Cases that I can use to argue to the level of Endangerment to my Children

C. Endangerment Weber, App 2002, 653 N.W. 2d 804

Weber makes two primary endangerment arguments: (1) that Dalbec abused W.P.W., and (2) that the denial of a teenager's custodial preference demonstrates endangerment.

Allegations of physical and emotional abuse are indicators of endangerment, but only when the degree of danger is significant. *Ross*, 477 N.W.2d at 756. A district court may properly deny an evidentiary hearing where the affidavit submitted in support of a modification of custody "was devoid of allegations supported by any specific, credible evidence." *Axford v. Axford*, 402 N.W.2d 143, 145 (Minn.App.1987). Importantly, in order to establish danger to a child's welfare, a parent's conduct must be shown to result in an actual adverse effect on the child. *Dabill v. Dabill*, 514 N.W.2d 590, 595-96 (Minn.App.1994). For example, behavioral problems and poor school performance by the child have served as indications of endangerment to a child's physical and emotional health. *Kimmel v. Kimmel*, 392 N.W.2d 904, 908 (Minn.App.1986), *review denied* (Minn. Oct. 29,1986).

Weber alleges that Dalbec pulled C.W.W. downstairs by a leg, that Dalbec often yelled obscenities, heaped physical and emotional abuse on the boys, and that one Easter, she pulled W.P.W. off the couch by his hair while screaming at him because he had dirt on his pants. The record shows that Weber petitioned for, and was denied an order for protection for the minor children when Dalbec allegedly "stomped" on W.P.W. But in order to establish danger to a child's welfare, Weber must show that Dalbec's conduct resulted in an actual adverse effect on the child. Weber presented no evidence demonstrating any such adverse effect. In this case, the district court rejected Weber's allegations because he failed to allege specific facts and because the allegations presented in Weber's affidavits were not supported by first-hand knowledge. The court also relied on the GAL's report, which found no evidence of physical or emotional endangerment of W.P.W. in the mother's environment. We conclude that the district court did not abuse its discretion.

Weber next argues that, "[t]he choice of an older teenage child is an overwhelming consideration in * * * deciding whether he is endangered by preserving the custodial placement he opposes." *Ross*, 477 N.W.2d at 756. But while a child's preference may justify an evidentiary hearing, a child's preference does not alone provide sufficient evidence of endangerment. *Geibe*, 571 N.W.2d at 778-79.

In *Ross*, the appellant established a prima facie case because the teenage child held a strong preference to live with his father, the child physically relocated to the father's home, and the child suffered emotional distress that led to poor school performance. *Ross*, 477 N.W.2d at 754. Here, by contrast, the record demonstrates only that the child wishes to change custody. Because none of the other endangerment elements are present and a change in preference alone does not prove emotional endangerment, *Geibe*, 571 N.W.2d at 779, the district court did not abuse its discretion in determining that evidence did not establish endangerment.

Proving “endangerment” is **not easy**. In the eyes of the court, endangerment takes on the most **traditional of definitions**. Has the child been **physically abused** by the other parent? Exposed to **drugs**, **pornography** or provided **alcohol** by the other parent? Has the child’s **health been neglected**? Have the child’s **nutritional needs been ignored**? Has the child’s **emotional health changed** substantially for the worse? Is the child **failing in school**?

Willey v. Willey

Annotate this Case

115 N.W.2d 833 (1962)

Alexina WILLEY, Appellant, v. Rudolph WILLEY, Appellee.

No. 50642.

Supreme Court of Iowa.

June 12, 1962.

*834 Smith, Peterson, Beckman & Willson, and Roy W. Smith, Council Bluffs, for appellant.

*835 Ross, Johnson, Northrup, Stuart & Tinley, Council Bluffs, for appellee.

LARSON, Justice.

The issue in this appeal is the right to custody of Rudolph, Jr., the son of these parties, born April 6, 1951. The plaintiff had been granted a divorce from defendant on March 23, 1959, on the ground of cruel and inhuman treatment, but under a stipulation approved by the court the defendant was to retain temporary custody of the child subject to certain rights of visitation in plaintiff until September 1, 1960. A few days before plaintiff filed her petition for divorce on July 1, 1958, defendant removed himself and their two children from the parties' home in Council Bluffs, Iowa, and had refused her the right to see the children. Court proceedings resulted in visitation rights, but defendant moved his residence to Albuquerque, New Mexico, in August, 1959, and took the children with him. Rudolph visited his mother for six weeks in the summer of 1960 under the terms of the divorce decree modification above set out, and on other occasions in Albuquerque. Being dissatisfied with these arrangements, plaintiff filed her application for permanent custody of her son and, after an extended trial of that issue, the court held permanent custody should be given the father, and provided the mother should only have such "rights of visitation * * * as in the father's judgment shall be reasonable and proper for the best interests of the child." We agree with the custody award, but not with the discretion left in defendant regarding visitation rights.

Plaintiff's appeal places before us the most difficult and perplexing problem involved in custody casesthat of whether one of the parties has a mental illness and, if so, whether it will be for the child's best interest to grant that parent custody or give him or her any visitation rights with the

child. Courts are always saddened when such issues arise, for under the rule of doing what is best for the child, many otherwise faultless parents may be denied the close association of a home with their child. Bowler v. Bowler, 355 Mich. 686, 96 N.W.2d 129, 74 A.L.R.2d 1068, and annotation in 74 A.L.R.2d 1074.

Although we must give weight to the trial court's findings, and recognize the question of child custody is addressed to the sound discretion of the court, it must also be remembered that our duty is to review such a matter de novo and, where the record is so extensive as it is here, we must decide the involved questions ourselves. Andreesen v. Andreesen, 252 Iowa 1152, 110 N.W.2d 275, and citations; Patzner v. Patzner, 250 Iowa 155, 162, 93 N.W.2d 55, 59.

Although mental illness alone will not be sufficient grounds to deny a parent custody of a child, as we shall later point out, the big issue here seemed to be whether the mother was mentally ill, or so ill that she was unfit to have the custody of this 9½ year old boy. On that issue defendant produced two able and reputable psychiatrists, Dr. Mahoney and Dr. Ash, associates, of Council Bluffs. Both gave their opinions that the mother was suffering from chronic undifferentiated schizophrenia with marked paranoid tendencies. Both said that she could harm someone, that while she was getting along reasonably well, if she were thrown back into a close family relationship, her mental condition might again become worse, and that to return the child to her custody could be a disturbing influence to her. They were given lengthy and exhaustive examinations and cross-examinations relative to the basis of their opinions. Other evidence introduced by defendant consisted of depositions of Frances, a sister of plaintiff, now acting as defendant's housekeeper, and Dona, the couple's 17 year old daughter who had chosen to live with her father. Their testimony as to plaintiff's actions and defendant's kindness to her was not subjected to cross-examination. An associate minister from Albuquerque, who had known the family about 2½ *836 months, testified that he had talked with the boy several times, had observed him in church, school, and among his classmates, and concluded that he was well, happy, well-adjusted, and wished to stay with his father. Recent pictures and report cards entered as exhibits appear to corroborate his testimony.

On the other hand, plaintiff produced an able and reputable psychiatrist, Dr. Farrell of Council Bluffs, her family physician over the past several years, and a Catholic priest who had advised with her about her troubles over these years. They all gave their opinions that the mother was not suffering from schizophrenia or any other mental illness that would tend to be detrimental to the mother-son relationship. Dr. Farrell said, "I can see no reason why it will hurt or harm her son or daughter to be under her care." They too were given lengthy and exhaustive examinations by both counsel, but found nothing more than poor judgment in some of plaintiff's writings and statements, introduced as exhibits herein. From her frequent visits to psychiatrists' offices and reading books on psychiatry, it is not surprising that she should try her hand at psychoanalysis in writings attempting a reconciliation with defendant. Plaintiff's other evidence was given by her youngest sister Beverly and by nineteen neighbors who had visited back and forth with her during the past year, one of which had entrusted very young children with plaintiff for several days. None had detected any sign of mental illness in plaintiff. While that would not be unusual [her ability to be pleasant and cheerful] in slight mental illness, it would seem strange if her alleged ailment was indeed chronic or had marked paranoid tendencies.

Although nearly one thousand pages of the record is devoted to such testimony, it will not aid our opinion by detailed references thereto. It will suffice to state that plaintiff's testimony and many of the exhibits apparently had a two-fold purpose, first, to prove that defendant morally was not a proper person to have the custody of the boy, and second, to prove factual many of the incidents which Dr. Mahoney and Dr. Ash assumed were delusional or fancied and indicative of mental illness. Her first purpose failed for the lack of substantial corroboration, but the second has substance. Dr. Farrell assumed, and the record to some extent sustains the conclusion that at least a few of plaintiff's accusations were well based, such as her announced belief that her sisters Frances and Julia were determined to have her committed as insane. Plaintiff has never been institutionalized as a mentally ill person, but these sisters did make such an effort, without success, just before plaintiff was to have the six weeks custody of the boy in 1960. It is her contention that this was done when Frances had not seen her for about six months, and was indicative of a conspiracy between the sisters and defendant to prevent her from exercising her court-approved visitation rights. If that inference was proper, it would seem that her feelings toward her husband and those sisters were not delusions but were perfectly normal. In further denial of alleged delusional traits she maintains that what she had related as dreams were erroneously referred to as visions by defendant's specialists. Without further discussion of these fact questions, it is sufficient to say we are not only faced with inconclusive evidence as to the factors considered by the specialists, but also with the sufficiency of the factors necessarily considered to justify their conclusions of undifferentiated schizophrenia. Both Dr. Mahoney and Dr. Ash frankly stated that one or several of these factors may not add up to the conclusion that she had a mental illness, but when taken together justified their findings here. We do not question their sincerity, but are far from satisfied defendant's proof of serious mental illness is sufficient to deny plaintiff any custodial rights in her son, now over 11 years old.

Our problem is distressing, for in addition to having opinions by trained specialists that are in total conflict, we have violent disputes as to the factual basis of some of *837 the expressed opinions as well as their sufficiency to sustain their findings. Most of the remaining testimony may be classified as partial. This places upon the court a most heavy and vexatious burden, one where doubts make a decision much less than completely satisfactory. We have often said in regular custody matters that a correct disposition of the case called for the wisdom of Solomon himself, and now to have such a mental illness element injected in a custody dispute makes the task almost impossible. Perhaps it would be helpful to have the aid of one trained in psychiatry, as a friend of the court, who on behalf of the state would examine the parties and give his impartial opinion as to the seriousness of any mental illness in custody cases. We have no such aid here, although Dr. Ash was appointed to examine plaintiff pursuant to defendant's application.

I. It has been well established in all jurisdictions that the court gives paramount consideration to the best interest of the child, and the desires or wishes of the parent are not controlling in custody disputes. Stillmunkes v. Stillmunkes, 245 Iowa 1082, 1086, 65 N.W.2d 366, 369, and citations. Under the circumstances revealed by this record, what disposition is for the best interest of the child? It is not disputed that it would not be for the best interest of a child to place him in the custody of one afflicted with a serious mental illness. Andreesen v. Andreesen, supra; annotations 74 A.L.R.2d 1073, 1075. But it is also true few persons do not at some time exhibit traits or feelings that depart from the norm, and to deny custody of a child to a good and loving parent on that basis would be unjust if not ridiculous. Slight mental illness, or an arrested case in

one found to be mentally ill, will not per se disqualify that person as a proper custodian of children. McKay v. McKay (1962) Iowa, 115 N.W.2d 151; Guiles v. Guiles, 41 Wash. 2d 377, 249 P.2d 368; Surrey v. Surrey (Ct. of App.D.C. 1958), 144 A.2d 421, 423; Hitchcock v. Hitchcock (1960), 220 Or. 112, 349 P.2d 254; Nelson, Divorce and Annulment, Vol. 2, 2d Ed., 1961 Revised, § 15.26, page 274.

Regardless of the basis for allowing defendant the temporary custody of Rudolph (it was done by stipulation, and no presumptions are attached to it), he has now been with his father over three and a half years and has become well adjusted to his surroundings at the paternal home. While the evidence that his present home and the relationships therein are good is not strong, it is not seriously disputed, and we are satisfied that at this time it is a proper one for the boy. He ranks high in his class at school, is a class officer, and attends church regularly. His health record is very good. Judged by his school absence record, it is somewhat better than when he lived in Council Bluffs. He appears happy and content, and there is nothing to indicate any substantial detrimental influences are present. Regretfully, there is evidence which would indicate both of these parents have done things and said things not intended to increase the love of their son for the other parent, but perhaps this is not unusual or entirely unexpected. Both deny such was their intent, and we give to this evidence no special significance. The proof is not sufficiently clear to deny custody or visitation rights upon that basis. The trial court, exercising its broad discretion, had ample basis for its conclusion that the permanent custody of the boy should be placed in the father and that it would be for his best interest that he remain with the father. We agree with that determination and affirm the decision in that regard.

II. However, the conclusion that plaintiff is not a fit and proper person to have the care, custody and control of the minor son, or is not a person of sound mind, and that she is suffering from a mental illness that would make it harmful to the minor son to be placed in her care and against his best interest, all as set out in paragraphs 8, 9, and 10 of the trial court's findings, we think, is not clearly or satisfactorily established. Even the defendant *838 does not seriously contend that is the fact, or contend that it is necessary to a decision in this case. Furthermore, the provisions in the decree that plaintiff's rights of visitation shall be at the discretion of defendant as in his judgment shall be reasonable and proper for the best interest of the child is erroneous and cannot be sustained.

It has often been stated that the love of a kind and good mother is most beneficial to a child, and that during tender years children are usually best cared for by their mother. Blundi v. Blundi, 243 Iowa 1219, 1230, 55 N.W.2d 239, 245. In Nelson on Divorce, supra, § 15.08, page 226, it is stated: "Mental illness of a parent may not require the parent to be deprived of the custody of his or her child when it appears that the health, safety and welfare of the child will not be jeopardized by permitting it to remain with its afflicted parent." This is especially so if the parent's behavior had been normal for a considerable period of time preceding the award of the child's custody.

In the instant matter there was little to show the health, safety or welfare of Rudolph would be jeopardized by granting the mother custody, but there is evidence his health has been better at his father's home and that his general welfare would be best served by allowing him to remain in the place he has lived for the past three years. But this does not mean there has been sufficient proof

that the mother is unfit for his custody or visitation. We think the evidence is substantial that Rudolph has been well treated and happy when left alone with his mother.

Although now over eleven years of age and certainly not in need of infant care, this lad or any lad still needs to know, appreciate and love his mother and, if not given that opportunity, will miss one of the better things of life. Proper visitation rights will provide this opportunity. Jackson v. Jackson, 248 Iowa 1365, 1376, 85 N.W.2d 590. Unless there is danger to him, and we find no such evidence in the record, it may be most unfair to deny him the privilege of spending some time with her. There is no evidence plaintiff has ever mistreated Rudolph, Jr. or has evidenced any ill will toward either of her children.

III. The rule is well established in all jurisdictions that the right of access to one's child should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation. It is a right which, unless specifically denied by the court, can be enforced by right of habeas corpus. Nelson on Divorce, supra, § 15.08, page 226, and § 15.26, page 274; Townsend v. Townsend, 205 Md. 591, 109 A.2d 765, 768; Commonwealth ex rel. Firestone v. Firestone, 158 Pa.Super. 579, 45 A.2d 923.

The feasible exercise of a parent's right of visitation should be safeguarded by a definite provision in the order or decree of the court awarding custody of the child to another person. Walden v. Walden, 250 Ky. 379, 63 S.W.2d 290; Chadwick v. Chadwick, 275 Mich, 226, 266 N.W. 331; Perr v. Perr (Mo.App.), 205 S.W.2d 909.

In Nelson on Divorce, supra, § 15.26, at pages 274 and 276, it is stated: "The rights of visitation is an important, natural and legal right, * * *." The right should be recognized by the court in custody cases and the "order should not make the right of visitation contingent upon an invitation from the party having the custody of the child, or require the consent of one parent for the other to visit the child, * * * thereby leaving the privilege of visitation entirely to the discretion of the party having the child in custody." On this proposition many late cases are cited, including McCourtney v. McCourtney, 205 Ark. 111, 168 S.W.2d 200; Clark v. Clark, 177 Okl. 542, 61 P.2d 28; and Sweat v. Sweat, 238 Iowa 999, 29 N.W.2d 180.

In Surrey v. Surrey (Ct. of App.D.C.), supra, 144 A.2d 421, 423, a case decided in *839 1958, in a proceeding on a motion to reinstate visitation rights which had been suspended on the father's motion when the mother was admitted to a hospital for a mental examination, and was found to be of unsound mind and was later discharged as cured, the court said too much importance was given to that discharge, that the issue was as to her present condition and whether visits with the children would or would not be in their best interest. It stated that the burden was on the father to support his claim that the mother's present condition was such that the visits would not be in their best interest. That was the concernable issue involved, and the sound or unsoundness of the mind of the mother, although entitled to consideration, was not determinative of that issue. It said: "Even if the mother is mentally ill, this would not ipso facto deprive her of the privilege of seeing her children", and that "when custody of children has been awarded to one parent, the parent deprived of their custody has the right of visitation with the children and ought not to be denied that right unless by his conduct he has forfeited his right, or unless the exercise of the right would injuriously affect the welfare of the children."

Obviously, in the instant case the trial court did not find either of these exceptions applicable, nor did it deny all visitation rights to the mother. By inference they were approved, but as to the times and places of visitation, discretion was left with the father. That cannot be done. Under this record we are satisfied plaintiff should have reasonable visitation rights and that they should be established by the court.

In this connection it is noted that by stipulation prior to the hearing on this matter the parties and the court had agreed the mother should have the boy at her home for a six weeks period during the summer vacation and that she should have certain hours of visitation with him at Albuquerque during the Christmas vacation. Except for outside interference during the first four weeks, they were exercised without difficulty in the summer of 1960. Unsupervised visitation rights, under the conditions now evident, appear reasonable and proper, and unless at some future time the mother exhibits some harmful tendencies toward the boy she should be granted a three weeks visitation right in her home at the close of the school year, and the hours of visitation during Christmas vacation as provided in the prior stipulation. The trial court is directed to enter a modified decree providing such reasonable visitation rights in plaintiff in conformity with this opinion. No further hearing is deemed necessary, and it is so ordered.

Affirmed in part and remanded with directions.

HAYS, THOMPSON, THORNTON, and SNELL, JJ., concur.

GARFIELD, C. J., and OLIVER and MOORE, JJ., dissent.

PETERSON, J., takes no part.

Argument for grounds of endangerment

The paramount need is for this child to be with her natural father. A natural father has a fundamental liberty interest in the care, custody, and management of his child, and this interest does not evaporate simply because the natural father has not been a model parent. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). Rather, in order to deprive a father of this natural right, a third person must show that there are "grave and weighty" reasons justifying such a deprivation, such as neglect, abandonment, incapacity, moral delinquency, instability of character, inability to furnish the child with needed care, or unless it has been established that such custody would not be in the best interest and welfare of the child. Durkin v. Hinich, 442 N.W.2d 148, 152-53 (Minn.1989); see also Wallin v. Wallin, 290 Minn. 261, 265, 187 N.W.2d 627, 630 (1971). There simply are no extraordinary circumstances of a grave and weighty nature to justify transferring custody from appellant to his former sister-in-law and brother-in-law. The extraordinary circumstances may be the fact that this case has taken as long as it has and has gotten as far as it has. - See more at: http://caselaw.findlaw.com/mn-supreme-court/1106622.html#sthash.qylTl17F.dpuf

Grounds for Why an Evidentiary Hearing should be held where in doubt ?

Harkema v. Harkema

Annotate this Case

474 N.W.2d 10 (1991)

In re the Marriage (now dissolved) of Kathleen L. HARKEMA, n/k/a Kathleen L. Schol, Petitioner, Respondent, v. Cary L. HARKEMA, Appellant.

No. C1-91-553.

Court of Appeals of Minnesota.

August 20, 1991.

*11 Benjamin Vander Kooi, Jr., Vander Kooi Law Offices, P.A., Luverne, for petitioner, respondent.

Joel C. Wiltrout, Lucht, Wiltrout & Ahlquist, Worthington, for appellant.

Considered and decided by CRIPPEN, P.J., and FOLEY, and NORTON, JJ.

OPINION

FOLEY, Judge.

Cary L. Harkema appeals the trial court's order denying his motion for custody modification and an evidentiary hearing where the trial court had previously issued an order granting the evidentiary hearing. We reverse and remand with instructions.

FACTS

Cary and respondent Kathleen L. Harkema, n/k/a Kathleen L. Schol, were married for approximately 16 years before their marriage was dissolved by judgment and decree on August 22, 1984. The parties were awarded joint custody of their four children, with physical custody granted to Kathleen.

Since that time, the oldest child has reached the age of majority, and physical custody of the second oldest child was transferred to Cary. Physical custody of the two youngest children, M.G.C.H. and C.D.H., ages 12 and 10 respectively, remains with Kathleen at this time.

Both parties have remarried. Cary remarried in 1990 and currently resides with his wife, her three children from a previous *12 marriage, and his oldest son. Kathleen is presently married to Al Schol, with whom she and the two youngest children continue to reside.

In August 1990, Cary moved the trial court to amend its August 1984 judgment and decree to make Cary the primary custodial parent for M.G.C.H. and C.D.H. Cary submitted his affidavit and the affidavit of licensed psychologist Marlo A. Skurdal as support for modification.

In his affidavit, Skurdal stated M.G.C.H. told him "when Al gets mad I get scared he is going to hit me or something." C.D.H. told Skurdal he was afraid of Al and that

he yells and like hits the walls, takes it out on everybody else * * *, [and] when he drives the car, he drives like a maniac, he scares us."

Skurdal also stated that, since interviewing these children at the time of the original dissolution, he "believes there is a substantial change in them due to the change in circumstances" of their mother's marriage to Schol. He concludes that

the present environment endangers their emotional development. * * * [H]e sees no harm by a change of physical custody and sees it as a benefit to both of the children.

In Cary's affidavit, he stated the two boys informed him they "wanted to remain living with [Cary] and are adamant about their refusal to return to living with [Kathleen]." He continued:

[Schol] is emotionally abusive, by yelling at them, telling them that they are stupid and dumb, and calling [Cary] and his new wife names * * *, [and] when [Schol] gets mad they are afraid of him and are afraid that he will hit them, even though he has never done so.

The trial court ruled on Cary's motion on August 29, 1990. In its findings of fact and order, the trial court ordered an evidentiary hearing, home studies and the appointment of a guardian ad litem.

The guardian ad litem subsequently met with the two boys on two occasions. Both boys reasserted their desire to live with their father, citing as support for their choice, Schol's verbal abuse, threats, and fits of anger where he starts throwing objects. Both boys also stated they get along very well with their stepmother, while they have some difficulty in getting along with their own mother. The guardian ad litem recommended Cary be awarded physical custody. The guardian ad litem stated that, although he did not believe any emotional problems were apparent at the time, if communication did not improve in Kathleen's home, problems could develop in the future.

A licensed social worker for the Pipestone County Family Services Center conducted a visit of Cary's home. She stated that if the situation in Kathleen's home did not improve, "it is likely the two boys, as they become older, will choose to live with their father." She recommended Cary be awarded physical custody of the two boys.

A counselor from Hennepin County Family Services conducted the visit of Kathleen's home. She found no evidence of Schol threatening the boys or being verbally abusive toward them, even though she did find Schol provided discipline in an inappropriate manner at times by raising his voice and losing his temper. She commented both boys expressed strong opinions of wanting to live with their father. She attributed this, however, to the activities available to them in the country, their developmental stage and typical identification with the more masculine parent. Both boys stated they could live with their mother if it was required.

The Hennepin County counselor found it difficult to assess whether or not the boys were in emotional danger in their mother's home environment. She commented it was impossible to fully assess the situation without interviewing all family members. She stated:

It appears that none of the evaluators, psychologists, or the guardian ad litem involved with this family had the opportunity to interview and observe all the critical family members, and therefore are not in a position to offer recommendations.

*13 Upon receipt of the above reports, the trial court specifically found insufficient evidence to justify an evidentiary hearing for change of custody. Although it found a significant change in circumstances occurred in that Kathleen had remarried, there was insufficient evidence of endangerment. Therefore, the trial court concluded that, pursuant to the three-pronged test set out in the statute, a change of custody was not in order.

ISSUE

Did the trial court err by denying an evidentiary hearing on the motion for modification of child custody?

ANALYSIS

In custody determinations, appellate review is limited to the question of whether the trial court abused its discretion by improperly applying the law. Pikula v. Pikula, 374 N.W.2d 705, 710 (Minn.1985).

A trial court has broad discretion in matters of child custody and will not be reversed absent a clear showing of an abuse of that discretion.

Roehrdanz v. Roehrdanz, 438 N.W.2d 687, 690 (Minn.App.1989), pet. for rev. denied (Minn. June 21, 1989).

When the parents do not agree to custody modification, the trial court must use a three-part analysis pursuant to Minn.Stat. § 518.18(d). Coady v. ViRay, 407 N.W.2d 710, 712 (Minn.App.1987). Minn.Stat. § 518.18(d) provides that

the court shall not modify a prior custody order unless it finds, upon the basis of facts that have arisen since the prior order or that were unknown to the court at the time of the prior order, that a change has occurred in the circumstances of the child or the custodian and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custodian established by the prior order unless: * * * * * * (iii) the child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

Where sufficient evidence exists warranting consideration of a modification order, then the trial court shall order an evidentiary hearing. Taflin v. Taflin, 366 N.W.2d 315, 320 (Minn.App.1985). However, this hearing should not be held unless the movant makes a prima facie showing that the section 518.18(d) standards could be satisfied. Westphal v. Westphal, 457 N.W.2d 226, 229 (Minn.App.1990). This showing is made when the accompanying affidavits set forth sufficient facts which, if true, justify modification. Nice-Petersen v. Nice-Petersen, 310 N.W.2d 471, 472 (Minn.1981). At a minimum, these affidavits must

establish satisfactorily on a preliminary basis that there has occurred a significant change of circumstances * * * [which] endanger the child's physical or emotional health or the child's development.

Id. (citations omitted).

Cary contends he met his burden of establishing, at least on a preliminary basis, that a significant change in circumstances has occurred that endangers the boys' physical or emotional health or emotional development. The trial court agreed and ordered an evidentiary hearing. However, in its March 1, 1991 order, the court sua sponte denied Cary's request for the evidentiary hearing, even though it found a change in circumstances because of Kathleen's marriage to Schol and the home study reports concluded a change of custody to the father would best serve the boys' interests.

Where the trial court has issued an order for an evidentiary hearing, it cannot then sua sponte deny the evidentiary hearing without first giving the parties a chance to argue the case. In addition, Cary has met his burden of supplying sufficient facts which, if true, justify modification. Cary's and Skurdal's affidavits alleged both boys made statements that their *14 stepfather did things that scared them. This included yelling, throwing things, hitting walls, and driving the car like a maniac.

Fear of the custodial parents has been found to be a recognized sign of present endangerment. Lilleboe v. Lilleboe, 453 N.W.2d 721, 724 (Minn.App.1990). The trial courts have been cautioned to pay special attention to cases alleging present endangerment and are strongly encouraged to conduct evidentiary hearings in such cases in order to protect the best interests of the children. Id.

It was alleged that Schol was emotionally abusive to the boys by yelling at them, telling them they were stupid and dumb, and calling Cary and his wife names. "Allegations of abuse, physical or emotional, have been held to endanger a child's well-being." Id. In Lilleboe, this court held that an evidentiary hearing was required to protect the best interests of the child where allegations of abuse, fear of the custodial parents, changes in the children's attitude and behavior, and the consistent denial of visitation proved to be sufficient facts which, if true, may endanger the children's physical or emotional health or development. Id.

In Taflin, this court held that the best interests of the two minor children would best be served by conducting a full evidentiary hearing where affidavits alleged claims of voluntary relinquishment of the children and minimal contact with the children for over two years, borrowing of excessive amounts of money from the children without repayment, and abuse of child support payments. Id. at 320-21.

The trial court cites Niemi v. Schachtschneider, 435 N.W.2d 117 (Minn.App. 1989), where an evidentiary hearing was held with respect to one child. In Niemi, it was alleged the child was not adjusting well, was depressed, withdrawn, impulsive, expressed a strong desire to live with his father, and indicated he might run away from home if custody was not transferred. Id. at 118-19. However, after an evidentiary hearing, the court found insufficient evidence to justify modification of custody. Id. at 119. No hearing was held as to the younger child's endangerment because the affidavits presented did not indicate the possibility of her endangerment. Id. at 118.

DECISION

Because evidentiary hearings are strongly encouraged, an evidentiary hearing should be held where the trial court already found a change in circumstances and modification is in the boys' best interest. Where some dispute exists as to whether the present environment endangers the boys' emotional development, an evidentiary hearing would be helpful and is justified. Whether the underlying facts developed at such a hearing then justify modification is a question left to the discretion of the trial court. Therefore, we reverse and remand for an evidentiary hearing.

Cases For Spousal Support

DOBRIN V. DOBRIN

A case to fall back on in terms of gross earnings and what was awarded to spouse in terms of spousal support.

STATE OF MINNESOTA
IN COURT OF APPEALS
C5-98-2071

In Re the Marriage of:
Robert G. Miksche, petitioner,
Appellant,

vs.

Joann M. Miksche,
Respondent.

Filed June 29, 1999
Affirmed in part, reversed in part, and remanded
Anderson, Judge

FACTS

Father and mother's marriage was dissolved on June 26, 1997. The trial court held hearings for five days and issued a judgment and decree on August 26, 1997. Mother took custody of their two children and was awarded child support in the amount of $1,632 per month and spousal maintenance in the amount of $1,300 per month. - 1,300 cited in this case for gross earnings of $42,000 for spouse

In awarding support, the trial court made very detailed findings regarding father's income. The court essentially found that father grossed $18,000 a year in salary from his own corporation and $54,000 in rental income, for a combined gross income of $72,000. His net income after taxes was $46,920. The court also found that father claims a depreciation expense of $18,360 on his rental income schedule. The court concluded that the claim was not true depreciation, making the amount claimed cash available to father. Thus, the court added it back to father's net income, bringing the total to $65,280, or $5,440 a month.

The court calculated mother's reasonable expenses to determine an amount for spousal support and found that she had reasonable expenses of $3,600 per month, but only made $700 per month. The court determined that mother's income plus child support still left her with a reasonable need of $1,300 per month and awarded her maintenance in that amount.

Father made a motion to modify child support and spousal maintenance on July 14, 1998. He claimed in his affidavit that his rental income had decreased in the last year to $42,000, a $12,000 decline. He also alleged in his affidavit that mother's income had increased and her living expenses had decreased. He further alleged that, when calculating his net income, the court should not have added the depreciation he deducted from his rental income. The district court found there was no substantial change in circumstances to justify modifying either child support or spousal maintenance. Mother moved for need-based attorney fees in response to the motion. The trial court denied the request, finding father's motion was neither frivolous nor in bad faith.

Cases For Award of Attorney Fees

In re Marriage of Green (1992)

Annotate this Case

[No. A048728. First Dist., Div. Five. May 12, 1992.]

In re Marriage of JAMES PAUL and CAROLINE ANN GREEN.

JAMES PAUL GREEN, Appellant, v. CAROLINE ANN ALLEN, Respondent.

(Superior Court of San Mateo County, No. 301652, Allan J. Bollhoffer, Judge.)

(Opinion by King, Acting P. J., with Low, J., fn. * and Haning, J., concurring.)

COUNSEL

James Paul Green, in pro. per., for Appellant.

Bernard N. Wolf and David P. Uccelli for Respondent.

OPINION

KING, Acting P. J.

In this case we hold that an award of attorney fees and costs, either as a sanction or for actions "related" to a marital dissolution action, was supported by findings that a party to the action brought other actions or proceedings against his spouse or her attorney to gain an unfair advantage over the spouse, to deliberately attempt to exhaust his spouse financially and deny her effective counsel, and to dissuade her counsel from pursuing the action.

James Paul Green, an attorney representing himself, appeals from an order awarding attorney fees and costs to his former spouse Caroline Ann Allen (Green).

Following the issuance of remittitur in In re Marriage of Green (1989) 213 Cal. App. 3d 14 [261 Cal. Rptr. 294], Caroline fn. 1 filed a motion for $116,313 in attorney fees and costs under Civil Code section 4370 fn. 2 and former section 4370.5. fn. 3 In support Caroline filed her lawyers' declarations accompanied by itemized billing statements for services rendered in the instant matter and in "myriad related actions in both the trial and appellate courts," as well as a detailed income and expense declaration. James filed extensive opposition papers.

At the end of a hearing on November 17, 1989, the trial court announced its tentative decision. Caroline filed a proposed statement of decision to which James responded with objections, proposed counter/additional findings, and a request for hearing. The trial court filed its statement of decision and order without further hearing. **[6 Cal. App. 4th 589]**

The court found that six different actions and proceedings, including Green v. Uccelli (1989) 207 Cal. App. 3d 1112 [255 Cal. Rptr. 315] (James's malicious prosecution suit against Caroline's attorney) were related to this marital dissolution proceeding within the meaning of section 4370. fn. 4 The court declared it had reviewed and was familiar with these actions, which were described in the declarations of Caroline's attorneys and the documents referred to therein. The court further found that "but for the pendency of the family law matter" and James's "desire to gain an unfair advantage over [Caroline] and to dissuade her counsel from pursuing the family law matter, none of the other actions would have been filed."

The court ordered James to pay Caroline's attorney fees and costs in the amount of $100,024. It found James's "conduct in the marital dissolution action in the trial court and in his myriad appeals manifest[s] a deliberate attempt to exhaust [Caroline] financially and emotionally and deny her effective counsel." Quoting this court's comments in Green v. Uccelli, supra, 207 Cal.App.3d at pages 1124 and 1125, and in In re Marriage of Green, supra, 213 Cal.App.3d at page 29, the trial court expressed agreement with "the characterization, assessment, and motivation attributed to [James] by the Court of Appeal." The court found James "consistently and deliberately attempted to frustrate the policy of the law set forth in Civil Code § 4370.5."

[1] As the Supreme Court explained in In re Marriage of Sullivan (1984) 37 Cal. 3d 762, 768-769 [209 Cal. Rptr. 354, 691 P.2d 1020], "a motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. '[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]' " (Citations omitted.)

I

[2a] James first asserts the trial court lacked "jurisdiction" to award attorney fees incurred in the defense of Green v. Uccelli, supra, 207 Cal. App. 3d 1112, because: Caroline was not a party to that action and Uccelli is not a party to this one; there was no joinder or consolidation of the **[6 Cal. App. 4th 590]** two cases; the allegations against Uccelli concerned activities "outside the scope of the domestic action"; Green v. Uccelli, supra, 207 Cal. App. 3d 1112, was "final for all purposes"; costs claimed were paid in full; the time within which to claim costs (Cal. Rules of Court, rules 26, 870) had expired; this court having declined to award sanctions in Green v. Uccelli, supra (at p. 1125), Uccelli could not bring an independent action for damages on the basis of James's alleged bad faith prosecution of that appeal (Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 789-791 [226 Cal. Rptr. 90, 718 P.2d 77, 62 A.L.R.4th 1083]); and Caroline had no obligation for these fees.

The trial court based its award of attorney fees for the defense of Green v. Uccelli, supra, 207 Cal. App. 3d 1112, on the theory that it was related to this Family Law Act (FLA) proceeding within the meaning of section 4370 and upon section 4370.5 based upon its findings on James's conduct and motivation. James's discussion of section 4370 consists of an exploration of the legislative history of portions other than the relevant language, followed by a rehash of the argument outlined above. Caroline offers little further guidance. fn. 5 The recent case of In re Marriage of Seaman & Menjou (1991) 1 Cal. App. 4th 1489 [2 Cal. Rptr. 2d 690], however, contains a well-reasoned interpretation of the statute's "related" proceedings provision which supports the trial court's award in this case.

[3a] The Seaman court concluded that section 4370's general language gives trial courts broad discretion to determine whether an action is "related" to a proceeding under the Family Law Act, guided by the well-established mandate to "ascertain the intent of the Legislature so as to effectuate the purpose of the law" (Select Base Materials v. Board of Equal. (1959) 51 Cal. 2d 640, 645 [335 P.2d 672]). (1 Cal.App.4th at p. 1496.) "In keeping with the purpose of section 4370 [see In re Marriage of Sullivan, supra, at page 768, In re Marriage of Barnert (1978) 85 Cal. App. 3d 413, 428 (149 Cal.Rptr. 616)], the most obvious function of the 'related' proceeding language is to allow a trial court to fully ensure both parties' ability to maintain or defend a[n] FLA action. For example, by authorizing fees in cases related to FLA actions as well as in those directly under the FLA, section 4370 enables a trial court to ensure that an appropriate degree of financial parity between the parties is not lost by a party's litigation of matters which could have been part of the FLA action in an independent suit. ... Such suits ... even if unrelated in a factual sense, might fall within the purview of the **[6 Cal. App. 4th 591]** statute because of their effect on the FLA action. Thus, the statute enables a trial court to prevent **a spouse with greater financial resources from harassing or coercing the less advantaged spouse into submission** in the FLA case by forcing him or her to defend other lawsuits; such independent suits are

'related' within the meaning of section 4370 because they are intended to produce some result in a[n] FLA case." (In re Marriage of Seaman & Menjou, supra, 1 Cal.App.4th at p. 1497, italics added.)

Award of attorney fees ensures that spouse with greater financial resources does not extend the length of the trial with intent to exhaust respondent. It ensures that it keeps the opposing counsel looking for creative solutions to shorten the length of the trial. It should be incumbent even more on the court to award those fees when there is no explanation provided by the opposing counsel as to why a more adversarial approach is not more beneficial to the case.

[2b] This definition amply covers Green v. Uccelli, supra, 207 Cal. App. 3d 1112, as well as the other actions and proceedings the court found to be related to the dissolution action. We held if James's claims had merit he should have sought relief "not through an independent action but through an award of attorney fees and sanctions against [Uccelli] within the dissolution action." (Green v. Uccelli, supra, at p. 1116.) Moreover, the trial court in the instant case found that Green v. Uccelli, supra, among other actions, "arose out of the dissolution proceeding" and "would not have been filed but for [James's] improper motives," specifically "to dissuade [Caroline's] counsel from pursuing the family law matter." Thus, Green v. Uccelli, supra, is clearly a proceeding related to this FLA action within the meaning of section 4370, fn. 6 and James's conduct clearly violates the public policy set forth in section 4370.5 (now § 4370.6).

One respected authority has interpreted In re Marriage of Seaman & Menjou, supra, 1 Cal. App. 4th 1489 as elevating to jurisdictional requirements the factors a trial court should consider in determining whether a case is "related" to the FLA action. (See 1992 Cal. Family Law Report, pp. 5089, 5091.) We view it differently. [3b] Normally, whether another action is "related" to the marital case within the meaning of section 4370 is a factual question for determination by the trial court. (See In re Marriage of Green, supra, 213 Cal.App.3d at p. 28, fn. 8.) In holding that the parent's attorney fees in that dependency proceeding were not related to the dissolution action as a matter of law, In re Marriage of Seaman & Menjou, supra, merely outlined factors for the guidance of trial courts. fn. 7 The standard of appellate review usually will be, as here, whether substantial evidence supports the trial court's findings. **[6 Cal. App. 4th 592]**

It may be that the use of section 4370 to recover attorney fees and costs for a "related" action is no longer necessary given the enactment of former section 4370.5, now section 4370.6. Under the factual circumstances of the instant case, the findings of the trial court would clearly support an award of attorney fees and costs as a sanction under former section 4370.5 alone, since James violated the public policy in family law cases to promote settlement and reduce the costs of litigation by encouraging cooperation between attorneys and parties. But cautious counsel moving in an FLA action for an award of attorney fees and costs incurred in a related proceeding may choose to rely upon both sections 4370 and 4370.6, since it may be difficult to predict in advance which section the court will rely upon if it grants the motion. When the conduct is comparable to that exhibited here, an award of attorney fees and costs as a sanction would likely result in a greater recovery than one based upon need and ability to pay.

II

[4] James next contends portions of the statement of decision concerning his motivation in pursuing this and related cases are not supported by substantial evidence. He specifically objects to the trial court's references to 1) his desire to gain unfair advantage over Caroline and dissuade her counsel from pursuing the family law matter, 2) his deliberate attempt to exhaust Caroline financially and emotionally and deny her effective counsel, and 3) the "characterization, assessment, and motivation" attributed to him by this court.

Fortunately, the judge herein also presided at the trial and numerous other posttrial hearings. The record in this and related cases amply supports the court's findings. James's argument to the contrary-peopled with straw men, swimming with red herrings, and strewn with irrelevancies-is unworthy of even passing consideration.

III

[5] James maintains the trial court erred in awarding attorney fees for certain posttrial proceedings in 1987 because Caroline had previously been denied such fees. James submitted two prior orders to the trial court at the hearing on the motion, but has placed fourteen additional ones in the appellant's appendix on appeal, many of which make no mention at all of attorney fees. None of those that deny fees do so with prejudice or otherwise **[6 Cal. App. 4th 593]** preclude renewal of the fee requests at a later date. The statement of decision contains no allocation of attorney fees for any particular proceedings and James did not ask the court to set out its calculations. (See In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1274 [255 Cal. Rptr. 488].) The trial court specifically warned James against "pigeon-holing" individual matters, explaining that although it was relying on the amounts Caroline set forth in her motion, "the thinking of the court is that these things are also being awarded under 4370.5 of the Code, actually mainly under that section. [¶] So that your point about other orders and so forth I think is not well taken."

[6] In any event, denials of fee requests in conjunction with interim motions, without more, cannot preclude the court from exercising its responsibility on this issue at the end of the case. Trial courts have a duty to award appropriate attorney fees and costs pendente lite pursuant to section 4370. (See In re Marriage of Hatch (1985) 169 Cal. App. 3d 1213 [215 Cal. Rptr. 789].) However, trial courts also have a duty at the conclusion of the case to make a just and reasonable award of attorney fees and costs, considering the circumstances of the parties. Section 4370 provides, "from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding ...." (Italics added.)

[7] James also challenges claims for miscellaneous fees totalling $5,600. As has been stated, the statement of decision did not provide, nor did James request, a mathematical breakdown of the fee award. (See In re Marriage of Bergman (1985) 168 Cal. App. 3d 742 [214 Cal. Rptr. 661].) Thus, there is no express award of these particular fees for James to contest. Moreover, James's challenge in this regard raises only questions of fact, which, if they were raised below, were impliedly resolved against him by the trial court. In each case, the attorney declarations and itemized bills constitute sufficient evidence to support the findings. Nor are these fees time-barred, as section 4370 expressly allows awards in related proceedings as long as the family law action is pending. (See ante, fn. 4.)

Furthermore, since the award was based in part on former section 4370.5, it was in the nature of a sanction. Thus James's failure to request a mathematical breakdown of the court's award prevents us from ascertaining how the trial court ruled with regard to the $5,600 which James challenges. (In re Marriage of Hebbring, supra, 207 Cal.App.3d at p. 1274.)

IV

[8] Caroline begs this court "to help bring this senseless litigation to an end." We sympathize with her wishes and hope they will be fulfilled by the **[6 Cal. App. 4th 594]** award which we affirm today. We decline, at this time, to take the additional steps Caroline suggests.

As to section 4370, Caroline concedes the trial court's $10,000 pendente lite award may be adequate to cover her attorney fees on this appeal. Section 4370 is essentially need based (In re Marriage of Aninger (1990) 220 Cal. App. 3d 230, 244-245 [269 Cal.Rptr. 388]) and there is no authority for using the "lodestar" method in this context. The cases Caroline cites appear to be distinguishable. As to section 4370.6, that statute tracks the sanctions language of former section 4370.5 (ante, fn. 3), which formed a basis of the award below.

Although we recognize Caroline's justifiable frustration with James's egregious behavior, we decline to impose sanctions for a frivolous appeal (Code Civ. Proc., § 907; Cal. Rules of Court, rule 26 (a)). In light of our discussion of section 4370's related proceedings provision, it is impossible to say that "any reasonable attorney would agree that the appeal is totally and completely without merit" (In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 650 [183 Cal. Rptr. 508, 646 P.2d 179]). Nor can we properly declare James a vexatious litigant (Code Civ. Proc., § 391, subd. (b)(3); compare In re Luckett (1991) 232 Cal. App. 3d 107, 109 [283 Cal. Rptr. 312] [43 separate appellate actions filed] with In re Marriage of Green, supra, 213 Cal.App.3d at p. 28, fn. 8 [12 proceedings filed in this court]).

The judgment is affirmed.

Low, J., fn. * and Haning, J., concurred.

FN *. Retired Presiding Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

FN 1. For ease of reference, we will refer to the parties by their first names, James and Caroline. (See In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 475, fn. 1 [274 Cal. Rptr. 911].)

FN 2. Unless otherwise specified, all further section references are to the Civil Code.

FN 3. Former section 4370.5 required a trial court determining a just and reasonable award of attorney fees and costs to consider, in addition to need, "The extent to which the conduct of each party and the attorney furthers or frustrates the policy of the law to promote settlement of litigation, and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys. An award of attorney fees and costs pursuant to this paragraph is in the nature of a sanction." This provision is now contained in section 4370.6, subdivision (a).

FN 4. The applicable version of section 4370 provided, "(a) During the pendency of any proceeding under [the Family Law Act], the court may order any party, except a governmental entity, to pay such amount as may be reasonably necessary for the cost of maintaining or defending the proceeding and for attorneys' fees; and from time to time and before entry of judgment, the court may augment or modify the original award for costs and attorneys' fees as may be reasonably necessary for the prosecution or defense of the proceeding or any proceeding related thereto, including after any appeal has been concluded."

FN 5. Her suggestion that footnote 8 in In re Marriage of Green, supra, 213 Cal.App.3d at page 28, is res judicata, law of the case, and "completely dispositive," is belied by our explicit announcement therein that we were not deciding which if any actions were "related" as that term is used in section 4370, because "that is a factual determination to be made by the trial court."

FN 6. Throughout his brief, James reiterates the fact that Uccelli did not appear pro se in Green v. Uccelli, supra, 207 Cal. App. 3d 1112, but was represented by counsel both at trial and on appeal. Nevertheless, Uccelli's detailed itemized billings constitute substantial evidence of his professional participation in his own behalf. James cites no authority for his suggestion that Uccelli was required to move for "related case determination" in the civil action. Indeed, the only authority for attorney fees is contained in the Family Law Act.

FN 7. In re Marriage of Seaman & Menjou, supra, 1 Cal. App. 4th 1489, stands for the proposition that there are limits as a matter of law as to whether another action is "related" to a marital dissolution action within the meaning of section 4370. Simply because divorcing spouses are parties to another action does not automatically mean it is statutorily "related." For example, a collection action brought against the spouses by an unpaid creditor would normally not be "related" to the dissolution action, even though the obligation is a community obligation. On the other hand, an action filed by one spouse against the other for the purpose of harassment or intimidation is clearly related to the dissolution action within the meaning of section 4370.

FN *. Retired Presiding Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

In re the Marriage of Maureen Carole BECK, formerly Maureen Carole Kaplan, Petitioner, Respondent,

v.

Samuel Louis KAPLAN, Appellant.

No. C0-95-1153.

Supreme Court of Minnesota.

August 14, 1997.

Rehearing Denied September 17, 1997.

*724 John D. French, Mary Cullen Yeager, James J. Hartnett, IV, Faegre & Benson, Minneapolis, Frank R. Berman, Minnetonka, for Appellant.

A. Larry Katz, Robert W. Due, Elizabeth B. Bowling, Katz & Manka, Ltd., Minneapolis, for Respondent.

Heard, considered, and decided by the court en banc.

OPINION

ANDERSON, Justice.

Samuel Louis Kaplan appeals from the court of appeals' decision affirming the district court's order modifying the permanent maintenance award to his former spouse, Maureen Carole Beck, and awarding Beck a portion of her attorney fees. The district court increased Beck's maintenance from $1,800 to $4,000 per month, added an automatic cost-of-living adjustment clause, and awarded attorney fees in the amount of $53,000. The court based its decision to modify maintenance on a substantial change in circumstances which rendered the original decree unreasonable and unfair. The changed circumstances cited by the court were the increase in the cost of living, Kaplan's significant increase in income, and Beck's relatively static income level. At issue is whether the district court abused its discretion with regard *725 to either the amendment of the judgment and decree or the award of attorney fees. We reverse the order amending the judgment and decree and affirm the award of attorney fees.

A case that shows an award of $ 1800 in permanent spousal way back in 1972. 1993 – filed a claim based on cost of living to award $ 6,000. Court awarded $ 4,000

Critical to our inquiry into the propriety of the spousal maintenance modification are the facts and circumstances upon which the parties' 1974 negotiated stipulation was based. This stipulation was ultimately incorporated into the judgment and decree of marital dissolution.

Beck and Kaplan were married on September 7, 1958. During the first year of the marriage, Kaplan completed his second year of law school at the University of Minnesota and Beck graduated with honors from the University of Minnesota with degrees in art history and philosophy. The parties had two children and while Kaplan pursued his law career, Beck performed traditional homemaker responsibilities including the caretaking of the children. In 1970, Beck began to pursue her interest in art by taking classes, painting, and beginning to exhibit her art.

When the parties separated in late 1972, Kaplan continued to provide Beck with financial support. Beck served a petition for marital dissolution on July 13, 1973. Both parties retained counsel and began negotiating issues of spousal maintenance, child support, and a division of the marital property. The stipulation produced by these negotiations was executed on September 3,

1974. By its terms, Beck was awarded sole custody of the minor children, with child support of $350 per month per child; permanent spousal maintenance of $1,800 per month to terminate upon her death or remarriage, but not subject to reduction in the event her employment or earnings situation improved; the parties' homestead valued at $100,000, but subject to a mortgage in the amount of $47,000; and household goods, personalty, and $36,000 in cash. Kaplan was awarded the remaining marital property, including the parties' business interests subject to any indebtedness. The record discloses that during these negotiations, Beck proposed the inclusion of a cost-of-living adjustment clause for the spousal maintenance award, but Kaplan resisted and no such provision was added to the stipulation. The stipulation was incorporated in the judgment and decree entered on September 5, 1974.

Nineteen years later, on August 3, 1993, Beck moved the district court pursuant to Minn.Stat. § 518.64 (1992) for a modification of the permanent spousal maintenance award from $1,800 to $6,000 per month. She grounded her motion on a claimed substantial increase in the cost of living, a substantial increase in her expenses, and a substantial increase in her former spouse's income in the 19 years following the dissolution.

The referee found that the substantial increases in the cost of living and in Beck's needs, together with the increases in Kaplan's earnings, rendered the existing award unreasonable and unfair. The referee increased the maintenance award to $4,000 per month and awarded Beck $5,000 in attorney fees. In addition, the referee ordered an automatic biennial cost-of-living adjustment for the maintenance award. On both parties' appeal to the district court and after an evidentiary hearing, the court affirmed the modification of the permanent maintenance award and the inclusion of a cost-of-living adjustment and increased the attorney fee award to $53,000. The court found that Beck's living expenses were reasonable, acknowledged Kaplan's ability to pay increased maintenance without any adverse impact on either his financial condition or his standard of living, and concluded that "the increase in the cost of living coupled with [Kaplan's] significant increase in income and [Beck's] relatively static income level, when taken as a whole, constitute a substantial change in circumstances * * *." In the court's view, that substantial change rendered the original award unreasonable and unfair under Minn. Stat. § 518.64, subd. 2.

While Kaplan advances a number of alternative arguments challenging the increase in the spousal maintenance award and the inclusion of an automatic biennial cost-of-living adjustment of that award, the two arguments to which we direct our attention are that Beck either waived her statutory right to spousal maintenance modification or that the district court abused its discretion in modifying the permanent maintenance award.

*726 First, Kaplan essentially suggests that Beck's unsuccessful efforts to gain inclusion of a cost-of-living clause in the negotiated stipulation should be treated as a waiver of any later entitlement. Our review of the 1974 judgment and decree which incorporated the parties' stipulation leads us to conclude, however, that there was no waiver, explicit or implicit, of Beck's entitlement to seek modification of Kaplan's permanent spousal maintenance obligation. *See Karon v. Karon*, 435 N.W.2d 501, 503-04 (Minn. 1989) (when we approved and enforced the parties' *express* waiver by stipulation of any right to seek a spousal maintenance modification), and *Loo v. Loo*, 520 N.W.2d 740, 745 (Minn.1994) (when we cautioned that, to have binding effect, a stipulated waiver must contain both the contractual waiver of the statutory right to seek modification and express language divesting the trial court of its continuing jurisdiction to

entertain such motion). Accordingly, the district court has retained its jurisdiction to entertain a motion for modification.

Because we hold that the district court retained its jurisdiction to consider Beck's motion for modification, the questions remain as to what effect, if any, Beck's unsuccessful efforts to insert a cost-of-living clause in the judgment and decree should have had on the district court's ultimate conclusion that circumstances had substantially changed so as to render the original award unreasonable and unfair and whether the district court abused its discretion in modifying the maintenance award from $1,800 to $4,000 per month and adding a cost-of-living adjustment.

Minnesota Statutes section 518.64, subdivision 2 provides in pertinent part as follows:

The terms of an order respecting maintenance or support may be modified upon a showing of one or more of the following: (1) substantially increased or decreased earnings of a party; (2) substantially increased or decreased need of a party * * *; (3) receipt of assistance * * *; (4) a change in the cost of living for either party * * *, any of which makes the terms unreasonable and unfair * * *.

A movant for maintenance modification must not only demonstrate the existence of a substantial change of circumstances, but is also required to show that the change has the effect of rendering the original maintenance award both unreasonable and unfair. *See Nardini v. Nardini,* 414 N.W.2d 184, 198 (Minn.1987); *Rydell v. Rydell,* 310 N.W.2d 112, 115 (Minn.1981).

When a stipulation fixing the respective rights and obligations of the parties is central to the original judgment and decree, the district court considering the modification motion must appreciate that the stipulation represents the parties' voluntary acquiescence in an equitable settlement. *Claybaugh v. Claybaugh,* 312 N.W.2d 447, 449 (Minn.1981). In that regard, we have cautioned the district court to exercise its considerable discretion carefully and only reluctantly when it is faced with a request to alter the terms of an agreement which was negotiated by the parties. *Claybaugh,* 312 N.W.2d at 449 (*citing Sieber v. Sieber,* 258 N.W.2d 754 (Minn.1977)); *Kaiser v. Kaiser,* 290 Minn. 173, 179, 186 N.W.2d 678, 683 (1971).

While we accept the referee's findings of fact that Kaplan's income has greatly increased in the 19 years since the marriage was dissolved and that the cost of living has increased 278% during that same period, we cannot agree that those changes compel the conclusion that the original decree has been thereby rendered unreasonable and unfair as contemplated by Minn.Stat. § 518.64, subd. 2. These parties thoroughly negotiated their stipulation with the assistance of counsel and no evidence was offered to demonstrate that Beck did not or could not anticipate the inevitable increases in the cost of living or in her former spouse's earning capacity. To the contrary, Beck sought but failed to negotiate the cost-of-living adjustment in 1974. It is neither unreasonable nor unfair to hold the parties to their original negotiated agreement which at the time it was made undoubtedly balanced their compromised interests. Accordingly, the order of the district court granting the motion for modification and amending the judgment and decree of marital dissolution by increasing the permanent *727 spousal maintenance award and adding a cost-of-living adjustment is reversed on the basis that the order constitutes an abuse of the district court's discretion.

A case that shows attorney fee award based on need to the extent that she would have to dip into any limited assests she would have had. Award in the amount of $ 53,000

In connection with the modification proceedings, the district court ordered Kaplan to pay $53,000 of the attorney fees Beck claimed to have incurred. The court found that Beck did not have the means to pay the fees, reasoning that to satisfy this obligation, Beck would be required to deplete "the limited capital assets available to her for her retirement." *See* Minn.Stat. § 518.14 (1992). Kaplan has not persuaded us that the court abused the considerable discretion it is accorded in matters of this nature, particularly given the parties' disparate financial circumstances. *See Kiesow v. Kiesow*, 270 Minn. 374, 389, 133 N.W.2d 652, 663 (1965).

A court may award attorney fees if it finds:

(1) that the fees are necessary for the good-faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;

(2) that the party from whom fees * * * are sought has the means to pay them; and

(3) that the party to whom fees * * * are awarded does not have the means to pay them.

DOBRIN V. DOBRIN

In re the Marriage of Mary Louise Erickson DOBRIN, n/k/a Mary Louise Erickson, f/k/a Mary Louise Cooney, Petitioner, Respondent, v. Dale Thomas DOBRIN, Appellant.

No. C6-96-1054.

Minnesota Court of Appeals.

December 3, 1996. Review Granted January 29, 1997.

Appeal from the District Court, William R. Howard, J. *922922

Ronald D. Ousky, Gelhar Ousky, P.A., Bloomington, for Respondent.

Raymond M. Lazar, Elizabeth B. Bryant, Fredrikson Byron, Minneapolis, for Appellant.

Considered and decided by PETERSON, P.J., and KLAPHAKE and DAVIES, JJ.

OPINION

DAVIES, Judge.

In this dissolution proceeding, ex-husband challenges, on numerous grounds, the permanent spousal maintenance award and the award of attorney fees. We affirm.

FACTS

Appellant Dale Thomas Dobrin and respondent Mary Louise Erickson Dobrin were married from September 1989 until December 1993. At the time of the marriage, appellant was 46 and respondent was 49. Appellant *923923 is employed as a physician. In the years from 1989 to 1992, the range of his gross annual income was roughly $200,000 to $400,000. At the time of the marriage, respondent, who has a nursing degree and a master's degree in public health, earned $46,000 annually. Because of conflicts with her supervisor, she resigned her position about nine months after marrying. She testified that she would not have left her job without the security of appellant's income and that he supported her decision to resign.

Respondent filed for dissolution in January 1992. She was subsequently awarded $3,500 per month in temporary maintenance for nine months, ending in July 1993, when it became $1,000 per month. When the trial court entered its judgment in December 1993, it denied respondent's request for further maintenance.

Respondent appealed the denial of maintenance (among other things). In December 1994, this court, quoting Minn.Stat. § 518.552, subd. 1(b) (1992), ruled that the evidence required a finding that she " 'is unable to provide adequate self-support * * * through appropriate employment,' " reversed the denial of maintenance, and instructed the trial court on remand to set maintenance in "a reasonable amount."

On June 25, 1995, the trial court set permanent spousal maintenance at $2,975 per month, effective January 1, 1994 (in practical effect, the date of the original judgment). This created an 18-month arrearage. The trial court later granted $6,473 in attorney fees to respondent (in addition to another $750 granted in conjunction with appellant's 1995 motion for reconsideration).

Appellant appeals from the June 1995 maintenance order and the subsequent attorney fees awards.

Alimony

"* * * The term 'necessaries,' in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband."

"* * * In coming to a conclusion as to the amount of alimony, the station in life of the husband, his means as shown by the testimony, including his expenditures, and his apparent condition, should be the criterion as to the proper amount necessary to give the wife suitable support, it being remembered that such suitable support is not simply what will supply her with the bare necessaries of life, *292292 but such a sum as will keep her in the situation and condition in which her husband's means entitle her to live."

Letters between husband and wife are within the protection of the rule as are oral communications, and the contents thereof can not be disclosed unless the privilege is waived. *Bowman* v. *Patrick,* 32 Fed. Repr. 368; *Hopkins* v. *Grimshaw,* 165 U.S. 342. ** Double check on Rule and applicability to minnrsota **

In *Millspaugh* v. *Potter,* 62 A.D. 521, Mr. Justice Smith said at page 524: "There it was sought to prove a **confession by the wife to the husband** which is clearly within the protection of the statute."

Some Language that can be used

Minn.Stat. § 518.64, subd. 1 (1986) provides for modification of a maintenance award:

After an order for maintenance or support money, temporary or permanent, * * * the court may from time to time, on petition of either of the parties, * * * modify the order respecting the amount of maintenance or support money, and the payment of it * * * *. It has long been established that section 518.64 limits the court's power to modify a maintenance award to those cases in which maintenance has been provided by order or decree. Warner v. Warner, 219 Minn. 59, 78, 17 N.W.2d 58, 67 (1944). Similarly, it is well settled that where there is neither an award of maintenance nor a reservation in the decree of jurisdiction of the issue of maintenance for later determination pursuant to section 518.55, the district court cannot thereafter award maintenance. E.g., Eckert v. Eckert, 299 Minn. 120, 123, 216 N.W.2d 837, 839 (1974). There is, however, nothing in either statutory or decisional law which suggests that the district court may divest itself of the jurisdiction which the legislature has accorded it. To the contrary, this court has declared that a stipulation for maintenance adopted by the court in its final decree does not limit or deprive the court of its discretionary power to determine whether changed circumstances warrant revision of the maintenance award. Mark v. Mark, 248 Minn. 446, 450, 80 N.W.2d 621, 624 (1957); Ramsay v. Ramsay, 305 Minn. 321, 323, 233 N.W.2d 729, 731 (1975). It follows that the parties cannot by their stipulation bind the court as to what change of circumstance shall or shall not justify a change in [maintenance]. Mark v. Mark, 248 Minn. 446, 450, 80 N.W.2d 621, 624 (1957).7 These principles were reiterated in Hellman v. Hellman, 250 Minn. 422, 426-27, 84 N.W.2d 367, 371 (1957); Mund v. Mund, 252 Minn. 442, 446, 90 N.W.2d 309, 313 (1958); Tammen v. Tammen, 289 Minn. 28, 30, 182 N.W.2d 840, 842 (1970); and Kaiser v. Kaiser, 290 Minn. 173, 180, 186 N.W.2d 678, 683 (1971), are equally applicable here and adequately define a trial court's inquiry without interfering with its statutory exercise of jurisdiction. In practical effect then, a trial court which gives considerable weight to

the fact that the financial rights and obligations of the parties have been fixed in the decree as a result of their agreement may well be restrained in the exercise of its discretion but not controlled. Kaiser v. Kaiser, id. at 180, 186 N.W.2d at 683. And, of course, the tenor of that agreement must be considered in determining whether circumstances have so changed that the agreement has become fundamentally unfair. There is an old country saying that blood cannot be got from a turnip: an obligor who has no money can neither pay nor be forced to pay maintenance. If it is not fundamentally unfair to recognize that because of changed circumstances the obligor is no longer financially able to meet the terms of the judgment without modification, it is not fundamentally unfair to recognize that because of a marked change in circumstances the obligee's financial need exceeds that contemplated by the original judgment or the obligor's financial ability to meet the obligee's needs has improved. In summary, I view the majority decision as a significant departure from accepted principles of judicial supervision of spousal maintenance awards and contrary to declared public policy. Moreover, as the decision requires no particularized inquiry into the circumstances upon which the purported waiver was based or the specific consideration therefor, it offers little or no protection to one spouse from the potential overbearing by the other. The court appears to have treated this case like any other application for modification of maintenance, looking only to see if circumstances had changed subsequent to the stipulation. Having found that circumstances had changed, that the husband was earning even more money while the wife was earning much less, the court proceeded to modify maintenance upwards. It seems to me we need a better approach to stipulations on maintenance.2 Because of the unique institutional nature of marriage, these stipulations are not to be treated as ordinary contracts; they are not to be evaluated with a marketplace mentality. On the other hand, neither are maintenance stipulations to be ignored. Marriage partners who separate need to make agreements with some measure of finality so they can prudently plan their futures and get on with their lives. The initial inquiry, it seems to me, is to determine if the maintenance waiver is to be binding. How the fortunes of the parties fluctuated after the stipulation was made should not be relevant to this inquiry. The test is the conscionability of the waiver judged as of the time it was made, i.e., was it then reasonable and fair? The burden of proof is on the party seeking to evade the waiver. The test is to be conducted within the institutional context of the marriage relationship. Among the factors to be considered are: To what extent the waiver was part of an interdependent package settlement, whether, for example, the waiver was a trade-off for other assets; to what extent the marriage had been a long-term, traditional marriage; each spouse's degree of economic independence; also, to what extent the parties took into account the unforeseen future with its uncertainties of health and job security; and whether each party was represented by counsel. The policy of the law should be to promote marriage and the family by protecting the commitments inherent in marriage. While relationships outside marriage are perhaps becoming more common, marriage is still very much the norm because it denotes a particular kind of commitment, including a sense of permanence and a sense of responsibility by each spouse for the other's welfare. Implicit in the marriage commitment has been an understanding that if the money-making opportunities of one spouse are greater than for the other, the economically disadvantaged spouse, in the event of a marriage break-up, may expect

some financial support; the maintenance may be permanent, temporary or rehabilitative, or none at all, depending on the particular circumstances. The longer the marriage, the more bread-winning and home-making duties are divided, the more likelihood the need for maintenance by the economically disadvantaged spouse outweighs contractual provisions curtailing that need. This has been the law's policy over the years. On the other hand, some marriages are quite short. Or, as is becoming more common, there may be a marriage where both spouses have careers outside the home and both have a roughly equivalent measure of individual economic independence. In such cases there is more justification for enforcing the maintenance waiver. I am not interested in cataloguing a list of factors to weigh in determining the reasonableness of a maintenance waiver, nor in assigning weight to the various factors; nor are the factors here mentioned to be applied mechanically. The court sits as a court of equity. The guiding principle, however, is to judge the validity of the waiver as of the time it was given, not by subsequent changes of circumstances that, though unforeseen at the time of the waiver, were nevertheless assumed in the bargaining process as risks inherent in life. It can be argued that by approving the settlement stipulation and incorporating its terms into the divorce decree, the trial court found that the maintenance waiver was reasonable and fair at the time it was made. Most stipulated divorce actions, however, are proved up as default matters, the court assuming, especially if both spouses are represented by counsel, that the stipulation is appropriate. The court may not be aware of abuses of trust and confidence that may exist despite representation of counsel. While the court reviews what appears to be the reasonableness of the overall settlement stipulation, ordinarily it cannot be expected to make an indepth inquiry into the specific reasonableness of a waiver of maintenance. I would reverse and remand for findings on whether or not the waiver is enforceable. While I dislike prolonging this case, it appears that there will be further litigation in any event. See footnote 3. If the waiver is found to be nonbinding, there is no need to retry the second-step issue, namely, whether there has been a substantial change in circumstances. Frima would be entitled to the maintenance increase already ordered and not now disputed.

Crosby v Crosby

In re the Matter of Douglas Allen CROSBY, petitioner, Respondent,
v.
Dawn Rachelle CROSBY, Appellant.

OPINION

CRIPPEN, Judge.

Pointing to evidence of conflict between the parties, appellant, who was named as sole legal custodian of the parties' two children, challenges the trial court's determination that respondent should provide nearly one-half of the physical care of the children. We affirm the trial court's custody determination. We also find no trial-court error on additional issues raised by appellant.

FACTS

In the December 1997 judgment that ended the marriage, sole legal custody of the parties' two children was placed with their mother, appellant Dawn Crosby. Appellant was also named primary physical custodian, but the court decided respondent Douglas Crosby's visitation contacts would involve approximately one-half of the physical care of the children. This division of physical custody is almost the same as that in a temporary order issued one year earlier.

*295 The guardian ad litem testified that joint legal custody of the children "probably isn't possible." She based her conclusion on her observation that the parties have an inability to cooperate in or communicate about the rearing of their children. Despite not recommending joint legal custody, the guardian testified that respondent was doing a fine job "insofar as the parenting is concerned" and that he had done a "nice job with the children." The guardian recommended that the children spend substantial time with each parent.

The trial court found that both parties had significantly provided for the needs of the children and were capable of providing adequate care for the children. Moreover, the court found respondent had a disposition better suited to encourage and permit contact by the other parent. But the court felt joint legal custody would be inappropriate because the parties have difficulty communicating and resolving disputes and these disputes had erupted in front of the children. Given these competing concerns, the judge found that "[a] structured division of physical custody will give the children substantial time with each parent and the opportunity to experience the best each parent has to offer."

ISSUES

Did the trial court err in deciding that respondent should have one-half of the physical care of the children?

Did the court err in its classification and division of marital and non-marital property, or in other decisions?

ANALYSIS

1. Physical care of the children

A trial court has broad discretion to provide for the custody of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn.1984). The trial court has extensive discretion in deciding visitation questions and will not be reversed absent an abuse of discretion. *Manthei v. Manthei*, 268 N.W.2d 45, 45 (Minn.1978). Its underlying findings of fact will be upheld if they are not clearly erroneous. Minn. R. Civ. P. 52.01.

Appellant contends that the grant of extensive visitation to respondent was tantamount to joint physical custody and inappropriate given these circumstances in which the court determined that sole legal custody should be with the mother. Before awarding joint legal custody or joint physical custody, a trial court judge must evaluate, among other things, the cooperation ability of parents, their dispute resolution methods, and their willingness to use these methods. Minn.Stat. § 518.17, subd. 2 (1996).[1] In this case, the trial court found that joint legal custody would be inappropriate given the difficulty the parties have in communicating and in resolving disputes.

The unhappy marital history, the allegations and counter-allegations of abuse, and the guardian ad litem's testimony all support the determination that joint legal custody would be inappropriate given the parties' communication difficulties.

Despite this determination, the court could properly observe that problems in communicating with each other would not impair the ability of appellant and respondent to share joint physical custody of the children if the custody arrangement were structured. The court could reasonably expect that the history of disputes between the parties should not contradict the court's determination that they could successfully comply with *296 a schedule of times for exchange of physical custody in the same community. In fact, the parties shared custody on a nearly equal basis during 1997 and it is undisputed that the parties have not experienced significant difficulties in this regard. When determining whether a parent should share extensively in the physical care of children, the trial court is free to evaluate the cooperativeness of the parents differently than when deciding whether the parents could successfully act as joint legal custodians.

The trial court noted that both parents have played a large role in the children's lives and that both have been good parents. The guardian ad litem testified to this effect. Moreover, given the trial court's finding that respondent has a disposition better suited to encouraging and permitting contact by the other party, the court could rightfully refrain from limiting respondent's contacts with the children because of communication problems between the parties.

Appellant also disputes the sufficiency of the evidence to support the trial court's findings that "[b]oth parents have the capacity and disposition to give the children love, affection and guidance," that "both parties have positive attributes the children could benefit from and need to experience," and that respondent "has a disposition better suited to encourage and permit contact by the other parent." To support her argument, appellant points to evidence of prior angry outbursts by respondent and testimony of other witnesses about his bad behavior. In contrast, she points to evidence regarding her positive attributes as a parent. Although this recitation of facts by appellant might prompt another trier of fact to different findings, because there is sufficient contradictory evidence to reasonably support the trial court's findings, the evidence submitted by appellant does not render the trial court's findings clearly erroneous.

2. The division of marital and non-marital property; other issues.

a. Property. Neither child support nor maintenance was granted either party, but respondent received temporary maintenance during the pendency of the proceedings. The trial court identified marital property of approximately $117,000 and unsecured marital debt of approximately $18,000. The court awarded approximately $39,000 of the marital property to respondent Douglas Crosby and $78,000 to appellant Dawn Crosby. In addition, the court identified over $170,000 in disputed property as appellant's non-marital property. However, appellant was made responsible for the $18,000 unsecured marital debt. In order to offset the discrepancy in the award of marital property, the court awarded respondent approximately $27,000 of appellant's non-marital property consisting of a rock picker, a snowmobile with trailer, and a pickup truck with plow.

The trial court has broad discretion regarding the division of property in marriage dissolutions and will be reversed only for a clear abuse of discretion. *Hein v. Hein*, 366 N.W.2d 646, 649

(Minn.App.1985). Appellant challenges the amount of property deemed marital property, the division of the marital property, and the award of some of her non-marital property to respondent.

Appellant was injured as a child; as a result, she receives a lifelong annuity payment of $4,048 a month. She also has other substantial non-marital assets. Unquestionably, she used her assets to provide the majority of the family budget during the marriage.

Appellant claims that the trial court incorrectly deemed too much property to be marital property, given her extensive financial contributions to the parties' financial well-being. To overcome the presumption that property is marital, a party must demonstrate by a preponderance of the evidence that the property is non-marital. *Wopata v. Wopata*, 498 N.W.2d 478, 484 (Minn.App. 1993). Appellant does not claim that the judge erred in naming specific items as non-marital. Instead, she argues that the bulk of their property is derived from appellant's pre-marital assets and therefore should remain non-marital. But the trial judge found that appellant regularly co-mingled non-marital and marital funds "to such an extent that deposited non-marital funds lost that character." Appellant did not adequately trace her *297 allegedly non-marital assets, thus failing to meet her burden of proof. The record supports the trial judge's conclusion that although appellant's "non-marital assets were the primary source of funds expended by the parties, that fact alone was insufficient to establish the non-marital character of assets acquired during the marriage."

Appellant claims that the trial court's division of marital property was not equitable. A trial court must make a just and equitable division of marital property. Minn.Stat. § 518.58, subd. 1 (Supp.1997). An equitable division of marital property is not necessarily an equal division. *Riley v. Riley*, 369 N.W.2d 40, 43 (Minn.App.1985), *review denied* (Minn. Aug. 29, 1985). In this case, the division of marital property was unequal. Appellant received substantially more of the marital property than respondent. Even after the amount of unsecured marital debt is subtracted from her portion, she still received marital assets more than $20,000 in excess of those respondent received. Appellant has no reasonable grounds to challenge the division of marital assets.

Appellant also contends the trial court erred in granting respondent some of appellant's non-marital property. Awards of non-marital property are left to the discretion of the trial court. *Doering v. Doering*, 385 N.W.2d 387, 391 (Minn.App.1986). A trial court may award up to one-half of a spouse's non-marital property to the other spouse if necessary to prevent unfair hardship. Minn.Stat. § 518.58, subd. 2 (1996).

In this case, the trial court awarded respondent a pickup truck, a plow, a rock picker, a snowmobile, and a trailer that were appellant's non-marital property instead of a larger share of marital property. Due to the divorce, respondent was going to experience a substantial reduction in his standard of living. The award of the truck, the plow, and the rock picker was necessary to allow him at least to try to produce earned income. The snowmobile was part of a pair the couple owned, and it made sense to award one to each party. Moreover, this award is justified in that appellant was responsible for some waste of marital property during the pendency of the divorce, and the trial judge tried to offset this waste when making the award to respondent. *See* Minn.Stat.

§ 518.58, subd. 1a (1996) (if a party dissipates marital property during the pendency of a case, the court shall put the parties in the position they would have been in but for the dissipation).

b. Domestic abuse finding. Appellant challenges the trial court's finding that there was no domestic abuse, largely as a matter collateral to the custody dispute. Appellant alleges various incidents during which respondent was physically or emotionally abusive to her or others. Respondent denies or re-characterizes these incidents and counter-charges that appellant was herself abusive. Evidence in the record provides support for both parties. Due to the conflicting evidence, neither a finding of abuse nor a finding of no abuse could be deemed clearly erroneous.

c. Restraining order. Appellant disputes the power of the court to issue a mutual restraining order. Appellant evidently relies on *Mechtel v. Mechtel,* 528 N.W.2d 916 (Minn.App.1995), in which this court held that unless the respondent in a domestic abuse action also requests a restraining order, it is error to issue a mutual restraining order.

This case began when appellant requested an order for protection against respondent. The request was consolidated with respondent's request to initiate divorce proceedings. The trial court then issued a restraining order against respondent pursuant to Minn.Stat. § 518.131 (1996). The function of a temporary order for relief is to preserve the status quo until opportunity is afforded to decide the matter on the merits. *See Korf v. Korf,* 553 N.W.2d 706, 709 (Minn. App.1996). After both sides addressed the matter on the merits, the court found that there was no domestic abuse, but chose to place restraints on both parties.[2]

*298 The trial court issued the mutual restraining order to enable the parties to live in the same community peacefully and to aid in the goal of parental involvement in the lives of the children. This properly occurred as part of the court's authority in divorce proceedings, having regard for protecting the safety of the parties and upholding the best interests of the children.

d. Maintenance. Appellant also challenges the trial court's decision not to award her a credit for the temporary maintenance she had to pay respondent. "The standard of review on appeal from a trial court's determination of a maintenance award is whether the trial court abused the wide discretion accorded to it." *Erlandson v. Erlandson,* 318 N.W.2d 36, 38 (Minn.1982). A court may order maintenance if it finds that a spouse is unable to support him or herself adequately through employment in view of the standard of living established during the marriage. Minn.Stat. § 518.552, subd. 1(b) (1996). The maintenance issue essentially amounts to a balancing of the recipient's need against the obligor's financial condition. *See Erlandson,* 318 N.W.2d at 39-40.

In this case, when the parties separated and respondent left the farm, he lost the source of his income. Given the fact that the trial judge gave appellant a choice either to pay temporary maintenance or to allow respondent to stay on the farm and make a living, and she chose to make respondent leave the farm, the judge was well within his discretion to make no award to undo the effects of his temporary maintenance provision. Moreover, the amount in question was relatively minimal, $500 per month for a year, and was well within appellant's ability to pay.

e. Tax exemptions. Appellant challenges the award of both income tax exemptions for dependent children to respondent. The allocation of the federal tax exemptions is within discretion of the trial court. *Valento v. Valento,* 385 N.W.2d 860, 863 (Minn.App.1986), *review denied* (Minn.

June 30, 1986). The relative resources of the parties justify this award. Moreover, at the time of the hearing, the exemption was of no benefit to appellant because her primary source of income, the annuity from a personal injury action, was already tax exempt. The award of both exemptions to respondent was well within the trial court's discretion.

f. Attorney fees. Appellant challenges the award of attorney fees to respondent. An award of attorney fees "rests almost entirely within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion." *Jensen v. Jensen,* 409 N.W.2d 60, 63 (Minn.App.1987). A trial court shall award attorney fees when it finds that an award is necessary for a party to assert his or her rights in an action, that the payor has the financial means to pay the fees, and that the payee lacks the means to pay the fees. Minn.Stat. § 518.14, subd. 1 (1996).

The record makes it evident that respondent's financial resources are much less than those of appellant and that respondent is not financially able to pay for prolonged litigation. Appellant argues that respondent can liquidate assets to pay attorney fees. Although possible, this is not equitable because respondent uses the assets to make a living. *See Karg v. Karg,* 418 N.W.2d 198, 202 (Minn.App.1988) (award of attorney fees appropriate where payee would have had to liquidate part of property award to pay fees and payor had substantially higher income). Moreover, appellant has at times taken actions that increased respondent's legal costs.[3] The award of attorney fees was well within the trial court's discretion. Respondent has made a motion for attorney fees on appeal. For the same reasons determined by the trial court, he is awarded $1,500.

DECISION

The trial court properly considered the cooperation ability of the parents in deciding that respondent should share extensively in the physical care of his children. Moreover, the trial court acted within its discretion in *299 its division of marital and non-marital property and in its resolution of the other issues raised by the parties.

Affirmed.

NOTES

[1] Minn.Stat. § 518.17, subd. 2 (Supp.1997), provides:

In addition to the factors listed in subdivision 1, where either joint legal or joint physical custody is contemplated or sought, the court shall consider the following relevant factors:

(a) The ability of parents to cooperate in the rearing of their children;

(b) Methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods;

(c) Whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and

(d) Whether domestic abuse, as defined in section 518B.01, has occurred between the parents.

Here, appellant does not dispute the adequacy or accuracy of the trial court's findings regarding the parties' inability to cooperate.

[2] The restraints affecting appellant involve not stalking or harassing respondent, and an order to communicate only through counsel.

[3] Appellant refused to sell farm assets that were to be used to pay joint debts, refused to pay these debts, and allowed respondent's insurance to lapse — all contrary to court order.

Similar rationales adopted that are similar to my case

PETERSON V. PETERSON

Appellant. No. C2-84-2020.

May 28, 1985.

In re the Marriage of John L. BERTHIAUME, Petitioner, Respondent, v. Kathleen M. BERTHIAUME,	The case has the wife alleging the husband of sexual abuse. Medical evidence as vaginal irritation was presented. That however to the court was inconclusive evidence. The court inspite of potentially clear and convincing evidence and just not preponderance of evidence granted joint physical and joint legal custody and unsupervised visitation rights to the alleged father whose wife claimed sexual abuse. Level of evidence for endangerment inconclusive. The need for therapy in this case was determined as their knowledge of sexual know hows as oppose to the trauma they underwent. Minnesota Courts.
UHL V. UHL	Case of corporal punishment where mother used wooden spoon as disciplinary actions. Evidence found bruises, swollen lip. Mother found to be a competent mother as evidence cited was it was use for disciplinary action and not as endangerment children. Inasmuch as there was contradictory evidence [inspite of swollen lip and physical bruises] – imminent danger, regarding the use of corporal punishment in appellant's household, the trial court necessarily had to make a determination of the various witnesses' credibility. The court reasonably chose to give greater weight to the two professionals' testimony than that of parties who had a personal interest in the matter. It is the explicit duty of the trial court to make assessments of credibility, and this court will not second-guess that judgment unless it is clear it had no reasonable basis. – Evidentiary Hearing. Contestation of Custody.
DOBRIN V. DOBRIN	Spousal Support award of $3500.

1997	
GILES V. CALIFORNIA	**Domestic violence**

The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he kept away.... [The Constitution] grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated." *Ibid*.There is no mention in this paragraph of a need for prior confrontation, even though if the Court believed such a limit applied, the phrase "their evidence is supplied" would more naturally have read "their previously confronted evidence is supplied." *Crawford* reaffirmed this understanding by citing *Reynolds* for a forfeiture exception to the confrontation right. 541 U.S., at 54, 124 S.Ct. 1354. And what *Reynolds* and *Crawford* described as the law became a seeming holding of this Court in *Davis*, which, after finding an absent witness's unconfronted statements introduced at trial to have been testimonial,*373373 and after observing that "one who obtains the absence of a witness by wrongdoing forfeits the *26912691 constitutional right to confrontation," 547 U.S., at 833, 126 S.Ct. 2266, remanded with the instruction that "[t]he Indiana courts may (if they are asked) determine on remand whether ... a claim of forfeiture is properly raised and, if so, whether it is meritorious," *id.*, at 834, 126 S.Ct. 2266.

Although the case law is sparse, in light of these decisions and the absence of even a single case *declining* to admit unconfronted statements of an absent witness on wrongful-procurement grounds when the defendant sought to prevent the witness from testifying, we are not persuaded to displace the understanding of our prior cases that wrongful procurement permits the admission of prior unconfronted testimony.

Having destroyed its own case, the dissent issues a thinly veiled invitation to overrule *Crawford* and adopt an approach not much different from the regime of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), under which the Court would create the exceptions that it thinks consistent with the policies underlying the confrontation guarantee, regardless of how that guarantee was historically understood. The "basic purposes and objectives" of forfeiture doctrine, it says, require that a defendant who wrongfully caused the absence of a witness be deprived of his confrontation rights, whether or not there was any such rule applicable at common law. *Post*, at 2696 – 2697.

a person acts "knowingly" if "the element involves a result of *386386 his conduct" and "he is aware that it is practically certain that his conduct will cause such a result"); Restatement (Second) of Torts § 8A (1977) ("The word 'intent' is used throughout ... to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it").

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The majority tries to overcome this elementary legal logic by claiming that the "forfeiture rule" applies, not where the defendant *intends* to prevent the witness from testifying, but only where that is the defendant's *purpose, i.e.,* that the rule applies only where the defendant acts from a particular *motive,* a *desire* to keep the witness from trial. See *ante,* at 2683 – 2684 (asserting that the terms used to describe the scope of the forfeiture rule "suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying"*26992699 and that a "purpose-based definition ... governed"). But the law does not often turn matters of responsibility upon *motive,* rather than *intent.* See *supra,* at 2683. And there is no reason to believe that application of the rule of forfeiture constitutes an exception to this general legal principle.

Indeed, to turn application of the forfeiture rule upon proof of the defendant's *purpose* (rather than *intent*), as the majority does, creates serious practical evidentiary problems. Consider H who assaults W, knows she has complained to the police, and then murders her. H *knows* that W will be unable to testify against him at any future trial. But who knows whether H's knowledge played a major role, a middling role, a minor role, or no role at all, in H's decision to kill W? Who knows precisely what passed through H's mind at the critical moment? See, *e.g., State v. Romero,* 2007–NMSC–013, 141 N.M. 403, 156 P.3d 694, 702–703 (finding it doubtful that evidence associated with the murder would support a finding that the *purpose* of the murder was to keep the victim's earlier statements to police from the jury).

Moreover, the majority's insistence upon a showing of *purpose* or *motive* cannot be squared with the exception's basically ethical objective. If H, by killing W, is able to keep W's testimony out of court, then he has successfully "take [n] *388388 advantage of his own wrong." *Reynolds,* 98 U.S., at 159. And he does so whether he killed her *for the purpose of* keeping her from testifying, with *certain knowledge* that she will not be able to testify, or with *a belief* that rises to a *reasonable level of probability*. [Based on the pattern of events till date can the court based on the knowledge of evidence till date see with a reasonable level of probability that might be merit to the allegations of Gasligting and Organized Stalking alleged by the respondent as the defendant deliberately setting up the respondent over the last 6 years working his way towards an advantageous custody proceeding in his favor today.] lThe inequity consists of his being able to *use* the killing to keep out of court her statements against him. That inequity exists whether the defendant's state of mind is purposeful, intentional (*i.e.*, with knowledge), or simply probabilistic.

Fifth, the majority's approach both creates evidentiary anomalies and aggravates existing evidentiary incongruities. Contrast (1) the defendant who assaults his wife and subsequently threatens her with harm if she testifies, with (2) the defendant who assaults his wife and subsequently murders her in a fit of rage. Under the majority's interpretation, the former (whose threats make clear that his purpose was to prevent his wife from testifying) cannot benefit from his wrong, but the latter (who has committed what is undoubtedly the greater wrong) can. This is anomalous, particularly in this context where an equitable rule applies.

Now consider a trial of H for the murder of W at which H claims self-defense. As the facts of this very case demonstrate, H may be allowed to testify at length and in damning detail about W's behavior—what she said as well as what she did—both before and during the crime. See, *e.g.*, Tr. 643–645 (Apr. 1, 2003). H may be able to introduce some of W's statements (as he remembers them) under hearsay exceptions for excited utterances or present sense impressions or to show states of mind (here the victim's statements were admitted through petitioner's testimony to show her state of mind). W, who is dead, cannot reply. This incongruity arises in part from the nature of hearsay and the application of ordinary hearsay rules. But the majority would aggravate the incongruity by prohibiting admission of W's out-of-court statements to the police (which contradict H's account), even when they too fall within a hearsay exception, simply *389389 because there is *no evidence that H was focused on his future trial* when he killed her. There is no reason to do so.

Consider also that California's hearsay rules authorize admission of the out-of-court statement of an unavailable declarant where the statement describes or explains*27002700 the "infliction or threat of physical injury upon the declarant," if the "statement" was "made at or near the time of the infliction or threat of physical injury." Cal. Evid.Code Ann. § 1370 (West Supp.2008). Where a victim's statement is not "testimonial," perhaps because she made it to a nurse, the statement could come into evidence under this Rule. But where the statement is made formally to a police officer, the majority's rule would keep it out. Again this incongruity arises in part because of pre-existing confrontation-related rules. See *Davis*, 547 U.S., at 831, n. 5, 126 S.Ct. 2266 ("[F]ormality is indeed essential to testimonial utterance") . But, again, the majority would aggravate the incongruity by prohibiting admission of W's out-of-court statements to the police simply because there is *no evidence that H was focused on his future trial* when he killed her. Again, there is no reason to do so.

Sixth, to deny the majority's interpretation is not to deny defendants evidentiary safeguards. It does, of course, in this particular area, deny defendants the right *always* to cross-examine. But the hearsay rule has always contained exceptions that permit the admission of evidence where the need is significant and where alternative safeguards of reliability exist. Those exceptions have evolved over time, see 2 K. Broun, McCormick on Evidence § 326 (6th ed. 2006) (discussing the development of the modern hearsay rule); Fed. Rule Evid. 102 ("These rules shall be construed to secure ... promotion of growth and development of the law of evidence"), often in a direction that permits admission of hearsay only where adequate alternative assurance of reliability exists, see, *e.g.*, Rule 807 (the "Residual Exception"). Here, for example, the presence in court of a witness who took the declarant's statement permits cross-examination of that *390390 witness as to just what the declarant said and as to the surrounding circumstances, while

those circumstances themselves provide sufficient guarantees of accuracy to warrant admission under a State's hearsay exception. See Cal. Evid.Code Ann. § 1370.

More importantly, to apply the forfeiture exception here simply lowers a constitutional barrier to admission of earlier testimonial statements; it does not *require* their admission. State hearsay rules remain in place; and those rules will determine when, whether, and how evidence of the kind at issue here will come into evidence. A State, for example, may enact a forfeiture rule as one of its hearsay exceptions, while simultaneously reading into that rule requirements limiting its application. See *ante,* at 2688, n. 2. To lower the constitutional barrier to admission is to allow the States to do just that, *i.e.,* to apply their evidentiary rules with flexibility and to revise their rules as experience suggests would be advisable. The majority's rule, which requires exclusion, would deprive the States of this freedom and flexibility.

Cases For Jarvis Order

OPINION

HUSPENI, Judge.

The Medical Director of the Minnesota Security Hospital petitioned for authorization to administer neuroleptic medications to Homer Jarvis, who has not consented to such treatment. Jarvis has been committed as a mentally ill and dangerous person since 1977. The trial court appointed counsel and a guardian ad litem for Jarvis. At the hearing on the petition, Jarvis sought appointment of two examiners. His motion was denied. By order on July 15, 1988, the trial court approved the administration of medications. We reverse and remand for a new hearing.

FACTS

Jarvis is 54 years old. He was committed as a mentally ill and dangerous person in 1977, after he shot and killed his sister. He has been diagnosed as suffering from a paranoid disorder or from schizophrenia, paranoid type. (The chief distinguishing feature is the presence of hallucinations with schizophrenia.) Jarvis has steadfastly refused all treatment efforts and denies his mental illness. His previous challenges to forced medication resulted in a supreme court decision establishing procedures to be followed in non-emergency situations where a committed patient refuses neuroleptic medications. Jarvis v. Levine, 418 N.W.2d 139 (Minn.1988).

Jarvis has become increasingly violent over the past year. He has attacked patients and staff at the security hospital, sometimes causing serious physical injury. He is frequently verbally abusive and attempts to provoke others. He has been placed in locked seclusion, where his

condition is not expected to improve. He is not considered competent to make decisions concerning his own treatment.

The treatment review panel (a multi-disciplinary group of professionals not directly involved in treating Jarvis, which reviews patient treatment issues) has approved the use of neuroleptic medication for Jarvis four times in the past year. Alternative therapies have been tried, but continue to be unsuccessful. In June 1988, the Medical Director of the Minnesota Security Hospital petitioned the trial court for an order authorizing forcible administration of medications.

By order on June 30, the trial court appointed an attorney (who had not previously represented Jarvis) to represent Jarvis at the hearing on the petition, but Jarvis refused to speak with his counsel or permit him to review his medical records. Two days before the scheduled hearing, counsel had still not been allowed to review the medical records to prepare. The court issued an additional order affording counsel access to the records on the eve of trial.

A guardian ad litem was also appointed, and he interviewed Jarvis, reviewed the medical records, and filed a report in support of the application for authorization of neuroleptic medications.

Jarvis refused to attend the adversary hearing on the petition on July 15, but was represented by his appointed counsel at that hearing. Psychiatrist Charles Van Valkenburg, who has treated Jarvis since January 1988, testified as to the serious deterioration in his patient's condition. Prior trials of medication have produced significant

[433 N.W.2d 122]

improvement and Dr. Van Valkenburg testified that the anticipated benefits of neuroleptic medications clearly outweigh the risks.

At the close of the testimony Jarvis' counsel moved the trial court to appoint a "second examiner" to diagnose his client's mental illness and an additional doctor of pharmacology to offer an opinion on the proposed medications. Counsel relied on recent amendments to Minn.Stat. § 253B.17 in urging the court to appoint the examiners. Counsel for the medical director (the petitioner below) opposed the request, arguing there is no statutory authorization for such appointments and the request was untimely.

The trial court denied Jarvis' motion, but indicated it might have granted the motion if made before the hearing. The trial court immediately announced its findings and approved the administration of neuroleptic medications. On appeal, Jarvis does not challenge the findings, but argues that he was entitled to appointment of a "second examiner."

ISSUE

Did the trial court err in denying the patient's motion for appointment of additional experts?

ANALYSIS

The Minnesota Supreme Court held that a treating facility seeking to administer neuroleptic medications without the consent of a committed person must comply with the so-called "Price procedure." Jarvis v. Levine, 418 N.W.2d 139, 147 (Minn. 1988). The reference is to Price v.

Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976). There, the supreme court held that committed patients have a constitutional right to privacy and the state must justify treatment methods which constitute a substantial intrusion on the patient's personal autonomy. Specifically, the court ruled that the state must, before performing psychosurgery or electroconvulsive therapy, obtain court approval for such treatment. Id. at 262-63, 239 N.W.2d at 913. If the patient refuses the treatment or is incompetent, the medical director must petition the court. Id. The court must also appoint a guardian ad litem for the patient. Id. After an adversary proceeding, the court must "determine the necessity and reasonableness of the prescribed treatment." Id. Jarvis extended the application of this procedure to neuroleptic medications, which are involved in this case. Jarvis, 418 N.W.2d at 147.

In Price, the supreme court listed factors to be considered in balancing "the patient's need for treatment against the intrusiveness of the prescribed treatment." Price, 307 Minn. at 262-63, 239 N.W.2d at 913. The court should consider the extent and duration of the anticipated improvements, the risk of side effects, whether the treatment is experimental, acceptance of the treatment method in the medical community, the extent of intrusion into the patient's body, and the patient's competence to determine the desirability of the treatment. Id. The trial court's findings in this case specifically enumerate these factors.

Both Price and Jarvis contemplate preliminary review of proposals for intrusive treatment at the hospital level. As the Jarvis opinion indicated, it may be very difficult to obtain court approval for proposed treatment if the treating physician is unable to obtain approval of his or her peers. "If, on the other hand, both the treatment review panel and the hospital review board approve of the proposal by the treating physician, court approval should be quickly forthcoming with little difficulty." Jarvis, 418 N.W.2d at 149. Despite such approval within the hospital, the supreme court held the patient is also entitled to additional scrutiny of the application by the courts in an adversary hearing.

Neither the original procedures adopted in Price nor the procedures extended to neuroleptic medications in Jarvis explicitly require the appointment of additional experts at the patient's request. The administrative rules promulgated for cases requiring judicial approval of certain treatments do not address the issue of such additional experts. See Minn.R. 9515.-0200-.0800

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(1987). Jarvis relies upon the 1988 legislature's modification of a critical provision of the commitment act.

Minn.Stat. § 253B.17 permits patients (except those committed as mentally ill and dangerous) to petition the court "for an order that the patient is not in need of continued institutionalization or for an order that an individual is no longer mentally ill, mentally retarded, or chemically dependent; or for any other relief as the court deems just and equitable." [If I am represented and not refused] Minn.Stat. § 253B.17, subd. 1 (1986). That subdivision was recently amended to permit patients who are committed as mentally ill and dangerous to petition the court "for a hearing concerning the administration of neuroleptic medication." 1988 Minn.Laws ch. 689, art. 2, §§ 119-20.

The amendment is a response to the supreme court's opinion in Jarvis, which was released on January 15, 1988. The amendment specifies that a hearing on a patient's petition concerning medications "may also be held pursuant to sections 253B.09 and 253B.12." Id. (Those sections govern initial commitment and review hearings.)

The statute requires the trial court must, in connection with a patient's petition under section 253B.17, appoint an examiner (a licensed physician or licensed consulting psychologist) to report on diagnosis and treatment. Minn.Stat. § 253B.17, subd. 3 (1986). Upon request, the court must also "appoint a second examiner of the patient's choosing." Id. (Patients (or proposed patients) may also request a second examiner in connection with initial commitment proceedings, Minn.Stat. §§ 253B.07, subd. 3 (1986), 253B.18, subd. 1 (1986); when an initial commitment as a mentally ill, mentally retarded, or chemically dependent person is reviewed, Minn.Stat. § 253B.12, subd. 3 (1986); and in connection with some proceedings before the judicial appeal panel (sometimes called the supreme court appeal panel) involving mentally ill and dangerous patients, Minn.Stat. § 253B.19, subd. 2 (1986).)

Respondent argues that the statutory guarantee of a second examiner is limited to hearings held pursuant to a patient's petition, noting the petition in this case was brought not by the patient but by the medical director of the treating facility. We cannot agree.

All Jarvis petitions to initiate involuntary administration of medications will, necessarily, be brought by treating professionals. However, the legislature has specified that patients may also bring medication issues before the courts and obtain a second examiner in connection with such hearings. By respondent's analysis, the patient would not be entitled to an examiner at a hearing for authorization to initiate medications. However, the patient could bring his own petition challenging the administration of medications at virtually the same time, and pursuant to the statute, would then be entitled to the appointment of a second examiner for purposes of that hearing. In effect, two hearings would be required, instead of the single one mandated by Jarvis.

The result urged by respondent ignores the legislative policy which guarantees the patient's right to an independent examiner throughout the commitment process. The supreme court did not intend that the Jarvis hearing be a mere "rubber stamp" for treatment decisions made by the hospital. The statutory amendment reflects the legislature's apparent recognition that the availability of a second examiner is critical to meaningful court review of a petition for involuntary administration of neuroleptic medications.

The trial court in this case indicated it would likely have appointed an examiner if the patient's request had been timely made. We agree that a request for appointment of a second examiner must be promptly made. However, we believe the trial court erred in finding this request to be untimely. New counsel was appointed just two weeks before the scheduled hearing date. He was unable to speak to his client. He was permitted access to necessary medical records only on the eve of trial and only after obtaining an additional court order. There was virtually no time to explore the basis for the treating psychiatrist's choice of specific medications, although

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counsel attempted, on cross-examination, to highlight the likely side effects and his client's own demonstrated sensitivity to medication. Intentional delay in requesting the second examiner should not be tolerated, but we believe the request in this case was timely made, under the circumstances.

While we concur in appellant's request for an additional opinion as to the propriety of the specific treatment for which court approval was sought, we are troubled by his request for an additional opinion as to diagnosis. The focus of this hearing was treatment, as it was the focus of the Price and Jarvis decisions, and as it remains the focus of the commitment act. See Minn.Stat. § 253B.03, subd. 7 (1986) (right to treatment directed at rendering further institutionalization unnecessary).

Appellant's mental illness has been variously diagnosed as schizophrenia and as a paranoid disorder. The supreme court has recognized the lack of clarity regarding this patient's diagnosis. Jarvis, 418 N.W. 2d at 140. Arriving at a working diagnosis is a function for Jarvis' treatment team, and not a function of the courts. See Minn.Stat. §§ 253B.18, subd. 2, 253B.12, subd. 1(1). The function of the trial court in this case was to determine whether nonconsensual intrusive medical treatment was appropriate. [Research some more Why??] The trial court correctly refused to appoint an additional examiner on the issue of diagnosis.

Finally, we also note that respondent has reprinted portions of Jarvis' medical records in the appendix to his brief. Appellant has made no objection. However, we have previously stressed the need to prevent public dissemination of private data from medical records. In re Morton, 386 N.W.2d 832, 835 (Minn.Ct.App.1986). Counsel properly withdrew the medical records, admitted in evidence at the hearing, from the public file to protect the patient's privacy. If it is necessary to submit these materials for appellate review, they should be set forth in a separately bound "confidential appendix." Incorporation of the medical records into the respondent's brief is inappropriate.

DECISION

Because we hold the patient is entitled to a second examiner on the question of involuntary medication, and that examiner was timely requested under the circumstances of this case, we reverse. The matter is remanded for a new hearing on the medical director's petition for authorization to administer neuroleptic medications.

REVERSED AND REMANDED

JARVIS v. LEVINE

No. C2-86-1633.

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418 N.W.2d 139 (1988)

Homer JARVIS, individually and on behalf of all others similarly situated, Petitioner, Appellant, v. Leonard W. LEVINE, in his official capacity as Commissioner of Human Services, et al., Respondents.

Supreme Court of Minnesota.

January 15, 1988.

- Citing Case

Charles H. Thomas, Eugenia L. Hedlund, Mankato, Mark A. Bohnhorst, Michael Hagedorn, St. Paul, for appellant.

Mary L. Stanislav, Sp. Asst. Atty. Gen., St. Paul, for respondents.

Heard, considered and decided by the court en banc.

OPINION

YETKA, Justice.

Appellant Homer Jarvis seeks review of a decision of the court of appeals which held that involuntary treatment with neuroleptic drugs was not an intrusive treatment per se and thus did not require court approval to administer under the procedural requirements of Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976). He also seeks review of the court's determination that his claim for post-medication review and damages is moot.

We reverse the court of appeals in part, affirm in part and remand.

I.

Homer Jarvis was indeterminately committed to the Minnesota Security Hospital in March 1977 as mentally ill and dangerous after the shooting death of his sister. He was convicted of manslaughter for the death and has served and been discharged from his sentence.

During his period of commitment, Jarvis has been involuntarily treated with major tranquilizers or neuroleptic medication[1] four times. This case involves only the most recent course of treatment, which began in December 1984 and ended in September 1985.

The diagnosis of Jarvis' mental illness is not clear. Although the court of appeals concluded that he had been diagnosed as paranoid schizophrenic, the record seems to indicate the more appropriate diagnosis to be paranoid state because Jarvis lacks hallucinations. Jarvis denies that he is ill or requires professional help and believes that hospital personnel and the courts have conspired to commit him indefinitely. He also believes that the medications he receives

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are poisoning him. However, Jarvis is articulate and intelligent and his self-care skills are intact. The record contains no evidence that Jarvis is currently violent. The question of involuntary medication in emergency situations is, therefore, not before the court. Jarvis has apparently been quite a difficult patient, at times refusing to cooperate in treatment programming, group therapy, individual counseling, or psychological interviews. He has been caustic, derogatory and sarcastic in his interactions with the hospital staff.

A. Prior Involuntary Treatment

Jarvis was first treated with neuroleptic medication (Prolixin) in March 1977, shortly after his commitment. He immediately complained of tremors, blurred vision, tiredness and difficult urination. Jarvis' treating physician, concerned over Jarvis' severe side effects, also doubted that significant progress would be made with medication. He discontinued treatment in the summer of 1978.

In November 1978, a second course of neuroleptic treatment was begun. Because Jarvis' doctor noted "significant side effects" from Prolixin, a different drug (Navane) was used. Jarvis then developed severe akathesia. Akathesia refers to strong subjective feelings of distress or restlessness which cause a compelling need for the patient to be in constant motion. The patient may attempt to obtain relief by constant, repetitive motions primarily of the extremities. See Goodman & Gilman, The Pharmacological Basis of Therapuetics 405-06 (7th ed. 1985). Because of Jarvis' discomfort, the medication was changed to Serentil. Respondent Dr. Doheny, then a psychiatric consultant, discontinued neuroleptic medication in February 1980 due to Jarvis' "severe akasthisia [sic] and lack of symptoms." Jarvis remained off medications for nearly 1 year. The physical side effects improved and there was apparently no significant deterioration in his mental condition.

In February 1981, a third course of involuntary treatment was begun, continuing until May 1982. By September 1981, Jarvis was strongly requesting discontinuance. Dr. Paul Melchiar, M.D., a psychiatric consultant, found "no clear-cut evidence that he has benefited from medication." In May 1982, Dr. Melchiar concluded that Jarvis was "within his legal rights to refuse medication" and discontinued neuroleptic treatment. Jarvis remained off neuroleptics for 2½ years until December 1984. There is no evidence that it has been necessary to medicate Jarvis in an "emergency" during his periods off medication. The emergency procedures are thus not at issue in the present case.

B. Most Recent Course of Treatment

In November 1984, respondent Dr. Doheny, Jarvis' treating physician, initiated a request for involuntary treatment. The involuntary medication policy contained in the Institutions Manual Guidelines, which was promulgated by the Department of Public Welfare in 1981, was followed because Jarvis refused treatment. Jarvis' claim is based primarily on his contention that the policy procedures do not sufficiently protect his rights under Minnesota and federal law. In addition, he contends that the procedures have not been properly followed in his case and warrant a hearing on his claim for damages.

C. Manual Involuntary Medication Policy

The policy manual sets forth both substantive and procedural requirements for involuntary medication treatment cases.

Substantive Requirements

In non-emergency cases before involuntary treatment with neuroleptic drugs may begin, two elements must be established:

a. The patient lacks the ability to engage in a rational decision-making process regarding the acceptance of treatment and is unable to weigh the possible benefits and risks of treatment (the mere fact of disagreement about medication does not in itself constitute evidence of inability); andb. The patient's behavior has been observed and documented and the patient is found to be suffering from a major mental illness with severe functional incapacity ***.

Section XII-4030, 2.a., 2.b. After these elements have been established, one of the two following conditions must also be found before treatment can begin:

(1) The patient has a documented history of clearly demonstrated reductions of symptoms during previous treatment with the [drug] and of clearly demonstrated deterioration of function when the [drug] was discontinued; [Only If you can prove I had it in the first place] or(2) The nature of the documented behavior of a committed patient is sufficiently severe and of such duration that the known benefits clearly outweigh the possible risks of the medication.

Section XII-4030, 2.c.(1), (2) (emphasis added).

If the second condition has been met, neuroleptics may be administered for a trial period, but:

(a) The trial may not exceed 30 days in length; and(b) At the end of 30 days the treatment will be evaluated by the treatment team, and if the evaluation establishes the efficacy of the [drug] for that patient (using the criteria in XII-4030, 2.c.(1) above), the treatment team may initiate another request for involuntary administration of the [drug] for that patient.

Section XII-4030, 2.c.(2)(a), (b).

In assessing the risks and benefits of forced medication, the manual requires consideration of "the possible non-physical side effects *** such as anger, fear, and distrustfulness which may result from involuntary administration of medication." Section XII-4030, 2.c.(3).

Procedural Requirements

1. Documentation and Recommendations of the Treatment Team (Section XII-4050)

This step requires documentation of factors considered by the treatment team such as medical necessity, an individualized treatment plan, reason for the patient's refusal, past side effects, potential risks and benefits, less intrusive treatments, and probable courses of treatment without neuroleptics.

2. Certification of Need for Involuntary Treatment (Section XII-4060)

The attending physician must also provide a written statement which (1) describes the patient's clinical status, diagnosis and preferred treatment; (2) lists major treatment alternatives considered and reasons for rejecting such alternatives; (3) indicates the patient's expected response; and (4) certifies that criteria for involuntary treatment have been met and procedures completed.

3. Review and Approval by Facility Treatment Review Panel (TRP) (Section XII-4070)

The case is then reviewed by the TRP. The TRP is a multidisciplinary group of mental health professionals. It is composed of a licensed physician, the hospital's chief executive officer, the patient advocate, a staff psychologist, social worker and registered nurse. It is recommended that, to reduce any conflict of interest, a member of the particular patient's treatment team not serve on the review panel.

In non-emergency cases, the TRP decides whether the substantive and procedural requirements of the manual have been followed and whether the patient's wishes should be overruled pursuant to those standards. The TRP may approve or disapprove medication and set conditions on its approval. A written summary is required. Either the attending physician or the patient may appeal the TRP decision to the facility medical director, who makes the final decision. The TRP's decision is, therefore, non-binding and may be overridden by the medical director.

4. Review by Hospital Review Board (Section XII-4080)

The board determines whether procedural requirements were followed "and the extent to which the rights and dignity of the patients were considered and protected." The board makes recommendations to the Commissioner of Human Services. The

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board is not responsible for assessment of the clinical decision and also cannot override the medical director.

Jarvis commenced this action for damages pursuant to 42 U.S.C. § 1983 and for declaratory and injunctive relief. Although Jarvis initially sought relief on behalf of himself and others similarly situated, he failed to move the trial court to certify the class.

Jarvis' complaint asserted four claims: (1) that respondents failed to comply with the involuntary medication policy established by the Minnesota Department of Human Services (DHS), (2) that respondents' failure to follow the policy violated Jarvis' constitutionally protected rights of privacy and liberty, (3) that the failure to comply violated Jarvis' statutory right to treatment, and (4) that forcible administration of neuroleptic medication without prior judicial review violated Jarvis' rights to due process of law.

Respondents moved for summary judgment on all counts. Jarvis moved for partial summary judgment on only the fourth count concerning the right to premedication judicial review.

The trial court granted respondents' motion and denied Jarvis' motion, and judgment was entered. On appeal, the court of appeals affirmed the judgment with some modification. Jarvis v. Levine, 403 N.W.2d 298 (Minn.App.1987)

The court of appeals held that involuntary treatment with neuroleptic drugs was not an intrusive treatment per se and, therefore, did not require premedication judicial review under Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976). The court held that a committed mental patient has only a "qualified right" to refuse neuroleptic treatment under both Minnesota and federal law. The court further held that the exercise of "professional judgment" by hospital personnel, after compliance with DHS mandatory guidelines, was sufficient procedural protection. The court modified the judgment, however, concluding that a right to post-medication review exists. Finally, the court found Jarvis'

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claim for damages inappropriate as a matter of law. This court granted Jarvis' petition for further review.

The issues raised on appeal are:

(1) Does involuntary neuroleptic treatment of involuntarily committed mental patients constitute intrusive treatment under Price v. Sheppard?(2) Does Minnesota law establish substantive rights of committed patients which exceed a federal constitutional minimum?(3) Did the court of appeals err when it held that Jarvis' claim for post-medication review and damages were moot?

The ultimate issue underlying this case is whether state medical personnel may forcibly administer neuroleptic[2] medication in non-emergency situations to a committed patient who refuses consent without prior court approval. Neither the United States Supreme Court nor this court has directly addressed this question. However, 12 years ago, in Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976), this court recognized that "intrusive" forms of treatment seriously infringe upon a committed mental patient's right of privacy. The court recognized that some treatment decisions could be left to the medical judgment of hospital officials without unduly infringing on a patient's rights. However, because the potential impact of the more intrusive forms of treatment can be so severe, the court refused to leave those decisions solely within the discretion of medical personnel. Id. at 262, 239 N.W.2d at 912-13. The court, therefore, established pre-treatment judicial review procedures to be used before the imposition of "intrusive" forms of treatment on non-consenting patients:

(1) If the patient is incompetent to give consent or refuses consent or his guardian other than persons responsible for his commitment also refuses his consent, before more intrusive forms of treatment may be utilized, the medical director of the state hospital must petition the probate division of the county court in the county in which the hospital is located for an order authorizing the prescribed treatment;(2) the court shall appoint a guardian ad litem to represent the interests of the patient;(3) in an adversary proceeding, pursuant to the petition, the court shall determine the necessity and reasonableness of the prescribed treatment.

Id. at 262, 239 N.W.2d at 913 (footnotes omitted).

Price also enunciated the criteria to be utilized by the probate courts in determining the necessity and reasonableness of the proposed treatment:

In making that determination the court should balance the patient's need for treatment against the intrusiveness of the prescribed treatment. Factors which should be considered are (1) the extent and duration of changes in behavior patterns and mental activity effected by the treatment, (2) the risks of adverse side effects, (3) the experimental nature of the treatment, (4) its acceptance by the medical community of this state, (5) the extent of intrusion into the patient's body and the pain connected with the treatment, and (6) the patient's ability to competently determine for himself whether the treatment is desirable.

Id. at 262-63, 239 N.W.2d at 913 (footnote omitted).

The form of treatment at issue in Price was electroconvulsive therapy (ECT) which the court found to be one of the most intrusive forms of treatment. Id. at 260, 239 N.W.2d at 912. The court also recognized that treatment techniques can "range in degree of severity and coerciveness from the least intrusive forms such as milieu

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therapy * * * and psychoanalysis, to drug, aversion, or electroconvulsive therapy, and ultimately to psychosurgery." Id. at 260, 239 N.W.2d at 911.

The holding was limited to psychosurgery and ECT:

We cannot draw a clear line between the more intrusive forms of treatment requiring this procedural hearing and those which do not. Certainly this procedure is not intended to apply to the use of mild tranquilizers or those therapies requiring the cooperation of the patient. On the other hand, given current medical practice, this procedure must be followed where psychosurgery or electroshock therapy is proposed.

Id. at 263, 239 N.W.2d at 913.

Thus, the question whether similar procedures are necessary before neuroleptic drugs can be involuntarily administered was expressly left open by Price. Jarvis argues that the involuntary administration of neuroleptics constitutes "intrusive" treatment, requiring the procedures established by Price to be followed. We agree.

The Price opinion did not set out an analytic framework for determining in the first instance whether a particular type of treatment technique is intrusive, thereby triggering its procedural requirements. In the present case, the court of appeals did not directly address this question.

The court of appeals did acknowledge the potentially serious side effects of neuroleptics. The court concluded, however, that neuroleptics are not intrusive per se apparently because these effects can vary widely among patients, type of drug and dosage. Jarvis, 403 N.W.2d at 308. Without any real analysis, the court found only that neuroleptics do "not clearly rise to the level of intrusiveness of electroshock treatments or psychosurgery." Id. For the reasons set out below, we disagree.

A. Intrusiveness of Neuroleptic Drugs

One of the principal considerations in the Price holding that ECT was "intrusive" therapy was the risk of side effects and permanent damage to the patient. We noted: "As the techniques increase in severity, so do the risks of serious and long-lasting psychological or neurological damage." Price, 307 Minn. at 260, 239 N.W.2d at 912 (footnote omitted). The court listed "the risks of adverse side effects" and "the extent of intrusion into the patient's body and the pain

connected with the treatment" as factors to be considered in determining whether ECT or psychosurgery is necessary. Id. at 262-63, 239 N.W.2d at 913.

Because the privacy interest protected was described by the court as "the concept of personal autonomy," id. at 257, 239 N.W.2d at 910, a reasonable starting point in any analysis of "intrusiveness" would be the probable effects of the particular therapy on the patient's body.

In the case of neuroleptics, the likelihood of at least some temporary side effects appears to be undisputed.

The most common results are the temporary, muscular side effects (extra-pyramidal symptoms) which disappear when the drug is terminated; dystonic reactions (muscle spasms, especially in the eyes, neck, face, and arms; irregular flexing, writhing or grimacing movements; protrusion of the tongue); akathesia (inability to stay still, restlessness, agitation); and Parkinsonisms (mask-like face, drooling, muscle stiffness and rigidity, shuffling gait, tremors). Additionally, there are numerous other nonmuscular effects, including drowsiness, weakness, weight gain, dizziness, fainting, low blood pressure, dry mouth, blurred vision, loss of sexual desire, frigidity, apathy, depression, constipation, diarrhea, and changes in the blood.

Plotkin, Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment, 72 Nw.U.L.Rev. 461, 475-76 (1977) (footnotes omitted). See also Gutheil & Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication, 12 Hofstra L.Rev. 77, 99-117 (1983); Gaughan & LaRue, The Right of a Mental Patient to Refuse Antipsychotic Drugs in an Institution,

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4 L. & Psychology Rev. 43, 51-52 (1978).

Many of these side effects can properly be described as relatively minor and of a temporary duration. However, on rare occasions, other more serious non-muscular side effects, such as skin rashes, ocular changes, cardiovascular changes and sudden death, have been documented. Plotkin, supra, at 476.

A more serious concern with the use of neuroleptics is the possibility, acknowledged in this case, of the patient developing tardive dyskinesia.[3] Tardive dyskinesia is a neurological condition that is permanent and irreversible. No satisfactory treatment exists. It is characterized by involuntary muscle movements such as chewing, blowing, or licking motions, but may also involve involuntary movement of other areas of the body. While some cases are mild, tardive dyskinesia can be life-threatening. In extreme instances, speech may be incomprehensible, and swallowing and breathing may be seriously impaired. See Plotkin, supra, at 476-77.[4]

The underlying rationale in the Price case holding that ECT was intrusive was our concern over the risk of permanent physical damage. Clearly, the risks of tardive dyskinesia alone, even if other temporary side effects are discounted, could warrant placing neuroleptics in the same category as ECT.[5] Other state courts have not been hesitant about classifying neuroleptics with ECT and psychosurgery as intrusive based primarily on their assessments of the drugs' potentially devastating side effects. For example, the Oklahoma Supreme Court classified neuroleptics as an "organic therapy," along with ECT and psychosurgery, seeing all three as "intrusive in nature and an invasion of the body." K.K.B., 609 P.2d at 749. Similarly, Massachusetts treated neuroleptics "in the same manner we would treat psychosurgery or electroconvulsive therapy." Roe, 383 Mass. at 437, 421 N.E.2d at 53.

As the court of appeals noted, the risks can and do vary greatly, depending on such factors as the specific drug used, dosage, duration of treatment, and age of patient. Jarvis, 403 N.W.2d at 308. In our view, however, the likelihood of some potentially devastating side effects is both sufficiently significant and well established to support a finding of intrusiveness.[6]

B. Validity of Price v. Sheppard

The court of appeals discussed Price as the proper standard applicable before use of intrusive treatment techniques, but concluded that neuroleptics were not intrusive per se. Jarvis, 403 N.W.2d at 308. As we have already stated, we disagree with the court's conclusion regarding intrusiveness. Respondents do not directly address the issue of intrusiveness. They argue instead that Price is no longer the correct standard to be used as an analytic framework for

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the proper procedures required before intrusive treatment can be involuntarily used.

In brief, respondents argue that Price was based solely on the right of privacy under the federal Constitution. The court balanced the patient's right to personal autonomy against the interests of the state, concluding that the state must use the least restrictive means when intrusive treatments are proposed to mitigate the impact on the patient's rights. Price, 307 Minn. at 257, 239 N.W.2d at 910. The Price opinion cited only federal privacy cases. Therefore, respondents argue, the court interpreted the federal Constitution as requiring the least intrusive means in the treatment of committed mentally ill patients.

However, the United States Supreme Court has subsequently determined that, at least in some circumstances, under the federal Constitution, a patient's rights are adequately protected if professional judgment is exercised by the treating physician. Youngberg v. Romeo, 457 U.S. 307, 321, 102 S.Ct. 2452, 2461, 73 L.Ed.2d 28 (1982). The Court determined that professional judgments are entitled to a presumption of validity and found "no reason to think judges or juries are better qualified than appropriate professionals in making such decisions." Id. at 323, 102 S.Ct. at 2462.

Youngberg did not resolve the question before this court today. The case involved a severely retarded individual committed to a state facility who filed suit for damages and injunctive relief under the federal Constitution. The patient, having the mental capacity of an 18-month-old baby, was obviously unable to participate in any treatment decisions. Youngberg also did not raise the issue of forced drug treatment and its potentially devastating effects, but, instead, involved rights to safe physical conditions, habilitation and freedom from bodily restraint. The significant differences between the factual and legal issues addressed in Youngberg and those raised today convince us that the case furnishes little guidance.

In addition, we are faced with the rights of persons committed to Minnesota institutions, pursuant to Minnesota law, by the courts of this state. Given the significant state law issues involved, we feel it is imperative to assume our obligation to be "independently responsible for safeguarding the rights of [our] citizens." State v. Gray, 413 N.W.2d 107, 111 (Minn.1987) (citations omitted). We thus decide the case exclusively under Minnesota statutes and our Minnesota Constitution.

The essential question in this entire case then is whether the policy and procedure outlined in this court's decision of Price v. Sheppard, supra, is still valid today and whether it should be

applied to the use of neuroleptic drugs in these circumstances. We hold that the Price procedure should apply in all future cases.

III.

At oral argument, the assistant attorney general contended that the court should not interfere with the proposed method of treatment between physicians and their patients. The state also argued that people committed to mental institutions are committed for the specific purpose of receiving treatment and, therefore, are different than people in free society. However, what counsel forgot is that the patient is in a state mental institution only because he or she was first committed by a court of law of this state.

The court's responsibility for the patient does not end at commitment. Commitment to an institution does not deprive an individual of all legal rights, see Minn. Stat. § 253B.23, subd. 2 (1986), especially fundamental rights guaranteed by our Constitution. It would be both unreasonable and unnecessary for the courts to become involved in every post-commitment treatment decision; however, it is equally clear that the courts cannot abdicate all responsibility for protecting a committed person's fundamental rights merely because some degree of medical judgment is implicated. When medical judgments collide with a patient's fundamental rights, as in this case,

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it is the courts, not the doctors, who possess the necessary expertise.

Indeed, the final decision to accept or reject a proposed medical procedure and its attendant risks is ultimately not a medical decision, but a personal choice. The practice of the various professions has been vastly changed in the past quarter of a century. The public has been unwilling, quite properly, to allow professionals such as lawyers, doctors, dentists and others a completely free hand in handling either a client, customer or patient's case. Administering to a patient today may be more accurately described as a team effort on the part of both the doctor and the patient. It is a doctor's obligation to explain to the patient the diagnosis and proposed method of treatment. The informed patient then decides whether to consent to the treatment in whole or in part. The doctor may recommend, but does not dictate the final decision.

Unless extraordinary circumstances exist, a competent person has the right to refuse to accept the type of intrusive treatment recommended here. An institutionalized patient should have the same right as one in a free and open society. To deny mentally ill individuals the opportunity to exercise that right is to deprive them of basic human dignity by denying their personal autonomy.[7]

There is a right to privacy under the Constitution of Minnesota. See State v. Gray, 413 N.W.2d 107 (Minn.1987). The right begins with protecting the integrity of one's own body and includes the right not to have it altered or invaded without consent. Commitment to an institution does not eliminate this right. When intrusive treatment is proposed, the "professional judgment" of medical personnel insufficiently protects this basic human right. While Jarvis' doctors have his best interests at heart, we recall that mental patients in the past have been used as tools for experimentation and new techniques. Many of the atrocities committed in Nazi Germany were allegedly carried out under the guise of "improving" medical science. We certainly do not mean to suggest that anything similar has occurred here. Nevertheless, we want to insure that such an opportunity never arises in this state. Therefore, we hold that the procedure outlined in Price

v. Sheppard, supra, must still be followed in this state not only in the case of psychosurgery or electroshock treatments, but also in the use of these neuroleptic drugs.

This holding is specifically made under Minn. Const. art. I, §§ 1, 2, 10 and not pursuant to any law or provision of the United States Constitution. We understand the argument is made that Price v. Sheppard, supra, was written at an earlier time, when the right of privacy was not clearly defined under the Minnesota Constitution. We, therefore, addressed the issues in Price only under the United States Constitution. However, we have subsequently recognized an independent right of privacy under the Minnesota Constitution. See State v. Gray, 413 N.W.2d 107 (Minn. 1987). Protection of the state right of privacy would require the same procedures we established in Price. Although judicial

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recognition of a constitutional right of privacy in Minnesota may be relatively recent, the protection of bodily integrity has been rooted firmly in our law for centuries. In Minnesota Bd. of Health v. City of Brainerd, 308 Minn. 24, 241 N.W.2d 624 (1976), appeal dismissed, 429 U.S. 803, 97 S.Ct. 35, 50 L.Ed.2d 63, we recognized the origin of this concept: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Id. at 36, 241 N.W.2d at 631 (citation omitted). This opinion should erase any doubt that Price is based upon principles of the Minnesota Constitution, principles which remain valid today.

This ruling will surely cause some additional limitations on the freedom of physicians to treat their patients in mental institutions. However, because the vast majority of patients and their families and guardians cooperate with treatment, this decision will likely affect a small number of patients in our institutions. In any event, the result is no different than restrictions placed on other professionals. Lawyers, architects, and engineers, for example, are greatly restricted in the exercise of their professional judgments by various rules and regulations. Nonetheless, the limitations imposed are accepted. Similarly, competent, ethical physicians should not object to having some restrictions placed on unlimited means of treatment.

We note that the state has already greatly limited a doctor's discretion to treat a patient forcibly by adopting the existing review process. In the 11 years since Price v. Sheppard was decided, the department appears to have made a commendable attempt to give the patient's wishes serious consideration. The question may then be raised as to why these elaborate rules should exist if their application must still be made subject to court approval. However, it is obvious to us that the system will not work if the medical director can overrule the advice of these boards in almost every instance. In Jarvis' case, that is precisely what occurred. The result is that the superstructure, while commendable in form, is rendered meaningless in substance unless further procedural protections are required.

If a treating physician cannot get the approval of his or her peers for the proposed treatment, serious questions arise regarding the reasonableness and necessity of the treatment plan. The mere fact that the medical director supports the physician is insufficient. Court approval in such cases may indeed be difficult to obtain, but is necessary. The serious invasion of personal autonomy which results should be ordered by a court rather than a doctor. If, on the other hand, both the treatment review panel and the hospital review board approve of the proposal by the treating physician, court approval should be quickly forthcoming with little difficulty. Moreover, once such court approval has been obtained, the physician and the hospital are completely free from liability.

As we pointed out in Price, the method of treatment can be outlined and consent given at the time of the original commitment. After commitment, the patient's attorney should be kept informed at all times of any proposed changes in treatment. See Matter of Harhut, 385 N.W.2d 305, 312 (Minn.1986). Moreover, state law requires judicial hearings at intervals of 6 or 12 months. Id. at 309; Minn.Stat. § 253B.13 (1986). In many cases then, treatment approval hearings may be consolidated with hearings already required. Therefore, the necessity for separate hearings to administer these drugs should occur in relatively few instances. Given the potential intrusion on a patient's fundamental rights, however, any additional burden on the state is warranted.

IV.

Insofar as the suit for damages in this case is concerned, we agree with the decision of the trial court that there is no cause of action. The parties involved followed the established procedures outlined by the state in the handling of mental

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institutions and are thus immune from liability. Dilmore v. Stubbs, 636 F.2d 966, 968-69 (5th Cir.1981); see also Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). In all future cases, however, prior judicial approval must be obtained.

In summary, we hold that the Minnesota Constitution guarantees a right of privacy. Where such a right is infringed upon by intrusive medical treatment, such as involuntary administration of neuroleptic drugs, the Minnesota Constitution guarantees certain procedural protections as delineated in Price v. Sheppard, supra. Thus, medical authorities seeking to treat Jarvis involuntarily with neuroleptic drugs must obtain pre-treatment judicial review. However, as to the failure of respondents to obtain judicial review in the past, prior to treating Jarvis, respondents are not liable for damages because they followed statutory procedures which were presumptively constitutional until today.

The court of appeals is affirmed in part, reversed in part and the case is remanded to the trial court for any action needed to conform with this opinion.

KELLEY, J., concurs specially.

POPOVICH, J., took no part in the consideration or decision of this matter.

KELLEY, Justice (concurring specially):

I concur in the court's opinion insofar as it is based upon Minnesota Statutes and a long line of our cases protecting the bodily integrity of our citizens. Those statutes and our common law cases, as well as our relatively recent case of Price v. Sheppard, 307 Minn. 250, 239 N.W.2d 905 (1976), afford more than sufficient support for the majority's conclusion. Therefore, I write only to note that I do not join in that part of the majority opinion, which, in my opinion, unnecessarily purports to base the decision on Sections 1, 2, and 10 of the Minnesota Constitution.

FootNotes

1. Jarvis and the court of appeals refer to the drugs used as "neuroleptics." Respondents and the trial court used the term "antipsychotic." The terms "neuroleptic," "major tranquilizer," "psychotropic" and "antipsychotic" are used interchangeably in the literature to describe this classification of drugs. Although "antipsychotic" is the most widely used term, medical literature suggests that "neuroleptic" is more medically precise in describing the effects, i.e., sedation of the nervous system. See Gaughan & LaRue, The Right of a Mental Patient to Refuse Antipsychotic Drugs in an Institution, 4 L. & Psychology Rev. 43, 46 (1978). We will follow the court of appeals and use the term "neuroleptic."
2. As noted supra p. 140, fn. 1, the terms "neuroleptic," "antipsychotic," "psychotropic," and "major tranquilizer" are used interchangeably. These are commonly phenothiazines (e.g., Thorazine, Vesprin, Serentil, Prolixin), thioxanthenes (e.g., Navane) and other heterocyclic compounds (e.g., Haldol). Goodman & Gilman, The Pharmacological Basis of Therapuetics 391-408. We stress that our holding today is confined to this particular classification of drugs and does not apply to "minor" tranquilizers.
3. In July 1985, the TRP expressed concern that Jarvis' medical records indicated the possibility that he was developing the disorder. Nevertheless, medication continued until September. The percentage of patients who will develop tardive dyskinesia cannot be accurately predicted. Respondents, however, estimate its incidence as between 5% and 40% of patients receiving neuroleptics. The Indiana Supreme Court concluded recently that the possibility of developing the condition was 50%. In re Mental Commitment of M.P., 510 N.E.2d 645, 646 (Ind. 1987).
4. For further discussions on the side effects of neuroleptics, see Davis v. Hubbard, 506 F.Supp. 915, 928-29 (N.D.Ohio 1980); M.P., 510 N.E.2d at 646; In the Matter of Guardianship of Roe, 383 Mass. 415, 436-40, 421 N.E.2d 40, 52-54 (1981); In re K.K.B., 609 P.2d 747, 748-49 (Okla. 1980).
5. Interestingly, the literature which documents the large variety of side effects of neuroleptics lists only potential short-term or long-term memory loss as the most likely serious effect of ECT. While there is some evidence that ECT may also cause permanent brain damage, the studies cited appear to be inconclusive. The evidence regarding neuroleptics is much more well established. Plotkin, supra, at 472-73.
6. Indeed, the State Department of Public Welfare, in Informational Bulletin # 87-55C dated August 31, 1987, acknowledged that antipsychotic medication is associated with tardive dyskinesia. The bulletin further noted that the disorder "can be severe, * * * cosmetically disfiguring or life threatening."
7. In fact, mentally ill persons may be competent to make some medical decisions. See Davis v. Hubbard, 506 F.Supp. 915, 935 (N.D.Ohio 1980) ("[T]here is no necessary relationship between mental illness and incompetency which renders [the mentally ill] unable to provide informed consent to medical treatment."). Minn.Stat. § 253B.03, subd. 6 (1986) expressly grants patients the right to consent to all medical and surgical treatment except for treatment of mental illness. However, with that limited exception, mentally ill patients are presumed to be legally competent. See Minn.Stat. § 253B.23, subd. 2(a) (1986).

In our view, a finding of legal incompetence is a prerequisite to involuntary medication with neuroleptics. This appears to be consistent with section XII-4030, 2.a. of the Institutions Manual Guidelines, supra, at 142. However, a mere finding of incompetence is insufficient to warrant forcible medication. The court must still conduct a so-called Price hearing to determine the necessity and reasonableness of the treatment.

For an excellent analysis of the types of factors to be considered in deciding whether or not to override an incompetent patient's refusal, see Beck, Right to Refuse Antipsychotic Medication:

Conclusive Tests that could have possibly been administered

Low Brain Levels of Vitamin B12 in Schizophrenia, Autism Patients

By Traci Pedersen
~ 1 min read

While brain levels of Vitamin B12 decrease naturally with age, individuals with schizophrenia and autism tend to experience a premature decrease, showing far lower brain levels of B12 than healthy people of similar age, according to a new study.

For example, compared to non-autistic children under age 10, kids with autism were found to have three times lower brain levels of Vitamin B12; a level more comparable to healthy adults in their 50s.

“These are particularly significant findings because the differences we found in brain B12 with aging, autism, and schizophrenia are not seen in the blood, which is where B12 levels are usually measured,” said lead researcher Richard Deth, Ph.D., professor of pharmacology at Nova Southeastern University’s (NSU) College of Pharmacy.

“The large deficits of brain B12 from individuals with autism and schizophrenia could help explain why patients suffering from these disorders experience neurological and neuropsychiatric symptoms.”

For the study, an international research team analyzed and compared brain tissue from otherwise healthy deceased donors and donors with autism or schizophrenia. They found that healthy elderly people in the age range of 61-80 have about three times lower levels of total brain B12 than younger age groups, which is a result of normal aging. This decrease may help adjust brain metabolism to sustain its function across the lifespan.

An active form of B12 called methylcobalamin, or methyl B12, supports normal brain development by managing a process known as epigenetic regulation of gene expression.

Significantly, the brain level of methyl B12 was found to be more than 10 times lower in healthy elderly people than in healthy younger people. A lower than normal level of methyl B12 in the brain could negatively alter neurodevelopment in younger years and could disrupt learning and memory later in life.

Both autism and schizophrenia are linked to oxidative stress, also found to be a significant contributor in the aging process. The researchers believe that oxidative stress may underlie the lowered brain B12 levels observed in this study.

The findings suggest the need for further research to determine if the use of supplemental methyl B12 and antioxidants like glutathione could help prevent oxidative stress and potentially be used as a treatment for these conditions.

The research is published in the online journal *Public Library of Science One* (PLOS One).

MRI STUDYING

Further study details as provided by University of Texas Southwestern Medical Center:

Primary Outcome Measures:

- Differences in hippocampal subfield activation between people with schizophrenia (or schizoaffective disorder) and healthy volunteers [Time Frame: Participants will be assessed over the course of 4-6 weeks, until all study procedures are complete] [Designated as safety issue: No]

This study will investigate the alterations in the medial temporal lobe, specifically the differences in hippocampal subfield activation, between patients with psychosis (Schizophrenia and Schizoaffective disorder), their relatives and normal volunteers. We hypothesize that there will be an increase in perfusion and a decrease in subfield activation in the people with psychosis.

Secondary Outcome Measures:

- Differences in glutamate neurotransmitters and glutamatergic function between people with schizophrenia (or schizoaffective disorder) and with healthy volunteers [Time Frame: Participants will be assessed over the course of 4-6 weeks, until all study procedures are complete] [Designated as safety issue: No]

  We aim to measure glutamate-related neurochemical profiles in schizophrenia using proton magnetic resonance spectroscopy (MRS) 7T. We will measure several brain metabolites, including glutamate, glutamine, GABA, glycine, N-acetylaspartyl-glutamate, glutathione, and myo-inositol, in addition to other major signals in brain MRS (i.e., N-acetylaspartate, creatine and choline), in anterior cingulate cortex (ACC) and dorsolateral prefrontal cortex (DLPFC) in volunteers with schizophrenia (SZ) and normal volunteers (NV).

Research on Schizophrenia

Schizophrenia, the most chronic and disabling of the severe mental disorders, is a major focus of research at the National Institute of Mental Health (NIMH), the world's foremost mental health scientific organization. This Federal agency takes the lead in neuroscientific investigation devoted to understanding the causes, diagnosis, prevention, and treatment of schizophrenia and other mental disorders, which afflict millions of Americans.

Since the Institute's inception 50 years ago, much has been learned about mental disorders and their effects on the brain. Revolutionary scientific advances in neuroscience, molecular biology, genetics, and brain imaging have provided some of the greatest insights into the complex organ that is the seat of thought, memory, and emotion. Thanks to these new tools, the scientific evidence that mental illnesses are brain disorders now exists.

More than 2 million Americans are affected by schizophrenia in any given year, and only one in five recovers completely. The illness, which may impair a person's ability to manage emotions, interact with others, and think clearly, typically develops in the late teens or early twenties. Symptoms include hallucinations, delusions, disordered thinking, and social withdrawal. Most people with schizophrenia continue to suffer chronically or episodically throughout their lives. Even between bouts of active illness, lost opportunities for careers and relationships, stigma,

residual symptoms, and medication side effects often plague those with the illness. One of every 10 people with schizophrenia eventually commits suicide.

As the search for better treatments and ways to transfer those treatments to clinical practice continues, NIMH is harnessing the most sophisticated scientific tools available to determine the causes of schizophrenia. This brain disorder, like heart disease or diabetes, is complex and likely results from the interplay of genetic, behavioral, developmental, and other factors. There is an active search on several levels for the specific risk factors that may lead to schizophrenia.

Many years of family studies indicate that a vulnerability to schizophrenia is inherited. Still, scientists do not know how many genes are involved in this complex disorder, how the genetic predisposition is transmitted, or how behaviors or other events may interact with a genetic vulnerability to trigger the disorder. But an arsenal of new molecular tools and modern statistical analyses are allowing researchers to close in on particular genes that might make people more susceptible to schizophrenia by affecting, for example, brain development or neurotransmitter systems governing brain functioning.

On another research front, investigators supported by NIMH are using state-of-the-art imaging techniques to study the living brain. They have recently discovered specific, subtle abnormalities in the structure and function of the brains of patients with schizophrenia that may provide new insights into the origins of the disease. In other imaging studies, scientists have found evidence of early biochemical changes that may precede the onset of disease symptoms, prompting examination of the neural circuits that are most likely to be involved in producing those symptoms.

Uhl v. Uhl

Annotate this Case

413 N.W.2d 213 (1987)

In re the MARRIAGE OF Larry D. UHL, petitioner, Appellant, v. Hyon Suk UHL, Respondent.

No. CX-87-787.

Court of Appeals of Minnesota.

October 6, 1987.

Bruce Duncan, St. Paul, for appellant.

Barry A. Sullivan, Stockman, Sullivan & Sadowski, Coon Rapids, for respondent.

Heard, considered and decided by LANSING, P.J., and RANDALL and CRIPPEN, JJ.

OPINION

RANDALL, Judge.

This matter is before us on appeal from remand following our decision in Uhl v. Uhl, 395 N.W.2d 106 (Minn.Ct.App.1986). In that case, Larry Uhl appealed the trial court's grant of custody to Hyon Uhl. Appellant Uhl claimed the court services investigator and other professionals paid insufficient attention to two allegations of respondent Hyon Uhl's alleged abuse of the parties' daughter.

On appeal, this court determined that the custody evaluator was not sufficiently familiar with the two incidents, both of which were substantiated by child protection services. The evaluator knew of the two incidents, but, in reliance on child protection's recommendation that **the incidents were not substantive, did not pursue their investigation**. This court remanded, instructing the district court "to permit [an] updated [custody] report" and to conduct "a review hearing." On remand, the trial court ordered court services to update the custody evaluation, and to update any abuse allegations.

Following the review hearing, the district court ordered visitation mediation and, on respondent's motion, structured visitation. The district court reaffirmed the judgment and decree in all respects. Larry Uhl appeals, claiming the court erred by awarding custody to respondent and by modifying visitation. We affirm.

FACTS

The parties were married in Seoul, South Korea, January 26, 1973. At the time, appellant was an American soldier stationed in Korea. Respondent, a Korean National, became a U.S. citizen when the parties later moved to the United States. Appellant is presently 35; respondent is presently 41 years of age. The Uhls have two children, Caroline and Lawrence.

*214 The parties separated in May 1985, and were divorced in January 1986. The divorce was particularly acrimonious. At trial, the court examined the extent of two substantiated incidences of abuse of Caroline by respondent. It is these two reported incidences, as well as any additional abuse allegations occurring after the dissolution hearing, this court was interested in developing on remand.

The family situation in this matter, according to the trial court's memorandum, incorporated into the original judgment and decree, was particularly difficult:

The evidence is full of the usual denials and self justification by both parents. In the times prior to the actual physical separation there was a tremendous amount of yelling, name calling and other immature behavior on the part of both parents. The custody evaluator feels, and the Court agrees, that the primary cause of this behavior is the father. Unfortunately the conduct has continued after the separation with extreme behavior of this sort occurring when the children are being picked up and returned home from visitation. This evidence is important because this confrontive behavior has put the mother under tremendous stress. All persons, including the experts, agreed that the mother can explode, act out, and be very impulsive when under stress.

The father seems to be bent on doing anything in his power to hurt his soon to be ex-wife. This is obvious from the content of the interviews given to the custody evaluator. The father's vexatious attitude is further apparent from his in Court testimony. The basis for his acrimonious attitude is the past activities of his wife prior to their marriage in Korea. The Court finds it difficult to understand how the father can be so critical of these activities when he married the [mother] with full knowledge of her past. Having outlined the backdrop of the child abuse allegations, those allegations must now be closely scrutinized as they relate to the mother's fitness as a parent. This Court believes that there has been some abuse in the period prior to the physical separation, but that the extent of the abuse is uncertain. There is a claim that the mother hit the children and used a wooden spoon for assaults on the children. There have been two investigations by child protection which have verified some form of abuse.

After the first reported incident, respondent entered counseling. The second reported incident occurred while she was in counseling. She continued counseling after the second incident. The trial court concluded, "the work product of the [custody] evaluator convinces this Court that this issue is exaggerated and what problems do exist are under control." The trial court found that in his report, prepared for trial, the evaluator focused on the parents' efforts to provide a parenting plan:

The evaluator found that without any prompting the mother provided various models of parenting ideas which she was carrying out and intended to implement in the future. The father's answers to questions that would stimulate this kind of response consisted of entirely negative criticisms of his wife. His testimony in Court confirms this in that he presented no real parenting plan and presented a tremendous amount of negative material about his wife. * * * The mother is the only one who provided structure, stability, and any kind of plan. Abuse Allegations

Three incidents composed appellant's abuse allegations at the dissolution trial. Two incidents were verified by child protection. One incident occurred in June 1985, and the second in October 1985. In the June 1985 incident, respondent hit Caroline with a spoon. In the October 1985 incident, respondent hit Caroline in the mouth with her hand, and cut Caroline's mouth. Respondent believed her ring may have cut Caroline's mouth. A third incident occurred after the separation, at a time the children were misbehaving. Respondent, under extreme stress, according to court services reports, sent the children to stay with their father.

*215 The trial court found some abuse had occurred, but found the extent uncertain, a finding which gave rise to the remand by this court. The court noted there were no further allegations of abuse after the parties separated. It also noted respondent's problems were being addressed in counseling.

On Remand

This court did not specifically request additional findings. It ordered an updated custody study with emphasis on the abuse allegations. Appellant is primarily concerned with the two 1985 incidents. He also claims respondent did not take the children in for follow up medical examinations after the separation. He did not pursue the medical examination claims.

According to the updated report, respondent was under a lot of stress when she hit Caroline. The evaluator's updated custody report states:

On December 20, 1986, and January 4, 1987, I spoke with Jory Rasmussen, the child protection worker who has had contact with the Uhl family. He states their records reflect two substantiated instances of physical abuse by Mrs. Uhl. He sees neither of them as being particularly serious. He states on 6/12/85 Mrs. Uhl admitted she spanked Caroline with a wooden spoon approximately once a week. He recommended she get counseling which she subsequently did. On 10/15/85 Mrs. Uhl struck Caroline with the back of her hand resulting in a swollen lip. He says there have been no further substantiated instances of abuse.

Rasmussen saw respondent's act of sending the children to stay with their father as a practical coping gesture. Moreover, the evaluator reported Rasmussen stated:

Mrs. Uhl does sometimes lose patience with the children, but that is usually because the children are escalating due to things Mr. Uhl has told them * * *. Mr. Rasmussen states it is his opinion that Mr. Uhl does not wish to parent the children but wants to gain control of them in order to spite Mrs. Uhl. He states Mr. Uhl manipulates the children in order to get at Mrs. Uhl. He states he believes Mrs. Uhl is more emotionally stable than Mr. Uhl and that Mr. Uhl's desire to hurt Mrs. Uhl is being very emotionally destructive to the children.

The custody evaluator visited the children in each of the Uhls' homes. When visiting the children in respondent's home, the evaluator noted that the children played with their toys and interacted well with their mother and with each other. The evaluator noted that respondent was physically affectionate with the children. In the evaluator's summary and recommendations, she stated she does not believe respondent is an abusive parent, although, when under stress, she tends to lash out verbally at the children.

During the visit at appellant's home, the evaluator noted the children were quiet and withdrawn. The first thing appellant said to the evaluator was, "Did you ask these children about their preference? The Appeals Court said you had to." The evaluator observed that the children answered fearfully and said they did not remember. When the evaluator refused to discuss the children's preferences, appellant continued to "just sit there. In over half an hour, he never addressed a word to the children or made eye contact with them."

The evaluator noted in her report, relative to the abuse reports, that respondent has participated in counseling, that the therapists believe she has stopped using physical punishment on the children, and that the children do not present as abused children. The therapist stated that respondent was having difficulty dealing with cultural transitions from her native country to the United States. The therapist referred respondent to Hyon Sook Han, a senior social worker at Children's Home Society. Mrs. Han stated that respondent's child rearing methods reflect Korean values and norms.

On remand, the trial court, after reading the reports, reaffirmed its decision to give respondent custody, and ordered scheduled visitation. The original decree provided for liberal visitation. Under the original decree, appellant visited with the children every weekend and one night a week. According *216 to the custody evaluator, confrontations initiated by appellant occurred at each visit when appellant dropped off and picked up the children. In response to this situation, the court structured visitation to occur every other weekend and one night a week. The court also provided that appellant must stay in the car when he drops off and picks up the children.

ISSUES

1. Did the trial court err by finding respondent was fit and proper to have custody?

2. Did the court err by modifying the visitation schedule?

ANALYSIS I. Custody

After viewing the updated custody study, the trial court reaffirmed the original decree in its entirety. In the original decree, the trial court found respondent was the primary caretaker, and found that because appellant works nights and weekends, it was impossible for him to be the primary caretaker. **Did defendant want to be the primary caretaker to strengthen his case ???**

Appellate review of custody determinations is governed by the abuse of discretion standard. Pikula v. Pikula, 374 N.W.2d 705, 710 (Minn.1985). The factors to be considered are outlined in Minn.Stat. § 518.17, subd. 1 (1986) and in Pikula:

[W]e hold the factors set forth in section 518.17, subd. 1, require that when both parents seek custody of a child too young to express a preference for a particular parent and one parent has been the primary caretaker, custody be awarded to the primary parent absent a showing that the parent is unfit to be the custodian.

Pikula, 374 N.W.2d at 713.

Here, the trial court found respondent was the primary caretaker. Appellant argues, based on the abuse reports, that respondent is unfit. Appellant lists several concerns: one of the episodes of abuse occurred after respondent underwent therapy; respondent suffers from low self esteem; she was no longer in therapy; substantiated acts of abuse reflect her Korean values that physical punishment is an appropriate form of discipline; and she has not demonstrated the ability to "adequately parent at all times."

The updated evaluation reflects that respondent continued therapy after the second abuse allegation. While Joe Wotruba, respondent's psychologist, stated that respondent suffered from a depressive disorder, he went on to state, "she is doing fairly well now. * * * [she] is dealing with cultural issues in her transition to the United States and emotional issues from her childhood."

The evaluator interviewed a number of people, including Caroline's teacher, and concluded:

I do not believe Mrs. Uhl is an abusive parent. Caroline has stated to me and to Jory Rasmussen that she is not afraid of her mother and she also stated to me that her mother has not spanked her since the separation. Mrs. Uhl is conscientious in seeking counseling and her counselor stated she has changed her pattern of physical punishment towards the children.

We find persuasive the report of the child protection investigator who investigated the two 1985 reported incidents of abuse and concluded they were not serious.

Appellant cites Jones v. Jones, 377 N.W.2d 38 (Minn.Ct.App.1985), for the proposition that the primary caretaker doctrine is insufficient to determine custody if the primary parent cannot adequately parent at all times. In Jones the mother, the primary parent, suffered from a major

mental illness, and was repeatedly hospitalized for the illness. The hospitalizations were triggered by her repeated failure to take her medication. This court stated Mrs. Jones could not adequately parent at all times, relying on evidence that she went off her medication and had recurrences of her illness at least once a year. We concluded, based on a review of the trial court's findings, that the trial court was clearly erroneous there in finding the best *217 interests of the children were served by placing custody with the mother, and we found that the primary parent doctrine did not apply on those particular facts. We did not replace these concepts with a new test of "being an adequate parent at all times."

The Jones case is not applicable here. There is no evidence that respondent suffers from a major mental illness. The custody evaluation concluded only that she is depressed and suffering from stress, some of which is due to the acts of appellant.

We hold the trial court properly awarded custody of the children to respondent. The original complaints which warranted remand by this court were addressed and were not egregious to begin with. The kind of abuse reported to child protection in 1985 appears to be non-repetitive. Mitigating the reported abuse are the facts that respondent was under great stress, partially caused by appellant, and by the differences between Korean child rearing practices and those in the United States. Respondent is open and amenable to therapy, was and is willing to undertake additional therapy, and is flexible and willing to change some of her habits.

II. Visitation

Appellant argues that the court erred by modifying visitation. Respondent argues that, because the court originally ordered "liberal" visitation and did not schedule visitation, the court did not really modify visitation.

The court scheduled visitation because appellant was causing problems when he picked up and dropped off the children. The transcript reflects that while the children were with appellant, he vilified respondent, which caused problems with the children.

The abuse of discretion standard applies to visitation. Manthei v. Manthei, 268 N.W.2d 45 (Minn.1978). As respondent notes, the visitation scheduled by the court is only temporary, pending the outcome of visitation mediation. We affirm the trial court on both issues.

DECISION

The district court's award of custody to respondent and the court's scheduling of visitation was not an abuse of discretion.