

IN THE COURT OF APPEALS OF IOWA

No. 0-033 / 09-0807
Filed February 24, 2010

**JODI E. MANN, a/k/a JODI E. REITER,
a/k/a JODI E. ELTON,**
Plaintiff-Appellant

vs.

**IOWA DISTRICT COURT FOR
CERRO GORDO COUNTY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Cerro Gordo County, Paul W. Riffel, Judge.

A mother appeals from the district court's ruling finding her in contempt for failing to make her child available for visitation with the child's father. **WRIT ANNULLED.**

David C. Laudner of Heiny, McManigal, Duffy, Stambaugh & Anderson, P.L.C., Mason City, for appellant.

Mark Young, Mason City, for appellee.

Considered by Sackett, C.J., Doyle and Danilson, JJ.

SACKETT, C.J.

Jodi E. Mann filed a petition for writ of certiorari contending the district court should not have found her in contempt of court. The district court found Jodi willfully violated the visitation provisions of a previous order by refusing to make her daughter available for visitation with the daughter's father, Thomas M. Johnston, II. We annul the writ.

I. BACKGROUND AND PROCEEDINGS. Maranda was born in November of 1992 and is the daughter of Jodi and Thomas. In June 1995, a stipulated order was entered whereby Jodi and Thomas would have joint legal custody, with Jodi having primary physical care of Maranda. Thomas was to have reasonable visitation including alternate weekends and holidays, and an extended period of visitation over the summer. It provided specific times for exchanging the child and stated “[t]he parties agree to make all reasonable efforts to make Maranda available for visitation” In March of 2009, Thomas filed an application for rule to show cause why Jodi was not in violation of the visitation provision. He alleged he had not been given the opportunity to exercise his visitation rights since May of 2008. The matter came on for hearing on May 4, 2009.

Thomas, Jodi, and Maranda each testified. On direct examination, Thomas testified that there were no disruptions in visitation for approximately twelve years after the order was filed. He stated that the visitation problems began in the spring of 2008, when Jodi's current husband came to his house and accused him of sexually abusing Maranda. The police and the Department of

Human Services investigated the allegations and they were determined to be unfounded. Jodi's counsel did not cross-examine Thomas.

Jodi testified that Maranda had not seen Thomas since the spring of 2008 because Maranda's counselor recommended she not have visitation and Maranda did not want to see him. She explained that Maranda was afraid of Thomas because he allegedly touched her inappropriately in a bathroom. Jodi testified that Maranda is in special education in school and has difficulty comprehending. On cross-examination she admitted that Thomas has denied the allegations, that the abuse was not confirmed after investigations by the police and DHS, and that she has not informed Thomas about Maranda's counseling or asked him to participate. She testified that Maranda's counselor recommends supervised visits but she had not discussed supervised visits with Thomas because Maranda does not want to visit him. She stated, "I'm not going to force a sixteen year old to go where she doesn't want to go." Jodi believed she would have to physically force Maranda to go to visitation and that Maranda would run away if forced to go.

Maranda testified that she does not want to go to visitation because Thomas touched her inappropriately several times. She stated that she kept visiting him despite these incidents, until May of 2008, because she was scared of him. She admitted that she was also mad at her father when she stopped visiting him because he did not want her to go to certain social events, including a band festival and a dance.

The court entered its order on May 13, 2009. It found the allegations of abuse lacked credibility and that Jodi was denying visitation to Thomas by “merely deferring to the wishes of her child.” It found Jodi willfully violated the order in refusing to make Maranda available for visitation and sentenced her to serve ten days in jail. It granted Jodi the opportunity to purge the finding of contempt by making Maranda available for visitation. It ordered that due to the strained relationship between Thomas and Maranda, visitations were to be accompanied by Maranda’s paternal grandmother, Sally, until a more positive relationship was re-established.

Jodi filed a petition for writ of certiorari claiming her actions were not in willful disregard of the order and the court’s finding otherwise is not supported by substantial evidence. She also claims she received ineffective assistance of counsel.

II. SCOPE AND STANDARD OF REVIEW. “A writ of certiorari lies where a lower board, tribunal, or court has exceeded its jurisdiction or otherwise has acted illegally.” *State Public Defender v. Iowa Dist. Ct.*, 633 N.W.2d 280, 282 (Iowa 2001). Our review is at law, not de novo. *Matlock v. Weets*, 531 N.W.2d 118, 121 (Iowa 1995); *Backstrom v. Iowa Dist. Ct.*, 508 N.W.2d 705, 707 (Iowa 1993). We will sustain the writ if the court acted illegally by making factual findings without substantial evidentiary support or by not properly applying the law. *Allen v. Iowa Dist. Ct.*, 582 N.W.2d 506, 508 (Iowa 1998). Substantial evidence is that which “would convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt.” *Christensen v.*

Iowa Dist. Ct., 578 N.W.2d 675, 678 (Iowa 1998) (quoting *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744-45 (Iowa 1993)). In addressing constitutional issues raised however, we evaluate de novo the totality of the circumstances. *Pfister v. Iowa Dist. Ct.*, 688 N.W.2d 790, 794 (Iowa 2004).

III. FINDING OF CONTEMPT. A court may cite and punish a person for contempt if the person willfully disobeys a court order by denying visitation. See Iowa Code § 598.23 (2009); *Farrell v. Iowa Dist. Ct.*, 747 N.W.2d 789, 790 (Iowa Ct. App. 2008). The party alleging contempt, Thomas, must prove the alleged contemnor, Jodi, had a duty to obey a court order and willfully failed to perform that duty. *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007). Willful disobedience is proved by

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

Ervin, 495 N.W.2d at 744; *Wurpts v. Iowa Dist. Ct.*, 687 N.W.2d 286, 290 (Iowa Ct. App. 2004).

Jodi argues the court's finding that she willfully violated the visitation order is not supported by substantial evidence because (1) Thomas has not requested visitation since May of 2008, (2) Jodi simply acted consistent with Maranda's fears, (3) there was no proof Jodi deliberately interfered with Maranda's relationship with her father, and (4) she had a duty to protect Maranda following the allegations.

We agree with the district court's finding of contempt. The stipulated order does not require Thomas to request visitation. Additionally, it is patently clear

that any request for visitation, or attempt to exercise visitation, would have been an act in futility in light of the past disruption in visitation. The stipulation did require the parties to make reasonable efforts to exchange Maranda on alternating weekends. Jodi admitted she made no such efforts. We note, as did the district court, that Jodi has not been supportive or encouraging of Maranda's relationship with Thomas, and has failed to involve him in Maranda's counseling. Such behavior contravenes the joint legal custodial rights of Thomas provided in the original order and our policies on providing liberal visitation "to assure the child the opportunity for the maximum continuing physical and emotional contact with both parents . . . and which will encourage parents to share the rights and responsibilities of raising the child." Iowa Code § 598.41(1). When parents have joint legal custody and one parent has primary physical care, the parent with primary physical care has a responsibility of communicating to the other parent when joint decisions need to be made and must make the necessary information available. *In re Marriage of Hoksbergen*, 587 N.W.2d 490, 492-93 (Iowa Ct. App. 1998). Jodi also cannot rely on the duty to protect her daughter as a defense to a contempt action when the alleged threat, here Maranda's fear of abuse, is unfounded. *See Sulma v. Iowa Dist. Ct.*, 574 N.W.2d 320, 321-22 (Iowa 1998) (upholding finding of contempt when father felt he needed to withhold visitation of children from mother due to threat of drunk driving when there was no evidence mother presently engaged in such behavior). Substantial evidence supports the court's conclusion.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL. Jodi contends her trial counsel rendered ineffective assistance by failing to subpoena witnesses and by not soliciting certain testimony through direct and cross-examination. Our courts have recognized that a person defending herself against a claim of contempt that potentially results in a period of incarceration, is entitled to counsel. See *McNabb v. Osmundson*, 315 N.W.2d 9, 14 (Iowa 1982) (holding party was entitled to counsel in any contempt hearing if it would result in the loss of his physical liberty). In civil proceedings involving the termination of parental rights, or where a person's liberty is deprived through civil commitment, parties are entitled to the effective assistance of appointed counsel. See *In re Detention of Crane*, 704 N.W.2d 437, 438-39 (Iowa 2005); *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986). To establish ineffective assistance of counsel, Jodi must prove (1) her trial counsel's performance was deficient, and (2) the failure caused actual prejudice. *In re L.M.*, 654 N.W.2d 502, 506 (Iowa 2002). We may dispose of the claim without analyzing the first element, if the prejudice requirement is not met. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). The prejudice element is met when "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006) (citations omitted).

Jodi has not proved she was prejudiced by her attorney's failure to subpoena additional witnesses, ask certain questions of her, or solicit testimony through cross-examination of Thomas. There is no showing that such additional testimony would support Jodi's claim that her conduct was not in willful violation

of the order. Accordingly, there is not a reasonable probability that the outcome of the contempt hearing would have been different had Jodi's trial attorney solicited additional testimony. We annul the writ.

WRIT ANNULLED.