

**IN THE COURT OF APPEALS OF IOWA**

No. 0-808 / 10-0616  
Filed January 20, 2011

**THOMAS M. BERENS,**  
Plaintiff,

**vs.**

**IOWA DISTRICT COURT  
FOR CRAWFORD COUNTY,**  
Defendant.,

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Certiorari to the Iowa District Court for Crawford County, Edward A. Jacobson, Judge.

Thomas Berens challenges a district court order finding him in contempt of a decree of dissolution. **WRIT SUSTAINED.**

Bryan D. Swain of Salvo, Deren, Schenck & Lauterbach, P.C., Harlan, for appellant.

Julie A. Schumacher of Mundt, Franck & Schumacher, Denison, for appellee.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

**MANSFIELD, P.J.**

Thomas Berens challenges a district court order finding him in contempt for failing to pay certain postsecondary education and medical expenses of his children. Thomas argues: (1) his obligation to pay these expenses was too indefinite to support a finding of contempt; and (2) his due process rights were violated because he was found in contempt without an evidentiary hearing. Because we agree with Thomas's first argument, we do not reach the second. We sustain the writ of certiorari, vacate the contempt order, and remand for further proceedings.

**I. Background Facts and Proceedings**

Thomas and Kathy Berens were married in June 1981 and had three children together: Daniel (born August 1985), Sean (born June 1987), and Carter (born September 1990).

On August 29, 1994, Thomas and Kathy dissolved their marriage by a stipulated decree. Under this decree, Kathy was awarded primary physical care of the children and Thomas was ordered to pay child support. The child support obligation continued

until they reach the age of 18, marry or otherwise becomes emancipated. Provided, however that such obligation to support shall not cease or be reduced if any child is over the age of 18 and under the age of 22, is unmarried, and is regularly attending a course of vocational-technical training, either as a part of a regular school program or under special arrangements adopted to the individual's needs; or is, in good faith, a full-time student in a college, university or other area school, or who has been accepted for admission to a college, university, or area school and the next regular term of which has not yet begun.

The decree further provided for medical support as follows:

[Kathy] will maintain hospitalization and major medical insurance with current coverage on the minor children until said child is no longer entitled to child support. The deductible amounts will be paid 75% by [Kathy] and 25% by [Thomas]; and any amounts not covered by the deductible or insurance will be shared in the same percentages. Each party shall pay one-half of the optical and dental expenses of the minor children.

On February 12, 1996, the parties entered into a joint modification of the decree whereby the child support payments were increased, but no other pertinent changes were made to the original decree.

The parties then entered into a second joint modification on December 7, 1998, which was approved by the court. This modification again increased the amount of child support, but ended the right to receive support “no later tha[n] the children’s nineteenth birthday.” The agreement further addressed postsecondary education, stating: “Both parties agree to contribute to the [children’s] college education in accordance with Iowa Code Section 598.21(5A) [(1997)] providing for postsecondary education subsidy.”<sup>1</sup> No changes were made to the decree’s prior medical support provision.

On December 28, 2006, Kathy filed an application to show cause arguing Thomas had failed to pay his share of the children’s medical and dental expenses and postsecondary education expenses. Although the matter was set for hearing, there was no subsequent order from the court addressing the merits of the application.

On October 13, 2009, Kathy filed a second application to show cause requesting Thomas be held in contempt of court. Kathy claimed Thomas had failed to pay twenty-five percent of the health insurance deductible, one-half of

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<sup>1</sup> Then section 598.21(5A) now appears at Iowa Code section 598.21F (2009).

the health expenses not covered by insurance, and one-third of the children's postsecondary education expenses. At the time of the application, Daniel was attending medical school while Sean and Carter were enrolled at Iowa State University. Kathy alleged a total amount due of \$11,435.35.

Thomas resisted the application, arguing he was no longer required to provide medical support for Daniel and Sean because his child support obligation for them had terminated. Thomas maintained that under the original 1994 decree, which had not been amended on this point, his medical support obligation ended once the "child support" obligation did. Thomas further admitted he had an obligation to reimburse medical expenses for Carter until his high school graduation in the summer of 2009, but said he had not received proper documentation. Thomas also asserted that he had made "every reasonable attempt to pay one-third of the cost of attendance [at postsecondary education] for each child," so long as those amounts were clear. Thomas insisted that he has always paid one-third of regular college tuition. He added, "To alleviate confusion, Respondent believes the parties should agree on a reasonable amount in addition to tuition that the parties will pay for the minor children which would constitute one-third of the cost of attendance for each child."

The application was set for a hearing on November 2, 2009. According to Thomas, on this date, no hearing occurred. Instead, on this date, the court had an unreported discussion with counsel in chambers<sup>2</sup> and requested that briefs be submitted by November 17 addressing the scope of the postsecondary education subsidy. On November 16, Thomas filed a further resistance with the court,

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<sup>2</sup> Thomas's appellate counsel was not representing him at the time.

supported by his own affidavit. There, he pointed out that the bills he had received from Kathy left it unclear whether they were for a bona fide postsecondary education expense or not. He noted that they included cell phone charges, car expenses, and uncategorized charges from the university. He offered to stipulate that he would be liable for one-third of the "Total Cost of Attendance" set forth by the Iowa State University Office of Financial Aid, or \$6123.33 per child.

Kathy also submitted an affidavit, to which she attached a number of statements and invoices.<sup>3</sup> Her affidavit was dated November 17, 2009, but it was not filed with the clerk until March 23, 2010. In her affidavit, Kathy not only reiterated her original request for \$11,435.35, but she also asked for an additional \$1944.37 in postsecondary expenses as well as \$199 per month for one-third of the boys' health insurance dating back to May 2009. Kathy disagreed with Thomas's contention that he had always been ready, willing, and able to pay his share, stating that he "chooses to ignore requests for compliance with the decree."

Thomas claims he did not receive the affidavit, and Kathy's submission does not contain a proof of service.

On March 19, 2010, the district court entered an order holding Thomas in contempt. The district court found Kathy's claim to be "fully supported by her affidavit" and her amounts to be "fully documented." The court reasoned that Thomas's offer to pay \$6,123.33 per child would carry weight if he had paid this

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<sup>3</sup> The attachments included handwritten lists of expenses prepared by Kathy, cell phone bills, furniture charges, uncategorized bills from Iowa State University, and charges from a fraternity billing service.

amount, but he had not done so. The court added that “the niceties” of whether Thomas should have to pay a share of a specific bill “are not pertinent when he has paid nothing at all.” The court then ordered Thomas to serve thirty days in jail, but withheld mittimus so Thomas could purge his contempt by paying the sum of \$14,772.72. This amount consisted of \$11,435.35 in pre-filing postsecondary educational expenses, \$1944.37 in post-filing secondary expenses, and \$1194 in medical expenses (\$199 per month from May 2009 through November 2009).

On April 19, 2010, Thomas filed a petition for writ of certiorari. The supreme court granted the petition on May 13, 2010, and subsequently transferred the case to our court.

## **II. Standard of Review**

On writ of certiorari, our review is at law. *Reis v. Iowa Dist. Ct.*, 787 N.W.2d 61, 66 (Iowa 2010). In our review, “we may examine only the jurisdiction of the district court and the legality of its actions.” *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). Illegality exists when the court’s factual findings lack substantial evidentiary support, or when the court has not properly applied the law. *Id.* “Substantial evidence” supporting a contempt finding is “such evidence as could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt.” *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995) (quoting *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744 (Iowa 1993)).

### III. Contempt

Thomas argues the district court erred in adjudicating him in contempt because his postsecondary obligations were unclear. In order to find a person guilty of contempt for failure to make support payments, the person seeking a contempt order has the burden of demonstrating that the contemner had a duty to obey a court order and failed to perform the duty. Iowa Code § 598.23A(1) (2009); *Jacobo*, 526 N.W.2d at 866. The burden then shifts to the contemner to produce evidence that suggests he or she did not willfully violate the order or decree at issue. *Jacobo*, 526 N.W.2d at 866. However, the burden of persuasion remains on the person seeking the contempt to prove beyond a reasonable doubt that the contemner willfully acted in violation of the court order.

*Id.*

Evidence establishes willful disobedience if it 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 a right or not.

*Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 140 (Iowa 1988). A failure to follow a court order is not willful if a contemner shows the order was indefinite or that the contemner was unable to comply with the order. *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007).

Upon our review, we find that the indefiniteness of the court's existing decree forecloses a contempt finding in this case. See, e.g., *Wurpts v. Iowa Dist. Ct.*, 687 N.W.2d 286, 290-91 (Iowa Ct. App. 2004) (holding that because the

decree was “unclear,” there was not evidence beyond a reasonable doubt that the party willfully disobeyed it).

The parties’ disagreements center on two areas. One is the postsecondary education subsidy. Here the modified decree simply provided that the parties would “contribute to the children’s college education in accordance with Iowa Code [section 598.21F] providing for postsecondary education subsidy.” But section 598.21F is not by its terms self-executing. Rather, it contemplates that the court “shall determine the amount of the subsidy.” Iowa Code § 598.21F(2). That has not occurred. There has never been a court order determining the actual postsecondary education subsidy for these children. Accordingly, Thomas cannot be held in contempt for failing to perform an indefinite duty. See *In re Marriage of Neff*, 675 N.W.2d 573, 577-78 (Iowa 2004). As Thomas points out, Kathy’s documentation includes a number of items that are at least debatable, such as football tickets, a mug purchased through a fraternity, cell phone charges, car tax, insurance, license and repair fees, and income tax filing expenses. See *In re Marriage of Springer*, 538 N.W.2d 897, 901 (Iowa Ct. App. 1995) (holding parent not responsible to pay child’s sorority dues and telephone bills); *In re Marriage of Hull*, 491 N.W.2d 177, 179 (Iowa Ct. App. 1992) (holding a parent was not required to pay for truck payments, insurance, or miscellaneous expenses).<sup>4</sup>

Thomas also challenges the district court’s finding that he willfully failed to pay required medical support. Under the original decree, each party had certain

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<sup>4</sup> The district court concluded Thomas “has paid nothing at all,” but the affidavits before us do not support that finding.



medical support obligations that continued until the child in question was “no longer entitled to child support.” Under that initial decree, child support lasted until the child turned twenty-two, if the child was a full-time student. The 1998 modification, however, provided that child support would end when the child left high school, and then a postsecondary education subsidy would follow. The 1998 modification did not mention medical support. Rather, it provided that other provisions of the initial decree (e.g., the medical support) would “remain in force and effect as originally executed by the parties.”

Thomas argues that he is no longer required to pay medical support because that obligation is tied to child support and the child support obligation no longer continues past high school. His argument is not entirely without force. The parties could well have intended that Thomas would no longer have to pay medical support after the children left high school in recognition of the fact that Thomas would be paying a postsecondary education subsidy that exceeded the previous child support obligation. Moreover, as to the optical and dental expenses, even the original decree provided that “[e]ach party shall pay one-half of the optical and dental expenses of the *minor* children” (emphasis added). In short, given the wording of the decrees and their modifications, the record cannot support a finding that Thomas willfully disobeyed the medical support provisions.

In sum, given the uncertainties in the decree as to what Thomas was required to pay for a postsecondary education subsidy and postsecondary medical support, we do not find evidence that would convince a rational trier of fact that Thomas is guilty of contempt beyond a reasonable doubt. Therefore, we sustain the writ for certiorari, vacate the contempt order, and remand for further

proceedings. Our disposition of this case does not preclude the district court from doing that which even Thomas conceded it could do: clarify Thomas's postsecondary obligations and then order Thomas to fulfill them. But we cannot uphold a finding of contempt at this stage.

Thomas also argues he was denied due process because he was not afforded an evidentiary hearing before the district court found him in contempt. Kathy counters that Thomas waived the right to an evidentiary hearing. Because we hold that even without an evidentiary hearing, the record cannot support the district court's contempt finding, we need not address this issue.

**WRIT SUSTAINED.**