

IN THE COURT OF APPEALS OF IOWA

No. 6-769 / 03-2097
Filed November 16, 2006

WAYLON R. ARY,
Plaintiff,

vs.

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

IN RE MARRIAGE OF SARA J. ARY AND WAYLON D. ARY

**Upon the Petition of
SARAH J. ARY,**
Petitioner-Appellee,

**And Concerning
WAYLON D. ARY,**
Respondent-Appellant.

Appeal from the Iowa District Court for Benton County, William L. Thomas,
Judge.

Appellant challenges the district court's orders in contempt proceedings.

WRIT SUSTAINED IN PART AND ANULLED IN PART.

Waylon Ary, Belle Plaine, pro se.

Crystal Usher of Nazette, Marner, Wendt, Knoll & Usher, L.L.P., Cedar
Rapids, for appellee.

Considered by Sackett, C.J., and Vaitheswaran, J., and Brown, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

SACKETT, C.J.

The district court found Waylon in contempt for his failure to pay certain amounts the court found he was ordered to pay under the 1997 decree dissolving his marriage to his former wife, Sara J. Ary. The court denied Waylon's application to have Sara found in contempt for failing to provide two children for visitation and not allowing Waylon to claim certain of the children as income tax exemptions. The Iowa Supreme Court granted Waylon's petition for a writ of certiorari from this holding. He claims his writ should be sustained because the district court (1) erred in finding his failure to pay was willful, (2) applied an unreasonable punishment, (3) failed to find Sara in contempt for her violations of the decree, and (4) erred in awarding Sara attorney fees. We affirm in part; the writ is annulled in part and affirmed in part.

I. Scope of review

Contempt proceedings under Iowa Code chapter 598 (2003) are reviewed at law, not de novo. *Sulma v. Iowa Dist. Ct.*, 574 N.W.2d 320, 321 (Iowa 1998); *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995). The question is whether the district court acted illegally or without jurisdiction. *Madyun v. Iowa Dist. Ct.*, 544 N.W.2d 441, 443 (Iowa 1996). If it is claimed that a ruling is not supported by substantial evidence, we examine the record, not de novo, but to assure ourselves the proper proof supports the judgment. *In re Marriage of Spears*, 529 N.W.2d 299, 304 (Iowa Ct. App. 1994). We are not bound by the trial court's conclusions of law and may inquire whether the trial court applied erroneous rules of law that materially affect its decision. *Id.*

A person who has willfully disobeyed the provisions of a dissolution decree may be found in contempt pursuant to section 598.23(1) (2003). The order creating the duty in question must be clear and unambiguous. See *Copic v. Iowa Dist. Ct.*, 356 N.W.2d 223, 226 (Iowa 1984). The remedies available to the court when a person willfully disobeys a decree include the imposition of sanctions or specific requirements. Iowa Code § 598.23(2)(d). In order for the court to impose such remedies, it must have found proof beyond a reasonable doubt that a party willfully violated the decree. See *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 824 (Iowa 1996).

II. Background

The parties' 1997 dissolution decree placed custody of the parties' three children, now age sixteen, fourteen, and nine, with Sara. Waylon was given specific visitation, including every other weekend and two hours during the week. Waylon was ordered to pay child support, maintain medical and dental insurance for the children as long as it was available to him through his employer, and pay one-half of uninsured medical and dental costs within thirty days of receiving written notice from Sara. If Waylon was current with his support obligation as of December 31 of any year, he was to be able to claim certain of the children as dependents for income tax purposes. The property consisting primarily of the parties' personal residence, motor vehicles, and minimal checking and pension accounts was divided. Waylon was ordered to pay an equalization payment within sixty days of the decree as well as \$2,000 to Sara's attorney.

III. Visitation

Waylon has not been exercising visitation with the older two children. He contends it is because Sara has not made the children available and has encouraged them not to want to go with him. Sara says that Waylon does not ask for the two older children and that the children do not want to go. In denying Waylon's application, the district court found Sara did not do anything to interfere with Waylon's relationship with the children. Rather, he was responsible for the problems. Because we review at law, we affirm this finding and annul the writ as to this issue. However, for the sake of these children it would appear the parties' should each make a greater effort to assure that Waylon has a place in these children's lives.

IV. Contempt citation against Waylon

Waylon basically contends he should not be found in contempt for failing to pay a property settlement of \$6,753.05, \$2,000 in attorney fees, and \$916.88 in medical expenses, because his failure to pay was not willful.

Sara has shown Waylon has a duty to obey a court order; consequently, the burden shifts to Waylon to produce evidence suggesting the violation was not willful—either by establishing the order was indefinite or that he is unable to pay as ordered. See *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). However, Sara retains the burden to prove willfulness beyond a reasonable doubt. *Id.*

Waylon advanced at trial, among other things, that he is unable to pay because the dissolution and his current child support obligations leave him without sufficient funds to do so. He points out that in dividing property, the district court

valued the parties' residence at \$40,000, gave it to Waylon, and ordered him to pay the indebtedness on the house of \$31,680. He further contends he was unable to make house payments and a foreclosure action was commenced, harming his credit rating and making borrowing impossible. The evidence shows the house was on the market for two years and finally sold for \$25,000. In the dissolution decree the district court had concluded that with the house valued at \$40,000, Waylon was receiving \$16,685 in property, less the \$6,753 he was ordered to pay Sara, which would have left him with a net worth of a little less than \$10,000. There was no value in the house. Consequently, he received little if anything of value as a result of the division of assets.

Waylon also contends that in calculating his child support at \$648.38, the district court considered he would receive overtime pay, which he no longer receives. The child support is withheld from his wages and he appears to be current.

While correctly dismissing Waylon's contention his responsibility for paying the property settlement was contingent on being paid from the proceeds of the house, the court made no finding that Waylon had the ability to pay the amount ordered, nor is there a finding he has the ability to pay the attorney fees and medical bills. Waylon testified he could not pay monies in addition to the child support that is withheld from his payroll check and the record is void of any evidence showing he has that ability to do so.

The district court sentenced Waylon to thirty days in the custody of the sheriff of Benton County for the violations, but allowed him to purge himself of the contempt

if he presented an acceptable plan of payment in thirty days. If he failed to submit a plan, he would be directed to surrender to jail without further notice.

There is no evidence Waylon has the ability to pay the amount due at this time. In fact, the only evidence is that he cannot. While the district court provided that Waylon could purge himself of this offense by submitting an acceptable payment plan, there being no direction as to what plan would be accepted, we cannot determine if Waylon would have the ability to pay according to the plan. Consequently, we partially affirm the writ on this basis. In doing so, we note our finding does not affect the judgment for attorney fees and property settlement that came as a result of the dissolution decree.

V. Contempt against Sara

Waylon contends Sara should be held in contempt because she failed to allow him to take the income tax exemptions for the years he was current with his child support, as provided for in the dissolution decree. The district court found that as long as he had unpaid medical bills, they were part of the child support, so Sara was correct in her position. Waylon has failed to meet the necessary burden to show that Sara is in contempt on this issue.

V. Attorney fees for this action

We address Waylon's claim the district court improperly awarded Sara attorney fees under section 598.24. Section 598.24 permits a court to award attorney fees when a contempt action is brought and a party is found in default or contempt of a dissolution decree. Waylon was found in default of the parties' decree; consequently, we find the statutory requirements for an award of attorney

fees were met. Accordingly, we affirm on this issue and deny Waylon's request for attorney fees.

WRIT SUSTAINED IN PART AND ANULLED IN PART.

Brown, S.J., concurs in part and dissents in part.

BROWN, S.J. (concurring in part and dissenting in part)

I concur in the majority opinion in all respects except I respectfully dissent from division IV. That division upholds the writ of certiorari as to the district court's finding that Waylon Ary was in contempt of court and the punishment for that contempt.

The district court's ruling found Waylon was "in contempt for his willful failure to" pay the property settlement equalization ordered by the 1997 marriage dissolution decree; that he was "in contempt for his willful failure" to pay the attorney fees ordered by that decree, and that he was in contempt for failing to pay accrued medical bills. Although Waylon complains that his failure to pay these amounts was not willful, the court expressly found it was in the first two instances, and it is clearly implied in the third. In our review for legal error, the issue is whether this finding that Waylon's actions were contemptuous beyond a reasonable doubt is supported by substantial evidence.

The dissolution decree required Waylon to pay \$6,753.05 to equalize the property distribution. Although the sale of the parties' residence did not yield the amount expected, the district court correctly determined the order to pay was unconditional. Waylon admitted he had paid nothing toward this amount, citing the disappointing house sale as his reason.

The decree also required Waylon to pay \$2,000.00 toward Sara's attorney fees. He admitted he has paid nothing toward that obligation. The only reason he gave was that he had never gotten a bill from the attorney.

Waylon also admitted he had paid nothing toward the medical expenses of \$916.88, also required by the decree, His explanation was that Sara had lied about

some child support payments at an earlier hearing and that justified his not paying the medical bills provided him by Sara.

The record demonstrates Waylon's decision regarding each of these failed obligations was based on some self-help rationale he had developed, not on his inability to pay them. The only evidence in the record regarding his inability to pay is his testimony that he didn't have the money, demonstrated by his living with his parents (an arrangement he said he intended to end). There is no evidence of his present expenses or the total of his income, other than his hourly wage.

An important indication of his willfulness in withholding payments of these items is the fact Waylon has paid *nothing* toward them over a considerable period of time. He has not claimed he could not have made some payment over the years, and indeed any such claim would be disingenuous.

Considering all the evidence, it is clear to me that Waylon made no payments on these items because he felt he should not have to. Of course, dissatisfaction with terms in a court's decree is not an excuse for nonperformance. *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 825 (Iowa 1996).

The district court imposed a jail term as punishment for Waylon's contempt. However, Waylon was given a very reasonable opportunity to purge that punishment by submitting a plan for periodic payments of the sums due. Waylon had made up arrearages before by such payments over time and was familiar with this process. The district court's order demonstrated the court was more concerned with payment than punishment. I believe the sanction imposed was entirely reasonable under these circumstances.

I conclude Waylon failed to produce credible evidence that his failure to pay was not willful, and that substantial evidence supports the district court's contempt ruling and the punishment imposed. Consequently, I would uphold the district court's ruling addressed in division IV of the opinion and annul the writ in its entirety.