IN THE COURT OF APPEALS OF IOWA

No. 8-026 / 07-0881
Filed February 27, 2008

IN RE THE MARRIAGE OF LYNDA LOUISE PONTO AND MARK ROGER PONTO

Upon the Petition of
LYNDA L. PONTO, n/k/a
LYNDA L. HAVER,
Petitioner-Appellant,

And Concerning
MARK ROGER PONTO,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Lynda L. Haver appeals the district court's dismissal of her application for an order holding her former husband, Mark Ponto, in contempt of court for allegedly violating the provision of the parties' dissolution of marriage decree requiring Mark to pay a portion of the "post-high school education expenses" for the parties' son. **REVERSED AND REMANDED.**

Theodore F. Sporer and Maegan L. Lorentzen of Sporer & Flanagan, P.C., Des Moines, for appellant.

Kristy B. Arzberger of Arzberger Law Office, Mason City, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

MILLER, J.

Lynda L. Haver appeals the district court's dismissal of her application for an order holding her former husband, Mark Ponto, in contempt of court for allegedly violating the provision of the parties' dissolution of marriage decree requiring Mark to pay a portion of the "post-high school education expenses" for the parties' son. We reverse the judgment of the district court and remand for further proceedings.

I. BACKGROUND FACTS AND PROCEEDINGS.

Mark and Lynda's marriage was dissolved in May 1992 pursuant to a stipulation between the parties. They had one child together, Ezekial, born in December 1987. The parties stipulated they would have joint legal custody of Ezekial and he would be placed in Mark's physical care "based upon the parties' awareness that Lynda will be returning to a post-high school education . . . to continue her professional education." They further stipulated that Lynda would not pay child support for Ezekial while she was pursuing her education. However, they agreed to "re-negotiate the issue of primary custodian" and establish "both parties' financial obligations for the support of Ezekial" "[u]pon completion of [Lynda's] education or if she abandons her efforts therefore." Finally, the parties stipulated, "Mark will pay 70% of the post-high school education expenses for Ezekial. Lynda and Ezekial will contribute to the balance thereof to the extent they are each financially able to do so."

In October 1993, Lynda filed an application to modify the custodial provisions of the parties' dissolution decree. Mark filed a counterclaim,

requesting in relevant part that Lynda be required to pay child support. Prior to the trial, the parties agreed Ezekial should remain in Mark's physical care.

Following the trial, the district court entered an order in September 1995 modifying the dissolution decree. The court ordered Lynda to pay child support for Ezekial until he "marries, dies, or reaches age 18, whichever event shall first occur." However, if "Ezekial is still in high school upon reaching his 18th birthday, . . . the child support obligation shall continue until Ezekial graduates from high school." The order modifying the parties' decree further provided,

> The court retains jurisdiction to consider a further application at the appropriate time to determine whether or not the child support obligation should continue between the ages of 18 and 22 if the child is pursuing a post-high school education, in accordance with Iowa Code section 598.1(2).

Lynda filed a second application to modify the parties' dissolution decree in May 2004. The parties again entered into a written stipulation modifying their decree, which was adopted by the district court in August 2005. They stipulated, in part, that they would share joint physical care of Ezekial, and Lynda would "pay all costs associated with the minor child . . . until such time as [he] attains the age of eighteen (18) years" or until he is nineteen years old provided he "is engaged full-time in completing high school graduation or equivalence requirements." Because Lynda "is of sufficient financial means to provide all necessities for the minor child," the parties agreed neither would pay child support to the other party. However, they decided that should Ezekial "graduate

[from high school] before May 1, 2006, [Lynda] shall be responsible for child support . . . for each month from the month of graduation through May 2006."[1]

Nineteen-year-old Ezekial began attending the University of Iowa as a full-time student in August 2006. Lynda filed a contempt action against Mark in November 2006, alleging he did not pay seventy percent of Ezekial's applicable post-high school education expenses as required by the parties' original dissolution decree. Following a hearing, the district court found Mark was not in contempt. The court entered an order dismissing Lynda's contempt action and awarding Mark $500 in attorney fees.

Lynda appeals. She claims the court "erred by failing to enforce the original stipulation of the parties regarding post-secondary education support." She further claims the court "erred by failing to grant [her] an award of attorney fees in the contempt action." Mark requests an award of appellate attorney fees.

II. SCOPE AND STANDARDS OF REVIEW.

The parties disagree as to the correct standard of review in this matter. Our standard of review in contempt actions is "somewhat unique." *In re Marriage of Swan*, 526 N.W.2d 320, 326 (Iowa 1995). "If there has been a finding of contempt, we review the evidence to assure ourselves that the court's factual

[1] Mark and Lynda also agreed "that each party is hereby released and has satisfied and paid their respective child support obligation due and owing," and "each party is released from any further responsibility as it pertains to any past due child support." Mark argues this provision released him from any obligation he may have had under the parties' original dissolution decree because "the law in 1992 and 1995 did not differentiate between child support and post-high school education subsidy." This argument was neither presented to nor passed upon by the district court. *See Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) ("Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal."). We therefore need not and do not separately address this argument on appeal. *See Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000) (stating we may consider whether error was preserved despite opposing party's omission in not raising the issue of error preservation on appeal).

findings are supported by substantial evidence. The district court's legal conclusions are reviewed for errors of law." *Id.* at 326-27 (internal citations omitted).

However, a different standard of review is applied where the appeal, as here, is from a court's refusal to hold a party in contempt under a statute that allows for some discretion. *Id.* at 327. The statute at issue in this case is Iowa Code section 598.23(1) (Supp. 2005), which provides, "If a person against whom a . . . final decree has been entered willfully disobeys the . . . decree, the person *may* be cited and punished by the court for contempt." (Emphasis added). Under a statute such as this, the district court has "broad discretion" and may "consider all the circumstances, not just whether a willful violation of a court order has been shown, in deciding whether to impose punishment for contempt in a particular case." *Id*. Unless this discretion is "grossly abused," the court's decision must stand. *Id.*

"We find such an abuse when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Schettler v. Iowa Dist. Court*, 509 N.W.2d 459, 464 (Iowa 1993). "'Unreasonable' in this context means not based on substantial evidence." *Id.*; *see also In re Marriage of Hankenson*, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993) ("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." (internal citations omitted)).

III. MERITS.

Lynda claims the district court erred in finding that "[s]ince no order currently exists requiring [Mark] to pay college expenses, [he] cannot be held in contempt for his failure to pay the same." She argues the provision in their original dissolution decree requiring Mark to pay seventy percent of Ezekial's post high school education expenses was not modified by either of the two orders modifying the decree. We agree.

In dismissing Lynda's contempt application, the district court found "that at no time since the entry of the dissolution Decree was [Mark's] child support obligation, relating to payment of post-high school expenses, reinstated." We think it is clear, however, that (1) neither the original decree nor either of the two orders modifying the decree considered Mark's obligation to pay seventy percent of Ezekial's post-high school education expenses to be "child support" and (2) niether of the two modification orders relieved Mark of that obligation.

A dissolution decree or an order modifying such a decree "should be construed in accordance with its evident intention" as gathered from all parts of the decree. *In re Marriage of Goodman*, 690 N.W.2d 279, 283 (Iowa 2004). "Effect is to be given to that which is clearly implied as well as to that which is expressed." *Id.* However, in determining the court's intent, we "take the decree by its four corners and try to ascertain from it the intent as disclosed by the various provisions of the decree." *Id*. We do not give the trial court's interpretation of the original and modification decrees made by a judge other than the judges who entered those decrees the great weight we would accord

interpretations by the judges who entered them. *In re Marriage of Gibson*, 320 N.W.2d 822, 823 (Iowa 1982).

Applying these principles, we are convinced the district court did not intend to modify Mark's responsibility for Ezekial's post-high school education expenses in its September 1995 modification order. The original decree adopted the parties' stipulation, which dealt with "child support" in numbered paragraph 20, and provided for no child support, and dealt with "post-high school education expenses" in numbered paragraph 24, and provided for Mark's obligation to pay a portion of such expenses. In paragraph 4 of the 1995 order, the court ordered Lynda to pay "child support" for Ezekial. In that same paragraph, the court retained jurisdiction to consider "a further application at the appropriate time" for a determination of whether "*the* child support obligation should continue between the ages of 18 and 22 if the child is pursuing a post-high school education, in accordance with Iowa Code section 598.1(2)." (Emphasis added). The court's reference to "post-high school education" appears solely in the context of discussing Lynda's child support obligation, which the court contemplated could continue if Ezekial elected to continue his education beyond high school.[2] Mark's responsibility for Ezekial's post-high school education expenses was not

[2] The version of section 598.1(2) (1993) in effect when Lynda filed her petition to modify the parties' dissolution decree defined "dissolution of marriage" rather than "support." We note, however, that the 1991 code defined "support" in section 598.1(2). The legislature amended section 598.1 in 1993 and moved the definition of "support" contained in subsection (2) to subsection (6). Section 598.1(6) defined "support" to include "support for a child who is between the ages of eighteen and twenty-two years who is . . . a full-time student in a college, university, or community college." Thus, at the time of the first modification, a party's child support obligation could continue beyond the age of nineteen for a child who was pursuing a "post-high school education." *But see In re Marriage of Pals*, 714 N.W.2d 644, 647 (Iowa 2006) ("In 1997, the legislature amended section 598.1(6) to remove the postsecondary-support clause from the definition of support, redefined support to terminate at age nineteen, and enacted a separate statute to provide for a postsecondary education subsidy by both parents.").

referred to in that paragraph or anywhere else in the order. Furthermore, the court's modification order also declared, "Except as specifically modified by this order, the original decree shall be given full force and effect."

Mark's post high school education expenses obligation also was not mentioned in the August 2005 modification order, which likewise provided "that all other provisions of the original Decree and subsequent modifications shall remain unchanged." The district court incorrectly found that in "[t]he August modification order . . . the Court retained jurisdiction to determine payment for post-high school expenses." In fact, as the parties acknowledge, the August 2005 modification order did not in any manner mention or address the issue of post-high school education expenses.

The district court's finding that "no order currently exists requiring [Mark] to pay college expenses" is not supported by substantial evidence, given our conclusion that the post-high school education expenses provision in the parties' original dissolution decree was not modified by either of the two modification orders entered in this matter. The district court's dismissal of Lynda's contempt application was based solely on an erroneous interpretation of the parties' dissolution decree and subsequent modifications. The judgment of the district court dismissing Lynda's contempt application must therefore be reversed and the case remanded for further proceedings.

We do not, however, suggest what the ultimate ruling on the contempt application should be. We remand to the district court so that the court can determine (1) whether Mark willfully disobeyed the parties' dissolution decree under section 598.23(1), and if so, whether in the exercise of its broad discretion

the court believes he should be cited and punished for contempt, *see, e.g.*, *Huyser v. Iowa Dist. Court*, 499 N.W.2d 1, 3 (Iowa 1993) (vacating district court's contempt finding and remanding for a determination of whether contemnor's failure to pay child support was willful where the court did not consider the effect of an alleged agreement between the parties to defer collection of child support); and (2) whether, if not in contempt, Mark is nevertheless in default of the decree. On remand, if the district court finds Mark in contempt or default it should also consider whether Lynda should be awarded attorney fees pursuant to section 598.24, which authorizes the court to award reasonable attorney fees, as part of the costs, against a party who has been found in default or contempt of a dissolution decree.

We deny Mark's request for an award of appellate attorney fees from Lynda. Subject to a "rare exception" not applicable in this case, a party generally has no claim to attorney fees in the absence of a statute or contractual provision allowing such an award. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993). Section 598.24 does not authorize taxation of the alleged contemnor's trial attorney fees against the party seeking a contempt finding.[3] It therefore follows that the statute also does not authorize taxation of appellate attorney fees against the party that sought the contempt finding in district court. *Cf. Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 22 (Iowa 2001) (concluding that because statute did not

[3] The district court, however, awarded Mark attorney fees after dismissing Lynda's contempt application. We decline to disturb the trial attorney fees awarded to Mark despite our foregoing statement because Lynda did not challenge the award on appeal. *See* Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state . . . an issue may be deemed waiver of that issue.").

limit attorney fees to those incurred in district court it also contemplated the award of appellate attorney fees); *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) (holding that a statute that justifies *awarding* attorney fees in the trial court also justifies *awarding* attorney fees in the appeal).

IV. CONCLUSION.

We conclude the district court erred in its interpretation of the modification decrees, resulting in dismissal of Lynda's contempt application. The court's finding that "no order currently exists requiring [Mark] to pay college expenses" is not supported by substantial evidence given our conclusion that the "post high school education expenses" provision in the parties' original dissolution decree was not modified by either of the two modification orders entered in this matter. The judgment of the district court dismissing Lynda's contempt application is therefore reversed. We remand for further proceedings consistent with this opinion. Mark's claim for an award of appellate attorney fees is denied. Costs on appeal are taxed to Mark.

REVERSED AND REMANDED.