

IN THE COURT OF APPEALS OF IOWA

No. 7-709 / 07-0207
Filed January 16, 2008

FRED ABRAHAM,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR
BLACK HAWK COUNTY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister,
Judge.

Fred Abraham challenges by certiorari the district court's dismissal of his application for an order holding his former wife, Jacquelyne Joens, in contempt of court and the court's grant of Jackie's application for an order holding Fred in contempt of court. **AFFIRMED ON DIRECT APPEAL; WRIT SUSTAINED.**

Linda A. Hall of Gallagher, Langlas & Gallagher, P.C., Waterloo, for appellant.

David H. Correll of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellee.

Heard by Sackett, C.J., and Miller and Eisenhauer, JJ.

MILLER, J.

Fred Abraham challenges by certiorari the district court's dismissal of his application for an order holding his former wife, Jacquelyne Joens (Jackie), in contempt of court for alleged violations of provisions of the parties' January 2003 dissolution of marriage decree, and the court's grant of Jackie's application for an order holding Fred in contempt of court for violation of a separate provision of the decree. Jackie seeks appellate attorney fees. We affirm on the direct appeal of the dismissal and sustain the writ of certiorari.

I. BACKGROUND FACTS AND PROCEEDINGS.

Fred and Jackie were divorced on January 24, 2003. They are the parents of two adult children who were both students at the University of Iowa at the time of the contempt hearing. At the time of their divorce, the parties entered into a written stipulation that was incorporated into the decree. The stipulation provided, in relevant part, that Fred would be responsible for paying for the children's college tuition, room and board, books, and student fees, while "Jackie shall be responsible for providing the boys a reasonable monthly allowance." The stipulation further provided that Fred was to maintain health and dental insurance for the children through his employer's insurance plan, and that

All medical, orthodontia, dental, physical therapy, eye care, including glasses or contact lenses, mental health treatment, substance abuse treatment, prescription drugs, and any other medical expenses for the children not covered by the insurance shall be paid 100% by Fred until July 14, 2003 and thereafter 80% by Fred and 20% by Jackie.

On December 7, 2006, Fred filed a contempt action against Jackie alleging she had failed to pay the boys a "reasonable monthly allowance" and

had not paid the twenty percent of uninsured medical expenses for the boys she was responsible for, both in violation of the parties' decree. On January 3, 2007, Jackie filed a contempt action against Fred alleging he was in violation of the parties' decree for failing to reimburse her for eighty percent of the cost of allergy medicine she had purchased for both the boys to use. On January 9, 2007, a combined hearing was held on both contempt actions. On the date of the hearing Jackie paid the twenty percent of uninsured medical expenses she owed to Fred and thus that portion of Fred's contempt action was remedied and is not at issue in this appeal.

The district court entered a written order on January 10, 2007, on the remaining two issues. The court declined to find Jackie in contempt, finding that what a "reasonable" amount would be is not stated in the stipulation and concluding that "[w]hat is 'reasonable' is too indefinite and uncertain to form the basis for a contempt citation because there are many factors which will cause a student's personal expenses to vary from the university's estimate." It further suggested that what a "reasonable" monthly allowance for the boys would be should be fixed by stipulation of the parties, or by a modification of the decree if necessary. The court dismissed Fred's contempt application.

The court found Fred was in contempt of court for not paying his eighty percent share of the expenses for the boys' allergy medicine. It found the plain meaning of the stipulation was that the out-of-pocket expenses for any and all of the children's medical needs were to be paid eighty percent by Fred and twenty percent by Jackie, and the over-the-counter allergy medicine needed to treat the

boys' allergies was a "medical expense" not covered by insurance as expressly provided for in the parties' stipulation. The court noted that had the parties wanted to exclude such things as over-the-counter medications in their stipulation they were free to do so but had not.

Fred challenges both the district court's dismissal of his application to hold Jackie in contempt and the court's finding he was in contempt.¹ More specifically, he contends the court erred in finding the term "reasonable monthly allowance" was too ambiguous to support a finding of contempt, and that uncovered "medical expenses" includes over-the-counter medications. Jackie seeks appellate attorney fees.

II. MERITS.

A. Dismissal of Fred's Contempt Application.

Fred first contends the district court erred in finding the term "reasonable" was too indefinite and uncertain to form the basis for finding Jackie in contempt of the stipulated decree and dismissing Fred's contempt application.

When a trial court refuses to hold a party in contempt in a dissolution proceeding, our review is not de novo. Instead, we review the record to determine if substantial evidence exists to support the trial court's finding.

¹ Fred filed a petition for a writ of certiorari with our supreme court asking the court to review the district court's rulings. After noting that an appeal from a finding of contempt is a matter subject to certiorari review, Iowa Code section 665.11 (2007), while an appeal from a dismissal of a contempt application can be appealed directly as a matter of right, *State v. Iowa Dist. Court*, 231 N.W.2d 1, 4 (Iowa 1975), the supreme court granted Fred's certiorari petition. Although we believe a direct appeal should properly have been taken from the dismissal of Fred's contempt action, separate from and in addition to his certiorari petition on the grant of Jackie's application, we shall proceed as though the proper form of review was sought in accordance with Iowa Rule of Appellate Procedure 6.304.

An individual may not be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. 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)

(internal citations and quotations omitted).

“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. Court, 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 the willfulness issue,

however, remains on the person alleging contempt, *id.*, who must prove

willfulness beyond a reasonable doubt. *Christensen v. Iowa Dist. Court*, 578

N.W.2d 675, 678 (Iowa 1998). 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. *Id.*

What a “reasonable” monthly allowance should consist of is not defined in

the parties’ stipulation. We agree with the district court that without such a definition the term is too indefinite and uncertain to support a finding of contempt.

Although it is clear from the stipulation that Jackie had some obligation to provide

the boys some sort of monthly allowance, it is not at all clear what amount it

should be or what form it should take. The evidence shows that Jackie did

provide some support for the boys, including buying them a car to use at college

and providing them with money for gas. Thus, Fred's argument that she was in violation of this provision of the decree because she was providing the children with nothing at all is without merit.

Accordingly, we conclude substantial evidence supports the district court's determination Fred did not prove beyond a reasonable doubt that Jackie willfully violated the parties' stipulated decree. The court did not err in dismissing Fred's contempt application.

B. Grant of Jackie's Contempt Application.

Fred next contends the district court erred in finding that the term "medical expenses for the children not covered by the insurance" in the parties' stipulation included the cost of an over-the-counter allergy medication, Drixoral, for the children, and that he was thus in contempt for not paying his eighty percent share of the cost of that medication as required under the stipulation. More specifically, he argues it is clear from the stipulation that the language in question must be narrowly defined to include only prescription medications which would ordinarily be submitted to insurance for payment. He argues that because the language of the stipulation as incorporated into the decree parallels the language of Iowa Court Rule 9.12, and that rule does not include non-prescription drugs, the stipulation should not and does not include them either. In the alternative, Fred argues that if the term "reasonable monthly allowance" is too ambiguous to enforce by contempt, as discussed in detail above, then the court should have found the term "other medical expenses for the children not covered by insurance" too ambiguous to enforce as well.

Certiorari is an action at law; therefore, our review is at law. *Christensen*, 578 N.W.2d at 678. In our review of a certiorari action, we can only examine “the jurisdiction of the district court and the legality of its actions.” *Id.* When the court's findings of fact are not supported by substantial evidence, or when the court has not applied the law properly, an illegality exists. *Amro v. Iowa Dist. Court*, 429 N.W.2d 135, 138 (Iowa 1988).

Fred is correct that the language in the parties' stipulation closely parallels the language in rule 9.12. Rule 9.12 provides, in relevant part, that uncovered medical expenses are “all medical expenses for the child not paid by insurance” and that “[m]edical expenses” shall include “prescription drugs.” The rule does not expressly include non-prescription drugs in its list of “medical expenses,” but does expressly include “prescription drugs.” It is undisputed that Drixoral is an over-the-counter medication and no prescription is generally necessary to purchase it. There was a dispute as to how much Drixoral the boys need per month, and what level of usage might perhaps require a prescription due to the fact Drixoral contains pseudoephedrine. However, based on Fred's testimony regarding what the boys told him about how much they need and what he found out from the pharmacist as to how much a person can purchase per month, it was reasonable for him to believe no prescription would be needed for the medication to meet the boys' needs.

Furthermore, based on the language in question being placed in the stipulation with the other provisions regarding payment of health insurance for the children, it was reasonable for Fred to interpret the disputed language as

including only those medical expenses one would ordinarily submit to insurance for payment or partial payment. Over-the-counter medications are generally not submitted to insurance for payment.

As set forth above, contempt requires proof of willful disobedience of a court order or decree. 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, 542 N.W.2d at 824. The person alleging the contempt has the burden of persuasion on the willfulness issue. *Id.*

Based on the similarity of the language in the stipulation to rule 9.12, the placement of the disputed language in the stipulation, the fact it is undisputed Drixoral is an over-the-counter medication, and the information Fred had regarding the boys' level of use of the medicine and its availability, it was very reasonable for Fred to interpret his eighty percent responsibility for "any other medical expenses for the children not covered by the insurance" as *not* including the cost of the Drixoral. The language in question is at a minimum ambiguous with respect to Fred's obligation. We conclude a finding that Fred acted with a bad or evil purpose, in wanton disregard for the rights of others, or contrary to a known duty in not paying for eighty percent of the cost of the Drixoral is not supported by substantial evidence. Jackie did not meet her burden to prove Fred willfully violated the court's decree.

We conclude the district court's finding of Fred in contempt for not paying eighty percent of the cost of the allergy medicine is not supported by substantial

evidence. The court erred in granting Jackie's contempt application. The writ of certiorari must be sustained.

C. Appellate Attorney Fees.

Jackie requests an award of appellate attorney fees. A court may in its discretion tax reasonable attorney fees against a party found in default or contempt of a dissolution of marriage decree. Iowa Code § 598.24 (2007). We have concluded the district court erred in finding Fred in contempt of court. We therefore deny Jackie's request for an award of appellate attorney fees.

III. CONCLUSION.

We conclude substantial evidence supports the district court's determination that the term "reasonable" was too indefinite to support a finding that Jackie willfully violated the parties' stipulated decree. The court did not err in dismissing Fred's contempt application. We further conclude Jackie did not meet her burden to prove Fred willfully violated the terms of the decree by not paying for eighty percent of the children's allergy medication. Substantial evidence does not support the district court's finding that Fred is in contempt of court. Costs on appeal are taxed one-half to each party.

AFFIRMED ON DIRECT APPEAL; WRIT SUSTAINED.