchlow* principle. Therefore, the court-ordered independent psychiatric examinations of the parties and their children will accomplish the proper balance of providing the trial court with information relevant to the child custody decision, while maintaining the confidentiality required by the privilege.

Id. (citations omitted); *see also Koch v. Koch*, 961 So. 2d 1134, (Fla. 2007) (finding wife did not waive her right to maintain the confidentiality of her mental health records in marriage dissolution proceedings in which child custody was at issue); *accord Gates v. Gates*, 967 A.2d 1024, 1032 (Pa. Super. Ct. 2009), *appeal denied,* 980 A.2d 608 ("Presuming Father's primary purpose in seeking

the privileged documents was to ensure the existing custody order was in Jonathan's best interest, we recognize that Father was entitled to place Mother's mental condition at issue in the custody proceedings. Nonetheless, less intrusive means exist for the trial court to make a determination as to Mother's suitability as a custodial parent, rather than releasing Mother's privileged mental-health records from her December 2007 hospitalization and vitiating her statutory right of confidentiality. For example, Father can utilize Mother's testimony from the March 28, 2008 hearing to attempt to sustain his burden of proving modification is warranted, and if further inquiry into Mother's mental health is necessary, the trial court can order Mother to submit to a psychological evaluation pursuant to Rule 1915.8. However, Mother's mental health records are not subject to disclosure.")

We conclude the district court abused its discretion in ordering Amy to produce her statutorily and constitutionally protected medical and mental health records and they should not have been admitted.

IV. Disposition.

Because inadmissible evidence so pervades this record, we remand for a new trial on the issue of physical care and the attendant matters of child support, and visitation. *See In re Marriage of Daugherty*, 260 Iowa 878, 882–83. 151 N.W.2d 569, 572 (1967) (affirming as to the divorce but reversing and remanding for further evidence on issue of custody of the minor son); *In re Marriage of Gravatt*, 365 N.W.2d 48, 49 (Iowa Ct. App. 1985) (remanding for presentation of additional evidence regarding custody where report of attorney for the children was admitted over objection); *see also Lessenger v. Lessenger*, 258 Iowa 170,

175–76, 138 N.W.2d 58, 61 (1965) ("The general rule is where an equity case is not in a condition for a final decree, none will be made by this court, but the case will be remanded."). All other aspects of the decree are affirmed. We do not retain jurisdiction.

Costs on appeals are assessed to Alan.

AFFIRMED IN PART AND REMANDED WITH DIRECTIONS.