

IN THE COURT OF APPEALS OF IOWA

No. 8-775 / 08-0030
Filed December 17, 2008

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, George Stigler, Judge.

Matthew Weichers appeals from a district court order enjoining him from disseminating child abuse information and awarding attorney fees. **REVERSED AND REMANDED.**

Matthew P. Weichers, Cedar Falls, appellant pro se.

Mark A. Milder, Waverly, for appellee.

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

PER CURIAM

Matthew Weichers appeals from a district court order enjoining him from disseminating child abuse information and awarding attorney fees. We reverse the judgment of the district court and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

Matthew and Theresa Weichers were divorced in March 2004. Their three minor children were placed in their joint legal custody and in the physical care of Theresa. In April 2005, Theresa and the children moved to Texas. Matthew filed a petition to modify the physical care provisions of the parties' dissolution decree and sought an injunction prohibiting Theresa from removing the children from Iowa. Both requests were denied by the district court.

In January 2006, Matthew filed an "Application for Emergency Relief and Temporary Placement," alleging the children should be placed in his physical care "due to allegations of sexual abuse of an 11-year-old minor against [Theresa]." The district court denied Matthew's application. Matthew filed another "Application for Emergency Relief and Temporary Placement" and a petition to modify the physical care provisions of the parties' dissolution decree on August 3, 2007, asserting a physician reported to the Iowa Department of Human Services (DHS) that the children were being physically and emotionally abused by Theresa.

The district court entered an order on August 20, 2007, finding the "matters raised in the emergency application are matters best resolved by . . . [DHS] for its investigation. Depending upon the results of the DHS investigation,

the matter shall be rescheduled.” Matthew subsequently informed Theresa he would not be returning the children to Texas upon completion of their summer visitation with him in Iowa. Theresa responded by filing a contempt action against him on August 28, 2007.

On September 6, 2007, the day before a hearing was to be held on Theresa’s contempt action, Matthew filed another “Request for Emergency Order,” alleging the children should be placed in his physical care pending resolution of his petition to modify because DHS “has confirmed that [Theresa] had sexual intercourse with a 12 year old child on multiple occasions.” At the hearing held on September 7, 2007, the court identified the purpose of the hearing as “to deal with a request made by Ms. Weichers to have Mr. Weichers return the children to her in the State of Texas.” A child abuse assessment finding Theresa had sexually abused a minor child was admitted as an exhibit during the hearing. Following the hearing, the district court entered an order on September 10, 2007, requiring Matthew to return the children to Theresa if children in need of assistance (CINA) proceedings were not initiated by the county attorney within one week of the court’s order. No CINA proceedings were initiated, and Matthew returned the children to Theresa as ordered by the court. Theresa then filed a motion seeking attorney fees “due to [Matthew’s] contemptuous actions.”

Prior to the hearing on Theresa’s motion for attorney fees, Matthew, along with two groups advocating in favor of fathers’ rights, picketed the Black Hawk County Courthouse calling for the “impeachment” of the district court judge who

issued the September 10, 2007 order. An article also appeared in a local newspaper criticizing that order. The newspaper article contained details from the child abuse assessment entered as an exhibit at the hearing. On October 30, 2007, Theresa filed an “Application to Restrain Dissemination of Child Abuse Information and Damages” pursuant to Iowa Code section 235A.20 (2007),¹ which sought an injunction restraining Matthew from “disseminating child abuse information” and “further publicizing this case in general.”

A hearing regarding Theresa’s motion for attorney fees and section 235A.20 application was held on November 19, 2007, before the same district judge who had issued the September 10, 2007 order. At the outset of the hearing, Matthew requested that the judge recuse himself “due to the pickets and things of that nature.” The judge denied Matthew’s request and proceeded with the hearing. Upon completion of the hearing, an order was entered enjoining Matthew “from disseminating directly or indirectly any information that is of confidential nature contained in any child abuse report compiled by [DHS]” and awarding Theresa attorney fees pursuant to Iowa Code section 598.36.

Matthew appeals. He claims the district court erred in granting Theresa injunctive relief under section 235A.20 and awarding her attorney fees.²

¹ Section 235A.20 provides that “[a]ny aggrieved person may institute a civil action . . . to restrain the dissemination of child abuse information in violation of this chapter”

² Matthew additionally claims that the district court judge abused his discretion in denying his motion to recuse. However, due to our resolution of the other issues raised by Matthew on appeal, and our direction that any further proceedings be held before a different district judge, we need not and do not address this claim.

II. SCOPE AND STANDARDS OF REVIEW.

The issuance of an injunction pursuant to Iowa Code section 235A.20 “rests largely in the sound discretion of the trial court, and we will not ordinarily interfere with such ruling unless there is an abuse of discretion or a violation of some principle of equity.” *Kleman v. Charles City Police Dep’t*, 373 N.W.2d 90, 96 (Iowa 1985). We likewise review an award of attorney fees for an abuse of discretion. *In re Marriage of Romanelli*, 570 N.W.2d 761, 765 (Iowa 1997). “An abuse of discretion is found when the trial court has clearly exercised its discretion on untenable grounds or acted unreasonably.” *In re Marriage of Wagner*, 604 N.W.2d 605, 608 (Iowa 2000).

III. MERITS.

A. Injunction.

Matthew first claims the district court abused its discretion in granting Theresa injunctive relief under Iowa Code section 235A.20. In support of this claim, he argues that during the hearing on Theresa’s section 235A.20 application, the court demonstrated a lack of impartiality, ignored facts that were in Matthew’s favor, assumed the role of an advocate on behalf of Theresa by directing the questioning of Matthew, and “allowed his personal bias towards Matthew to interfere with his judicial responsibilities.”

“A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases.” *In re Marriage of Ricklefs*, 726 N.W.2d 359, 362 (Iowa 2007). Parties accordingly have a right to a neutral and detached judicial officer. *Id.* To that end, Canon 2A

of the Iowa Code of Judicial Conduct requires a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” “Patience and gravity of bearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.” *State v. Glanton*, 231 N.W.2d 31, 35 (Iowa 1975). Thus, although the “authority of a judge to question witnesses is well established,” *In re S.P.*, 719 N.W.2d 535, 539 n.4 (Iowa 2006), “restraint must be used.” *State v. Cuevas*, 288 N.W.2d 525, 533 (Iowa 1980). Judges are consequently discouraged from

enter[ing] the fray with their own interrogation of witnesses By engaging in the examination of witnesses the court becomes vulnerable to a multiplicity of criticisms; bias, prejudice or advocacy are some of those.

Id.

The district court in this case exposed itself to those exact criticisms by failing to exercise the restraint urged by the court in *Cuevas*. The court began the hearing on Theresa’s section 235A.20 application by itself questioning Matthew³ without requiring or allowing Theresa to present evidence in support of her application.⁴ It then, without allowing Matthew an opportunity to present any

³ It does not appear that Matthew was administered an oath as a witness.

⁴ After denying Matthew’s motion to recuse, the district court began questioning him as follows:

THE COURT: . . . Mr. Weichers, did you release confidential and privileged child abuse investigative reports from [DHS] to the news media?

MR. WEICHERS: No, sir, Your Honor. I talked to the news reporter after he already had read the court file. He already had all that information. I filled in the gaps for him.

THE COURT: Where did he get it?

MR. WEICHERS: He came to the courthouse here, Your Honor, and read the file himself.

THE COURT: That’s not in the file.

evidence on his own behalf, found that he had violated section 235A.20. See Iowa Code of Judicial Conduct Canon 3(A)(4) (“A judge should accord to every person who is legally interested in a proceeding, or that person’s lawyer, full right to be heard according to law . . .”). Indeed, the record reveals that no testimony or other evidence was presented at the hearing.⁵ The court’s decision to issue the injunction appears to have instead been based on its questioning of Matthew, together perhaps with its mistaken belief that it had not admitted the child abuse assessment into evidence at the September 7, 2007 hearing. See Iowa Code of Judicial Conduct canon 3(C)(1)(a) (stating a judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including where the judge has “personal knowledge of disputed evidentiary facts concerning the proceeding”).

The manner in which the district court conducted the hearing and its questioning of Matthew “changed the court’s role from an impartial decision-

MR. WEICHERS: My understanding is that is exactly what happened. He came to the courthouse and he read the file himself.

THE COURT: Well, it’s not in the file. You did fill in the gaps as you say. What sort of gaps did you fill in?

MR. WEICHERS: Back when we were very first divorced he wanted to have some information about that.

THE COURT: I’m not concerned about your right to tell whatever your side is. I’m concerned about alleged release of DHS Child Abuse Registry Reports. So just tell me about that.

MR. WEICHERS: . . . This whole thing came up after our last hearing, and my understanding, it was in part of the court record and I did talk to him about that at that point.

THE COURT: . . . [Y]ou have indicated you did disseminate private and confidential information to someone not authorized to receive it . . . so, I’m going to order an injunction in this matter that if you disseminate any more confidential information, you’ll be sanctioned for contempt of court.

⁵ On November 14, 2007, Theresa had filed “an affidavit signed by [her] . . . in lieu of live testimony” as she was “financially unable to appear” for the hearing. She had attached a copy of the newspaper article discussing the child abuse assessment to her section 235A.20 application.

maker to an advocate.” See *S.P.*, 719 N.W.2d at 539 (finding the court “assumed an adversarial role in the process by picking and choosing which evidence would come in on behalf of the applicants”). The record here “simply does not display what Edmund Burke described as ‘the cold neutrality of an impartial judge.’” *Id.* We must therefore conclude the court abused its discretion in granting Theresa injunctive relief under section 235A.20. See *Kleman*, 373 N.W.2d at 96 (stating the issuance of an injunction pursuant to section 235A.20 “is a delicate matter—an exercise of judicial power which requires great caution, deliberation, and sound discretion”).

B. Attorney Fees.

We turn next to Matthew’s claim that the district court erred in awarding Theresa attorney fees. Subject to a rare exception not applicable in this case, a party generally has no claim to attorney fees in the absence of a statute or contractual provision allowing such an award. *Hockenberg Equip. Co. v. Hockenberg’s Equip. & Supply Co.*, 510 N.W.2d 153, 158 (Iowa 1993). Theresa sought attorney fees pursuant to Iowa Code section 598.24, which authorizes an award of reasonable attorney fees, as part of the costs, against a party who has been found in default or contempt of a dissolution decree. However, as the district court recognized, Matthew had not been found to be in contempt.⁶

Theresa had requested attorney fees for services “directly related to [Matthew’s] willful contempt of the court’s order to return the parties’ children on or about August 25, 2007.” The district court, however, instead chose to award

⁶ In fact no hearing had addressed Theresa’s claim of contempt, and no ruling had found Matthew to be in contempt or default.

attorney fees to her under the authority of section 598.36. That section provides: “In a proceeding for the modification of an order or decree under this chapter the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court.” Iowa Code § 598.36. In awarding Theresa attorney fees under section 598.36, the court reasoned Matthew’s August 3, 2007 “Application for Emergency Relief and Temporary Placement” was “nothing more than an application to temporarily modify” the parties’ dissolution decree, which the court stated Matthew “lost . . . on the merits.”

Our review of the record, however, reveals that Matthew’s August 3, 2007 emergency relief application was not denied on its merits. Rather, the court’s order regarding that application deferred ruling on it “[d]epending upon the results of the DHS investigation.” Thus, Theresa was not a “prevailing party” as to that application as required for an award of attorney fees under section 598.36. Furthermore, although Matthew filed a petition to modify the parties’ dissolution decree contemporaneously with his application seeking emergency relief, that petition was still pending when the court entered its order awarding Theresa attorney fees. The district court thus exceeded its statutory authority in taxing attorney fees against Matthew.

IV. CONCLUSION.

We conclude the district court abused its discretion in granting Theresa injunctive relief under section 235A.20 and in awarding her attorney fees. The judgment of the district court is accordingly reversed and the case is remanded

for further proceedings, before a different district judge, on Theresa's section 235A.20 application and any other pending matters.

REVERSED AND REMANDED.