

IN THE COURT OF APPEALS OF IOWA

No. 3-982 / 13-0494
Filed December 5, 2013

**IN RE THE MARRIAGE OF MELISSA ANN LUDWIG
AND PETER GERARD LUDWIG**

**Upon the Petition of
MELISSA ANN LUDWIG,**
Petitioner-Appellee,

**And Concerning
PETER GERARD LUDWIG,**
Respondent-Appellant.

Appeal from the Iowa District Court for Dubuque County, Thomas A. Bitter, Judge.

Peter Ludwig appeals from the economic provisions of the decree dissolving his marriage to Melissa Ludwig. **AFFIRMED.**

Natalia H. Blaskovich of Reynolds & Kenline, L.L.P., Dubuque, for appellant.

Robert L. Sudmeier of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellee.

Considered by Vogel, P.J., Mullins, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MAHAN, S.J.

Peter Ludwig appeals from the economic provisions of the decree dissolving his marriage to Melissa Ludwig, claiming the property division is inequitable. He also appeals the district court's dismissal of his application for rule to show cause, arguing Melissa intentionally interfered with his visitation rights. Finally, he argues the district court abused its discretion in denying his request for trial attorney fees. Both parties request they be awarded their appellate attorney fees.

I. Background Facts and Proceedings.

Melissa and Peter were married in 1992 and have two minor children. Melissa filed a petition to dissolve the marriage in 2010. The parties agreed on the matters of child custody and support, as well as the division of most of their property, and a partial decree memorializing this agreement was entered August 14, 2012. Three issues were left for the court to decide: how to allocate a \$27,760 debt owed to Melissa's parents and a \$13,515 overdraft loan from Wells Fargo, the amount of any equalization payment that may be necessary, and whether to award attorney fees.

Before the court settled the remaining issues in the dissolution action, Peter filed an application for rule to show cause that alleged Melissa was violating the court's August 14, 2012 decree in several respects. Specifically, Peter alleged Melissa failed to inform and include him in the children's medical treatment, intentionally scheduled parent-teacher conferences during his visitation, forced the children to act as the parties' go-between by refusing to

communicate with him, and unreasonably refused to accommodate his request to extend visitation by fifteen minutes on one occasion.

On January 23, 2013, the court issued a supplemental decree on the remaining dissolution issues and ruled on Peter's application for rule to show cause. The court reviewed the net assets awarded to both parties in the August 14, 2012 decree and found Melissa received \$347,030.42 in net assets while Peter received \$128,523.37. The court then ordered Melissa to be solely responsible for both the debt to her parents and the Wells Fargo overdraft loan—which total \$41,275—because it was unable to determine how the funds were used. It then ordered Melissa to pay Peter \$88,616 to equalize the property settlement. Neither party was awarded attorney fees.

With respect to Peter's application for rule to show cause, the court had "no doubt" Melissa intentionally tried to limit Peter's contact with and information about the children. The court found that although these acts could support a modification action, they did not violate a court order and therefore did not support a finding of contempt. The court found the only act that violated the decree was the scheduling of a parent-teacher conference during Peter's visitation. However, the court was unable to find that violation was intentional and could be avoided. Accordingly, the court dismissed the application for rule to show cause.

Peter filed a motion to enlarge or reconsider pursuant to Iowa Rule of Civil Procedure 1.904(2). He argued that in addition to requiring Melissa to be solely responsible for the debt owed to her parents and the Wells Fargo loan, the court should find the debts were non-marital and allocate them only to Melissa. On

this basis, he asked the court to increase the equalization payment by \$20,637.50. Peter also asked the court to find Melissa in contempt and award him reasonable attorney fees and costs. In its March 7, 2013 order, the court denied these requests.

II. Property Division.

We review dissolution of marriage actions de novo. *In re Marriage of McDermott*, 827 N.W.2d 671, 676 (Iowa 2013). We examine the entire record and adjudicate property rights anew. *Id.* While they are not binding, we give weight to the trial court's fact findings, especially with regard to witness credibility. *Id.* We will only disturb the district court's ruling if there has been a failure to do equity. *Id.*

Peter first contends the property distribution is inequitable because the total property award favors Melissa by \$41,275. Although the court ordered Melissa to assume responsibility for the loan from her parents and the balance on the overdraft fund, Peter argues that court distributed the property in a manner that makes him responsible for the two debts, which total \$41,275—the amount of the discrepancy in the parties' net property awards. In order to balance the equities, Peter asks us to increase the equalization payment by \$20,637.50, which would leave the parties with an equal amount of property.

Iowa is an equitable-distribution state, and marital property is to be divided equitably after considering the factors set forth in Iowa Code section 598.21(5) (2011). *Id.* at 678. However, Iowa courts do not require an equal division or percentage distribution. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001). Rather, the court determines what is fair and equitable in each

circumstance, giving both parties a just and equitable share of the property that has been accumulated through their joint efforts. *Id.*

In order to accept Peter's argument that an increase in the equalization payment is warranted, the debts owed to Melissa's parents and Wells Fargo loan would have to be considered non-marital. Although the court found the debts should be assumed by Melissa, nothing in its order categorizes them as non-marital. The court specifically found ambiguities in these debts making it impossible to conclude they were non-marital. Furthermore, the court subsequently denied the portion of Peter's motion to enlarge and reconsider that asked the court to find the debts are non-marital.

We find the equalization payment ordered in the supplemental decree is equitable. The district court found Melissa should be solely responsible for these debts and ordered her to indemnify and hold Peter harmless as to both. Holding Peter harmless means Peter is not liable to Melissa if Melissa fails to repay the debts; it does not make the debts non-marital. When the debts are included in the division of marital property, there is a \$177,232.05 discrepancy in the amount of net property awarded Melissa and the amount awarded Peter. The court ordered Melissa to pay one-half this amount—\$88,616—to Peter to equalize the property distribution. The property distribution is equitable.

III. Contempt Action.

Peter also contends Melissa should be found in contempt. He argues that Melissa intentionally interfered with his court-ordered visitation by scheduling parent-teacher conferences during his visitation time. Combined with what he

alleges is Melissa's overall pattern in interfering with her relationship with the children, he argues a finding of contempt is amply supported.

Contempt actions are essentially criminal in nature; each element must be established beyond a reasonable doubt. *In re Marriage of Schradle*, 462 N.W.2d 705, 709 (Iowa Ct. App. 1990). Our review of the trial court's refusal to hold a party in contempt in a dissolution proceeding is not de novo. *In re Marriage of Hankenson*, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993). Instead, we review the record to determine whether substantial evidence supports the trial court's findings. *Id.* "The decision of the trial court will not be lightly reversed." *Id.*

A person who willfully disobeys a court order may be cited and punished for contempt. Iowa Code § 598.23. In order to find a party willfully disobeyed, the conduct must be "intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of other, or contrary to a known duty, or unauthorized coupled with an unconcern whether the contemnor had the right or not." *Schradle*, 462 N.W.2d at 709. A failure to follow a court order is not willful if the contemnor shows the order was indefinite or if the contemnor was unable to comply with the order. *Ary v. Iowa Dist. Ct.*, 735 N.W.2d 621, 624 (Iowa 2007).

Peter's application for rule to show cause alleges four counts. He argues Counts I, III, and IV allege instances of Melissa's refusal to support and foster his relationship with the children in violation of Iowa Code section 598.41(5)(b). But a violation of the statute is insufficient to support a finding of contempt. See Iowa Code § 598.23 (defining contempt as willful disobedience of a court order). Peter argues that although the language of the decree does not specifically address Melissa's duties as the children's physical caretaker, the decree "necessarily

invoked the requirements of Iowa Code section 598.41.” By declaring his argument is a “novel” one, Peter admits there is no case law to support his position.

We conclude Melissa cannot be held in contempt for failing to adhere to the duties set forth in section 598.41(5)(b). While there is no direct case law on this point, the court’s ruling in *In re Marriage of Hansen*, 733 N.W.2d 683, 701 (Iowa 2007), though largely dicta, is instructive. Due to problems between the parties, the district court specifically listed the responsibilities of the parties for the types of decisions that are inherent in joint custody awards pursuant to section 598.41(5)(b), such as which party would be responsible for determining the children’s religious affiliation. *Hansen*, 733 N.W.2d at 701. The supreme court noted the inclusion of such provisions in the decree raised “the possibility of contempt in the event of violation.” *Id.* The court made no similar provisions in the Ludwigs’ decree, and we find the general provisions of section 598.41(5)(b) cannot support a contempt finding.

We also conclude substantial evidence supports the court’s finding that Peter failed to prove Melissa intentionally violated the visitation provisions of the decree by scheduling parent-teacher conferences during his scheduled visitation. Melissa testified that she attempted to schedule a conference time for another day for reasons unrelated to Peter’s visitation, but was asked by the teacher to have the conference on the night in question. Because there is insufficient evidence to find beyond a reasonable doubt that Melissa acted intentionally with bad purpose or with wanton disregard to Peter’s visitation rights, we affirm the dismissal of Peter’s application for rule to show cause.

IV. Attorney Fees.

Peter contends the district court abused its discretion in declining to award him his trial attorney fees. See *In re Marriage of Sullins*, 715 N.W.2d 242, 255 (Iowa 2006) (holding the district court's award of attorney fees is reviewed for an abuse of discretion). An award of attorney fees depends on the parties' respective abilities to pay. *Id.* Because the district court declined to award attorney fees after finding both parties are able to pay their own attorney fees, we find no abuse of discretion.

Both parties request their appellate attorney fees be awarded. Such an award is not a matter of right, but rests within this court's discretion. *Id.* In determining whether to award appellate attorney fees, we consider the needs of the party seeking the award, the other party's ability to pay, and the relative merits of the appeal. *Id.* We decline to award either party appellate attorney fees. Costs of the appeal are taxed to Peter.

AFFIRMED.