

IN THE COURT OF APPEALS OF IOWA

No. 0-683 / 10-0231
Filed October 6, 2010

IN RE THE MARRIAGE OF NICOLE VANOSDEL AND MARK VANOSDEL

Upon the Petition of

NICOLE VANOSDEL,
Petitioner-Appellant,

And Concerning

MARK VANOSDEL,
Respondent-Appellee.

Appeal from the Iowa District Court for Pottawattamie County, Greg W. Steensland, Judge.

On review from the district court's order finding the petitioner in contempt.

WRIT ANNULLED.

Michael Winter, Council Bluffs, for appellant.

Jon Puk of Walenting, O'Toole, McQuillan & Gordon, Omaha, Nebraska,
for appellee.

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

SACKETT, C.J.

Nicole Vanosdel seeks review of¹ a district court order finding her in contempt for refusing to allow her former husband, Mark Vanosdel, court-ordered visitation with the parties' then seven-year-old daughter. We annul the writ.

BACKGROUND. The marriage of Nicole and Mark was dissolved in January of 2009. Mark was given traditional visitation every other weekend with additional visits on holidays and during the summer to take effect in June of 2009. In the meantime the court ordered supervised visits in February and March and an overnight in April and May. The decree also stated there was insufficient reason to believe Mark abused his daughter.²

¹ This case should have been commenced by filing a petition for writ of certiorari. See Iowa R. App. P. 6.107(a) (2009) ("Any party claiming a district court judge . . . exceeded the judge's jurisdiction or otherwise acted illegally may commence an original certiorari action in the supreme court by filing a petition for writ of certiorari . . ."). We do not dismiss but proceed as if the proper form of review was requested. See *id.* R. 6.108.

² The dissolution decree's findings noted that Nicole filed a report accusing Mark of abuse of their daughter in February of 2007, and the child was interviewed on March 20, 2007, by Project Harmony in Omaha, Nebraska, and she did not disclose anything during the interview. In September of 2007 Nicole testified that the child told her she had seen her dad's penis, and her sister told her the child had told the sister that her dad touches her vagina. In a subsequent interview with Project Harmony the child told Project Harmony that her dad touched her privates with his fingers. In October an experienced child abuse investigator filed a report indicating the abuse was not confirmed because there was no medical evidence to corroborate the child's unconfirmed statements. The court noted additional reports and on January 7, 2008, Carolyn Price again filed a report indicating the alleged abused was not confirmed, there being no corroboration of statements the child made to investigating officers, Project Harmony, her mother, and her grandparents. The child next reported her father kissed her private parts, and Nicole obtained a protective order from a Nebraska judge. Juvenile proceedings followed in Nebraska and the juvenile court in Nebraska dismissed the proceedings. The court noted Mark denied all claims and implied the statements the child made were planted by her mother and did not occur. The court also noted the Council Bluffs Police Department did not file charges against Mark. The court then concluded that in view of the numerous investigations by the Iowa Department of Human Services, the Council Bluffs Police Department, the Nebraska Juvenile Court, and

Mark filed an application for a rule to show cause in April of 2009 reciting that Nicole denied him visits on April 9 and 11, 2009, in violation of the January 2009 decree. The matter came on for hearing and the district court found that Mark had participated in the scheduled supervised visits. The court further found there were reports from the supervisor of the visits that revealed the child continued to indicate to her counselor, mother, teacher, and others that her father has touched her inappropriately in the past and that the supervisor recommend the visits continue to be supervised. The court further noted the child's allegations of abuse were investigated by the Iowa Department of Human Services and Iowa law enforcement agencies in Iowa and Nebraska. The court did not find any reason to disturb the finding of the dissolution court that there was "insufficient reason to believe Mark had abused his daughter."

The contempt court found the dissolution decree was silent as to a pickup and drop-off place, so Nicole was not found in contempt, and Mark's petition was dismissed. The court went on to order that the parties should exchange the child at the Target Store at 72nd and Dodge in Omaha, Nebraska.

On September 11, 2009, Mark filed another application for rule to show cause, contending that Nicole had continued to act intentionally to deny him visits with their daughter. He also asked among other things, that the court order an independent psychological evaluation of the child. He further advanced that there had been four and probably five investigations into the allegations of sexual

Nebraska law enforcement agencies, there was insufficient reason to believe Mark had molested his daughter.

abuse of his daughter and they were unfounded. He later amended his application, asking that an injunction be entered precluding Nicole from disseminating information on the custody and visitation matters.

On November 20, 2009, the matter came on for hearing before the district court. After hearing the evidence the court found:

There is no dispute that Nicole has violated the Court's Orders with regard to visitation. She admits that. She seeks to either mitigate or justify her conduct by trying to prove that Mark has sexually abused their daughter. Mark strenuously denied the allegations of sexual abuse and has done so from the first allegation made by Nicole [The child] has been the alleged victim in numerous investigations regarding allegations of sexual abuse on her by her father. In fact, there have been so many investigations and allegations made that the social workers with the Department of Human Services believe that continued allegations and investigations could almost be considered abuse in their own right.

The court then found Nicole in contempt of court and sentenced her to ten days in the Pottawattamie County jail. The court found she could purge herself of the contempt by abiding by the dissolution decree concerning visitation. The court set up a procedure for the parties to choose a child psychologist counselor and ordered that the parties and their daughter participate in joint counseling. The court further found if Nicole has done both things in the six months following the court's finding of contempt, then she shall have purged her contempt.

Nicole recognizes this should have been filed as a certiorari action.

Our review on certiorari is limited to determining whether the district court acted illegally or without jurisdiction. *Madyun v. Iowa Dist. Ct.*, 544 N.W.2d 441, 443 (Iowa 1996) *Rater v. Iowa Dist. Ct.*, 548 N.W.2d 588, 590 (Iowa Ct. App. 1996). Review is not de novo but at law. *Madyun*, 544 N.W.2d at 443. We

review as we would a certiorari action. Because of the quasi-criminal nature of the proceedings, a finding of contempt must be established by proof beyond a reasonable doubt. *In re Marriage of Schradle*, 462 N.W.2d 705, 709 (Iowa Ct. App. 1990). Substantial evidence is such evidence as could convince a rational trier of fact the alleged contemner is guilty of contempt beyond a reasonable doubt. *Rater*, 548 N.W.2d at 590.

Nicole admits she has denied visits between Mark and his daughter in contradiction of a court order but denies that contempt has been established beyond a reasonable doubt. She claims that she has no evil or bad intention and her only goal was to protect her daughter. She argues that her daughter told everyone who would listen, including the Department of Human Services, police officers, judges, and Nicole that her father touched her inappropriately.³

Contempt consists of willful disobedience to a court order or decree. *In re Marriage of Hankenson*, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993). “Willful disobedience’ requires 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.” *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 824 (Iowa 1996) (citation omitted). The alleged contemnor has the burden of providing evidence on any defense tendered. *Id.* The burden of persuasion on

³ The record reflects that Nicole has filed a petition to modify the visitation provisions of the parties’ divorce decree. The issue of modification of visitation is not presently before us. We also do not consider Nicole’s additional efforts to seek legal recourse in our decision. “Even good faith efforts to pursue further legal proceedings do not give aggrieved parties the right to flout a court order.” *Bevens v. Kilburg*, 326 N.W.2d 902, 905 (Iowa 1982).

the willfulness issue, however, remains on the person alleging contempt. *Id.* Parents can be held in contempt for interfering with visitation rights of a noncustodial parent or failing to return children to the custody of the other parent. See *Selma v. Iowa Dist. Ct.*, 574 N.W.2d 320, 322 (Iowa 1998) (upholding finding of contempt against father for refusing mother visitation); *Wells v. Wells*, 168 N.W.2d 54, 64 (Iowa 1969) (upholding finding of contempt against mother for refusing to return children to father as required by the decree).

Contempt judgments must be reviewed to ensure substantial evidence supports the judgment of contempt. *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744 (Iowa 1993). “Contempt is sufficiently shown if some of the default was willful.” *Rater*, 548 N.W.2d at 590. A party requesting a contempt finding has the burden of proving a contemnor (1) has a duty to obey a court order and (2) willfully failed to perform that duty. *Gimzo v. Iowa Dist. Ct.*, 561 N.W.2d 833, 835 (Iowa Ct. App. 1997). Willful disobedience is established if the evidence demonstrates:

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 contemner had the right or not.

In re Marriage of Jacobo, 526 N.W.2d 859, 866 (Iowa 1995) (quoting *Ervin*, 495 N.W.2d at 744).

This is a difficult case for all concerned. As the district court noted, “Nobody, especially this Court, wants to put a soon to be seven year old little girl in harm’s way.” No one discounts that the child has made the complaints, but that is not to say the child has necessarily been found credible. One report came

after the child called 911 from her father's home saying that she was locked in the bathroom because her father put his finger in her vagina.⁴

Upon our review we find ample evidence and a correct application of relevant law to the facts support the finding of contempt of court beyond a reasonable doubt. See Iowa Ct. R. 21.29(1)(d), (e). We annul the writ.

AFFIRMED.

⁴ A Department of Human Services report in the record stated:

Sgt. Ben Roth related there was something weird about the police call. Sgt. Roth stated that the girl had told communications that she had been penetrated. However, after officers responded to her call and talked with her outside, she changed her story to maybe he touched her on top of her clothing the week before. By the time she got to the hospital, she was saying nothing happened. It was also noted that [the child] exhibited no fear of her father while he was communicating with her while getting her belongings gathered to leave with the police. Sgt. Roth reported that the girl called 911 from her cell phone that was given to her by her mother.