IN THE COURT OF APPEALS OF IOWA

No. 1-158 / 10-1010
Filed April 13, 2011

IN RE THE MARRIAGE OF KELLY RAYMOND GENSLEY AND KANDI JEAN GENSLEY

Upon the Petition of

KELLY RAYMOND GENSLEY,
Petitioner-Appellant,

And Concerning

KANDI JEAN GENSLEY,
Respondent-Appellee.

Appeal from the Iowa District Court for Iowa County, Marsha M. Beckelman, Judge.

Kelly Gensley appeals the district court's order refusing to find his ex-wife in contempt of provisions of the dissolution decree involving the summer visitation schedule for their three children. **AFFIRMED.**

Melissa A. Stites Nine of Kaplan, Frese & Nine, L.L.P., Marshalltown, for appellant.

Crystal L.C. Usher of Nazette, Marner, Nathanson & Shea, L.L.P., Cedar Rapids, for appellee.

Considered by Vogel, P.J., and Doyle and Tabor, JJ.

TABOR, J.

Kelly Gensley appeals the district court's order refusing to find his ex-wife in contempt of provisions of the dissolution decree involving the summer visitation schedule for their three children. Because the district court did not grossly abuse its discretion in determining Kelly failed to meet his burden of proof, we affirm.

I. Background Facts and Proceedings.

The Gensleys were divorced in October 2008. The dissolution decree granted Kandi Gensley sole legal custody and physical care of the couple's three children. At the time of the dissolution, their older daughter was in ninth grade, their son was in seventh grade, and their younger daughter was in third grade. The decree allowed Kelly visitation, including fourteen consecutive days during the children's summer vacation. In response to motions filed pursuant to Iowa Rule of Civil Procedure 1.904(2), on December 9, 2008, the district court amended the decree, granting Kelly an additional one-week summer visitation with the children, which was not to be exercised consecutively to the fourteen days already provided.

On September 1, 2009, Kelly applied for an order to show cause why Kandi should not be held in contempt for denying Kelly his third week of summer vacation. Kelly alleged specifically that Kandi "failed to allow [him] to pick up the children on August 9, 2009 for his summer visitation." The district court

considered the show-cause action at a hearing on December 16, 2009.[1] On June 1, 2010, the court filed an order finding that Kelly did not carry his burden to prove that Kandi was in contempt of the court's decree regarding summer visitation. Kelly now appeals.

II. Legal Standards for Contempt of Dissolution Decree

Contempt proceedings under Iowa Code chapter 598 (2009) are primarily punitive in nature. *In re Marriage of Swan,* 526 N.W.2d 320, 327 (Iowa 1995). A court *may* cite and punish a person who willful disobeys a provision of a final decree for contempt under Iowa Code section 598.23, but is not required to do so in every case where the elements of contempt are met. *Id.*

The party applying for the rule to show cause bears the burden to prove beyond a reasonable doubt that the alleged contemner had a duty to obey a court order and willfully failed to perform the duty. *In re Marriage of Jacobo,* 526 N.W.2d 859, 866 (Iowa 1995). To establish willful disobedience, the applicant's evidence must demonstrate

> 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.

Gimzo v. Iowa Dist. Ct., 561 N.W.2d 833, 835 (Iowa Ct. App. 1997).

When proving the alleged contempt depends on interpreting provisions in the dissolution decree, the "decree is construed like any other written instrument." *In re Marriage of Lawson*, 409 N.W.2d 181, 182 (Iowa 1987). The

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[1] The district court also heard evidence in support of Kandi's application for a rule to show cause why Kelly should not be held in contempt for routinely returning the children late from visitations. Kandi's action is not the subject of this appeal.

determinative factor is the intent of the court granting the decree, as can be gathered from the document's four corners. *In re Marriage of Anderson*, 451 N.W.2d 187, 191 (Iowa Ct. App. 1989). The intent of the parties is not relevant. *In re Marriage of Jones*, 653 N.W.2d 589, 594 (Iowa 2002). Where a "genuine uncertainty" exists as to the meaning of a provision of the decree, resort by the district court to construction is proper. *Serrano v. Hendricks*, 400 N.W.2d 77, 79 (Iowa Ct. App. 1986).

III. Scope of Appellate Review

Our standard of review is somewhat unique in contempt cases. *Swan*, 526 N.W.2d at 326. If the district court finds a party in contempt, we review to see if substantial evidence supports the factual findings. *Id.* at 327. But we observe a different standard when the district court refuses to hold a party in contempt. *Id.* Because the district court is not required to hold a party in contempt even when the elements are met, we accord the court broad discretion. *Id.* We will not reverse unless the district court "grossly abused" its discretion. *Id.*

IV. The District Court Properly Exercised its Discretion in Denying Contempt

The fighting issue in the contempt action was the dispute between Kelly and Kandi regarding the interpretation of a summer visitation provision added to the dissolution decree following rule 1.904(2) motions. The following language appears in the district court's December 9, 2008 ruling amending paragraph 3(d) of the decree:

> Kelly is granted an additional one week of summer vacation with the children which shall not be consecutive to the 14 consecutive days referred to above. The notification procedure for this additional one-week period shall be the same as the procedure set forth above for the 14 consecutive days.

The original paragraph 3(d) in the decree provided as follows:

> The parties shall each be entitled to 14 consecutive days of time with the children during their summer vacation from school that is not interrupted by the other party's right to visitation or physical care except if it falls during a holiday in which event the holiday visitation schedule shall always take precedence. They shall schedule this time so that it does not prevent the children from participating in their organized summer activities, and shall give each other notice of when they wish to exercise this summer care every year by May 1. In the event of a scheduling conflict, Kelly shall have priority in odd-numbered years and Kandi shall have scheduling priority in even-numbered years.

The following series of events prompted Kelly to file his application to show cause. On April 30, 2009, at 5:46 p.m., Kandi sent an e-mail to Kelly notifying him that she would be "exercising [her] 14 days during the summer starting on August 5th through August 18th." Also on April 30, 2009, at 11:58 p.m., Kelly sent Kandi an e-mail indicating that he planned June 28 through July 12 as his fourteen consecutive days with the children. In the same e-mail, Kelly indicated his intent to take August 9 through August 16 as his third week of summer visitation.

In ensuing e-mails, the parties staked out their positions and threatened each other with contempt actions.[2] Kandi expressed her view that Kelly's

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[2] The district court noted the excessive number of contempt actions that both sides had filed following the dissolution and opined that the matter had taken on "a life of its own" because of the parents' inability to communicate with each other. The court told the parties:

scheduling priority in odd-numbered years set out in the original decree did not apply to his third week of visitation added in the December 9, 2008 order. She interpreted the term "notification procedure" in the amended paragraph as referring only to the notification deadline of May 1. For his part, Kelly insisted that he would take his third week of visitation as indicated in his original e-mail. Faced with this impasse, Kandi consulted with her attorney regarding the visitation provisions and then decided to follow through with her plans to take the children to the Iowa State Fair, where they had 4-H exhibits. Kelly testified that he went to Kandi's residence on August 9, 2009, only to find "nobody home." In Kelly's application for rule to show cause he alleges that Kandi was in contempt for her failure to allow him to have priority in scheduling all three weeks of his summer visitation with the children in 2009, an odd-numbered year.

In refusing to find Kandi in contempt, the district court observed that in the amended decree:

> The trial court . . . only addressed that Kelly would have to give notification to Kandi by May 1st of when he wished to exercise his third week of summer time with the children. It was not made explicit that Kelly was also to have priority in odd-numbered years in selecting when his third week of summer visitation would take place. Had the trial court wanted Kelly to have priority for the third week of his summer visitation, the trial court could have so provided.

The district court went on to determine that the amended decree did not expressly provide that Kelly's third week of visitation would take precedence over

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> I exhort you, for the benefit of the children, to use some common sense. Use some civility in working these things out because otherwise it's going to end up damaging your children irreparably. It has to stop. I mean, folks, look at this file. It has to stop. Please.

Kandi's two weeks of uninterrupted time. Rather, the court concluded that the third week was "subject to reasonable negotiation, compromise, and agreement by the parties, upon compliance with the May 1st notification requirement."

In construing a dissolution decree, we give force and effect to every word if possible. *In re Marriage of Brown*, 776 N.W.2d 644, 651 (Iowa 2009). The key words used by the court in adding Kelly's third week of visitation were "notification procedure." The question is whether this phrase referred only to the May 1 deadline for the parents to provide notice of their desired dates, which was set out in the decree's original paragraph 3(d), or whether it also incorporated the procedure to be used in the event of scheduling conflicts. We find the phrase "notification procedure" to be limited to the May 1 deadline. Had the court intended to pull in the odd-and-even-year priority scheme, it would have referred to the "notice and priority" provisions and not just the "notification procedure." A drafter's intent may be expressed by omission as well as by inclusion. *North Iowa Steel Co. v. Staley*, 253 Iowa 355, 357, 112 N.W.2d 364, 365 (1961). Indeed, in an earlier paragraph of the court's December 9, 2008 ruling, amending the original decree, the court expressly ordered the parents to alternate Christmas vacation dates between even- and odd-numbered years. This difference shows that the drafting court knew how to be precise where it intended the alternating year procedure to apply. *Cf. State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.,* 694 N.W.2d 518, 531 (Iowa 2005) (noting the legislature knew how to limit provisions of act where it intended to do so).

Contrary to Kelly's argument on appeal, we do not find that it "defies common sense to even suggest the trial court intended for Kelly's chosen dates to take precedence in the odd-numbered years only as it relates to two of his three weeks of court-ordered summer visitation." The drafting court could have reasonably believed that where there existed a symmetry between the parents' time with the children, a schedule of alternating years would help resolve potential conflicts, but where only Kelly was awarded the extra week of summer visitation, it was incumbent on the parties to reach a mutually agreeable time which did not infringe on Kandi's fourteen uninterrupted days with the children. We find the district court's interpretation of the summer visitation provision comports with the intent of the judge who issued the original and amended decrees.

Moreover, even if the district court misinterpreted the first court's intent in amending the dissolution decree, the vagueness of the summer visitation provision would negate any willfulness on Kandi's part in taking the children to the State Fair during her designated fourteen-day period. *See Wurpts v. Iowa Dist. Ct.,* 687 N.W.2d 286, 290—91 (Iowa Ct. App. 2004) (holding that because court order was unclear on amount of visitation required, father did not show mother willfully violated order). We conclude that the district court did not grossly abuse its discretion in concluding that Kelly fell short of proving Kandi willfully violated the visitation provisions in the amended dissolution decree.

Because we determine that Kandi was not in contempt of the dissolution decree, we deny Kelly's request for appellate attorney fees. *See* Iowa Code §

598.24; *Hankenson*, 503 N.W.2d at 434. Kandi also requests an award of appellate attorney fees. We deny that request because section 598.24 does not authorize taxation of the claimed contemner's fees against the party seeking a contempt finding. The costs of this appeal are taxed to Kelly.

AFFIRMED.