

**IN THE COURT OF APPEALS OF IOWA**

No. 8-540 / 08-0015  
Filed September 17, 2008

**IN RE THE MARRIAGE OF KONNIE JO ELSBERND AND MICHAEL A.  
ELSBERND**

**Upon the Petition of  
KONNIE JO ELSBERND,**  
Petitioner-Appellant,

**And Concerning  
MICHAEL A. ELSBERND,**  
Respondent-Appellee.

---

Appeal from the Iowa District Court for Winneshiek County, Margaret L.  
Lingreen, Judge.

Konnie Elsbernd appeals the dismissal of her application for contempt.

**REVERSED AND REMANDED.**

Marion L. Beatty of Miller, Pearson, Gloe, Burns, Beatty & Cowie, P.L.C.,  
Decorah, for appellant.

Dale L. Putnam, Decorah, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Eisenhauer, JJ.

**EISENHAUER, J.**

When Michael A. Elsbernd failed to fully pay his child support obligation, Konnie Jo Elsbernd filed an application to find Michael in contempt. The court dismissed Konnie's application and she appeals. Because we find the district court abused its discretion, we reverse and remand.

**I. Background Facts and Proceedings.**

On December 27, 2005, during the dissolution of marriage process, the court entered an order prohibiting the sale or dissipation of marital assets. The parties' principal marital asset was a hog confinement building Michael erected in 2000. Michael financed the confinement with a \$250,000 loan from Luana Savings Bank (LSB) and his parents later became co-signers. In 2006, the loan principal had been reduced to around \$106,000, with quarterly interest payments due. A 2006 intra-office LSB memo and bank employee testimony reveal Michael called the bank stating he wanted "to intentionally default on making any future payments and force the bank to foreclose" in order to reduce Konnie's property award.

Michael did not make his loan payment and in December 2006, LSB petitioned for foreclosure. Michael's answer admitted the debt and did not resist foreclosure. Konnie intervened in the foreclosure suit to protect her interests and also sought relief in the dissolution proceeding. On February 13, 2007, the dissolution court determined the loss of equity if the foreclosure was successful could violate the earlier dissipation of assets order and "may well be relevant" in the court's future decisions.

On March 19, 2007, a dissolution decree was filed incorporating the parties' stipulation concerning custody, visitation, and child support. Jurisdiction was retained to resolve disputed property issues. After trial from March 21 to March 28, 2007, the district court entered its supplemental dissolution decree in April 2007. At that time the foreclosure case had not gone to judgment.

The court determined Michael's principal occupation and primary source of income was feeding hogs in his confinement. The court found Michael's annual income to be "about \$50,000 per year." Michael had a contract through 2011 with Holden Farms which paid him \$88,803 annually for feeding hogs.

The court found in the 1990's, Michael, his brother, and his father failed to report income resulting in civil fraud penalties being imposed by the Internal Revenue Service. The court stated Michael "has failed to fully and accurately disclose his financial position" causing Konnie to incur substantial expense "in response to Michael's efforts to conceal assets." The court concluded Konnie was entitled to \$25,000 for attorney fees and expert assistance based on Michael's conduct. It stated:

Michael has consistently reported his net worth to his bank at around \$500,000 or more. Since the parties separated, he has steadily decreased his estimates of net worth, deflated the quantity and value of his assets, claimed assets titled in his name belonged to family members, and listed pre-existing debts not previously disclosed, all in an obvious effort to manipulate his financial status and shield his assets from division with Konnie. The court finds Michael lacks any serious credibility on these issues.

The court found after the parties separated, Michael "denied having any ownership interest in the hog finishing facility" and "his parents now support that assertion." The court discussed Michael's inconsistent claims – at trial asserting

his parents own the land under the confinement, but claiming he owned it in his loan financing documents and also in his subsequent financial statements. The court stated Michael's parents have now demanded a signed lease with substantial monthly rent for the land under the hog facility and have recently served notice of lease termination for non-payment of rent. However, the court found, "[n]o rent has ever been paid for this property in the past."

The court eventually found Michael owned the confinement while Michael's parents owned the land under the confinement, and ruled:

Prior to the separation [Michael's] right to use the land under the hog confinement building was not questioned or subjected to the payment of rent. Therefore, the court finds no merit to [Michael's] arguments the hog facilities have little or no value, or the claimed debts to his family members are legitimate.

The court also ruled a successful foreclosure by LSB "would have constituted a dissipation of marital assets" because Michael "has had the ability to stop the foreclosure by paying LSB the balance due."

Michael was awarded the \$450,000 hog confinement facility subject to the \$135,000 LSB loan, a \$20,000 cattle shed, agricultural equipment valued at \$107,000, and \$3793 in dividends and stock. The court rejected Michael's testimony he had no livestock after January 2006, and awarded him \$55,300 in livestock based on expert testimony that \$55,300 is Michael's "unaccounted for" cattle inventory. The court rejected Michael's testimony he had no interest in grain after January 2006, and awarded him \$39,190 in crops.

Two months after the dissolution decree, in June 2007, Michael's parents served Michael with a notice to quit based on nonpayment of the rent the

dissolution court had previously concluded was not a legitimate debt. In July 2007, Michael's parents filed an action for forcible entry and detainer in small claims court for "failure to pay rent when due" and evicted Michael.

Also in July 2007, Michael's parents were granted summary judgment against Michael on the confinement note originally owned by LSB. Michael's parents took over the confinement loan from the bank by assignment.

Michael and Konnie are the parents of three children and Michael generally kept current on his \$800 per month child support obligation until September, October, and November 2007. For those months Michael only paid \$625 of his \$2400 obligation. Konnie sought to have Michael held in contempt for underpayment and her application was heard in December 2007 on a court service day. The court limited each side to thirty minutes of testimony and took judicial notice of the prior court proceedings.

Contrary to his claims at the dissolution trial, Michael admitted he owned the confinement. Michael testified he signed a lease for rent of his parents' land after the dissolution trial, but he could not pay the rent. Michael stated he could not continue his six-year contract with Holden Farms after his parent's evicted him and the Holden contract terminated after he finished a turn of the pigs in July 2007. Michael testified his father had died and his seventy-four-year-old mother subsequently entered into a contract with Holden Farms on similar terms to Michael's contract. Michael's mother pays him \$600 per month rent for use of his confinement and all the equipment in the confinement. On August 1, 2007, Michael entered into an employment contract with his mother that pays him

\$26,880 per year to take care of the hogs. Michael pays his mother \$500 per month for rent for his current residence.

Michael was questioned about his farm equipment at the hearing. In April 2007, the court awarded him \$107,000 of farm equipment. Michael testified he did not have any farm equipment other than a baler, which he recently swapped to his mother for debt. When questioned about which debt was involved, Michael first claimed it was for house loan debt. After further questioning, he changed his testimony to state the baler was given for the bank debt his parents took over.

When questioned what he had done with the assets awarded in the dissolution decree, Michael responded he did not have any assets. In April 2007, the court awarded Michael livestock worth \$55,300. Despite this, Michael testified he liquidated his livestock in 2005 or 2006 and currently owns three chickens. Michael stated he sold four goats in 2007 and did not swap any livestock that year.

In April 2007, Michael was awarded \$43,000 in crops, dividends and stock. At the contempt hearing Michael claimed he had no liquid assets and paid his child support the best he could.

On December 13, 2007, the court dismissed Konnie's application for contempt and found:

There is no credible evidence in the record at the Contempt hearing that [Michael] is being undercompensated for his work, nor for the lease of the building. [Michael] no longer has ownership of any farm machinery, nor does he own livestock. There is no credible evidence in the record before this Court that [Michael] has assets he could liquidate or mortgage in order to secure the monies to meet the child support obligation.

The court ruled Michael's discretionary expenses were not excessive and found "no credible evidence of intentional waste of income" to avoid child support. However, the court entered an order for mandatory income withholding requiring Michael's mother to withhold his monthly child support and withhold an additional \$100 per month until Michael's support delinquency of \$1775 is paid.

Konnie appeals arguing the record, which included judicial notice of the prior court proceedings, proves beyond a reasonable doubt Michael is willfully and deliberately withholding child support. Konnie also seeks trial and appellate attorney fees.

## **II. Scope of Review.**

Contempt proceedings are "primarily punitive in nature" and our standard of review is "somewhat unique." *In re Marriage of Swan*, 526 N.W.2d 320, 326-27 (Iowa 1995). Konnie is appealing from the court's refusal to hold Michael in contempt under a statute that allows for some discretion. Iowa Code section 598.23A(1) (2007) provides: "If a person against whom an order or decree for support has been entered . . . fails to make payments . . . the person may be cited and punished by the court for contempt." Because the statute provides for discretion, "a trial court is not required to hold a party in contempt even though the elements of contempt may exist." *Swan*, 526 N.W.2d at 327. 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.* Therefore, “we review the record to determine if substantial evidence exists to support the trial court’s finding.” *In re Marriage of Hankenson*, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993).

### **III. Merits.**

Konnie argues the contempt court did not give sufficient notice to the dissolution court’s rulings and credibility determinations after a lengthy trial. We agree. The contempt court’s credibility findings are not supported by substantial evidence and ignore the lengthy and detailed credibility findings made eight months earlier by the dissolution court after a five-day trial. Specifically, Michael’s history of engaging in dishonest behavior, joined in by his family, began in 1997 when civil fraud penalties were assessed against Michael, his father, and his brother for hiding income. This behavior continued when Michael planned to intentionally default on the hog confinement loan payments. Only because Konnie learned of the pending foreclosure and intervened was the \$450,000 asset preserved for the dissolution property distribution. The dishonest behavior also continued when Michael and his parents joined together during the dissolution trial to claim Michael had no ownership interest in the hog confinement, despite financial records to the contrary.

Additionally, by ignoring the assets Michael was awarded four months before he stopped fully paying his child support obligation, the contempt court allowed Michael to accomplish what the dissolution court refused to allow:

Michael and his family conspiring to dispose of Michael's property and hide his income.

Finally, the contempt court failed to recognize Michael is still engaged in wrongful conduct and has no credibility concerning financial issues. The dissolution court specifically ruled Michael's claim for back rent to his parents was a sham debt developed after separation and not a legitimate debt. The parent's eviction based on this meritless debt allowed Michael to continue to manage the same hog operation in the same confinement for the same company. However, now the \$88,000 multi-year Holden Farm payments run through Michael's mother, who chooses to pay him \$26,880 per year for exactly the same work which yielded a \$50,000 per year income in the past.

This is the rare case where substantial evidence does not support the trial court's decision and we find a gross abuse of discretion. Before the separation, Michael "consistently reported his net worth to his bank at around \$500,000 or more." Post-decree, Michael's continuing pattern of dishonest intra-family transactions is, in the words of the dissolution court, an "obvious effort to manipulate his financial status and shield his assets. . . . Michael lacks any serious credibility on these issues."

Michael's post-decree conduct is unquestionably a willful violation of the dissolution decree and requires some form of punishment for contempt. A contempt judgment is required because Michael's "secretion of assets or transfer of assets . . . must be dealt with harshly." *In re Marriage of Williams*, 421 N.W.2d 160, 164 (Iowa Ct. App. 1988). The judgment of the district court dismissing

Konnie's contempt application is reversed and the case is remanded for further proceedings consistent with this opinion.

Konnie's claim for an award of trial and appellate attorney fees is granted under Iowa Code section 598.24. Michael shall pay Konnie \$2500 for trial and appellate attorney fees. Costs on appeal are taxed to Michael.

**REVERSED AND REMANDED.**