IN THE COURT OF APPEALS OF IOWA

No. 9-1003 / 08-1988
Filed February 24, 2010

IN RE THE MARRIAGE OF AMBER K. RIDOUT AND MARC ANDREW RIDOUT

Upon the Petition of
AMBER K. RIDOUT, n/k/a
AMBER K. FAIRBANKS,
Petitioner-Appellant,

And Concerning
MARC ANDREW RIDOUT,
Respondent-Appellee.

Appeal from the Iowa District Court for Madison County, Peter A. Keller, Judge.

Petitioner appeals the court's motion in limine ruling and attorney fee award. **AFFIRMED.**

Karen A. Taylor of Taylor Law Offices, Des Moines, for appellant.

Ryan E. Weese and Andrew B. Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellee.

Considered by Eisenhauer, P.J., Potterfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

EISENHAUER, P.J.

Petitioner appeals the court's motion in limine ruling and attorney fee award. We affirm.

I. Background Facts and Proceedings.

Amber and Marc Ridout divorced in May 2007 and were awarded joint legal custody and shared physical care of their son. In July 2007, Amber filed an application for a rule to show cause why Marc should not be held in contempt for failing to comply with the right of first refusal for physical care and the division of camping equipment and toys provisions of the decree. The parties attended mediation with Dr. Pottebaum. Agreement was reached through mediation and Dr. Pottebaum's September 17 mediation letter included recommendations on several parenting issues.

The court ruled on Amber's application in October 2007, noting the parties had reached an agreement. The court ordered the parties to follow Dr. Pottebaum's September 17 recommendations and further clarifications. Additionally, "any further disputes related to [their son] shall be addressed with Dr. Pottebaum before further court action is filed."

Subsequently, Amber and Marc disagreed about summer visitation and medical payments—two issues not addressed in the September 17 mediation letter. The parties again met with Dr. Pottebaum, but were unable to reach agreement.

In July 2008, Amber subpoenaed Marc's work records from his employer without giving Marc notice of the subpoena. There were no pending court proceedings at the time of the subpoena.

In August 2008, Amber filed another application for a rule to show cause why Marc should not be held in contempt for failing to comply with the summer visitation and medical payment provisions of the decree. Amber acknowledged the parties had discussed these new issues with Dr. Pottebaum. Marc resisted and also filed an application for sanctions. Amber subpoenaed Dr. Pottebaum to testify at the November 2008 contempt hearing. Marc's request to quash the subpoena was denied. Marc filed a motion in limine seeking to prevent any testimony by Dr. Pottebaum.

Dr. Pottebaum appeared pursuant to the subpoena. The court considered Marc's motion in limine at the beginning of the hearing and took preliminary testimony from Dr. Pottebaum. She testified her communications with Marc are privileged and she could not release information without his signed consent. Further, she stated Marc had not consented to releasing information. The court granted Marc's objection to Dr. Pottebaum's testimony on the grounds of privilege and relevancy.

After the hearing, the court dismissed Amber's contempt application. The court also ruled Amber's service of a subpoena on Marc's employer was a clear and willful violation of Iowa Code §§ 622.63-65 (2007) and Iowa Rule of Civil Procedure 1.1701(7). Amber was ordered to pay $1000 and Amber's attorney was ordered to pay $2500 of Marc's attorney fees. This appeal followed.

II. Scope of Review.

"When an application for contempt is dismissed, a direct appeal is permitted." *State v. Lipcamon*, 483 N.W.2d 605, 606 (Iowa 1992). Our review is not de novo. *City of Masonville v. Schmitt*, 477 N.W.2d 874, 876 (Iowa Ct. App. 1991). Rather, "review is on assigned error only." *Id*.

III. Privileged Communications.

Amber argues the district court erred in granting Marc's motion in limine. We review the district court's ruling on the admissibility of evidence for an abuse of discretion. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000).

Under Iowa Code § 622.10 (2007), Dr. Pottebaum is prohibited from "testimonial use of confidential information." *In re Marriage of Hutchinson*, 588 N.W.2d 442, 446 (Iowa 1999). However, "the privilege does not apply where the person in whose favor the privilege is made waives it." *Id*. Marc objected to Dr. Pottebaum's testimony because it was privileged and she unequivocally testified Marc did not waive the privilege.

The only additional authority cited by Amber is Iowa Rule of Civil Procedure 1.516(2). That rule applies to mental/physical examinations ordered by the court and has no applicability here.

Because we conclude Marc did not waive his privilege, we need not address Amber's relevancy claims. Accordingly, we find no abuse of discretion.

IV. Sanctions.

Amber recognizes the court's authority under Iowa Rule of Civil Procedure 1.1701(2) to award reasonable attorneys fees as a sanction for abuse of the

subpoena process. She argues, however, the amount awarded is excessive. We find no error. The total attorney fees incurred by Marc exceeded the sanctioned amount and the fees awarded were reasonable.

Costs are taxed to Amber.

AFFIRMED.