

**IN THE COURT OF APPEALS OF IOWA**

No. 8-912 / 07-1864  
Filed January 22, 2009

**BLAKE ARLO MCCORMICK,**  
Plaintiff,

**vs.**

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

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Certiorari to the Iowa District Court for Lucas County, Peter A. Keller,  
Judge.

Plaintiff in certiorari action challenges orders of contempt arising out of  
numerous violations of court orders related to his dissolution decree obligations.

**WRIT ANNULLED.**

George B. Jones, Lamoni, for plaintiff.

Theodore F. Sporer and Meghan S. Hanson of Sporer & Flanagan, P.C.,  
Des Moines, for Mary Joann McCormick.

Considered by Sackett, C.J., and Vaitheswaran and Potterfield, JJ.

**POTTERFIELD, J.**

Plaintiff in this original certiorari proceeding challenges court orders finding him in contempt. Writ annulled.

**I. Background Facts and Proceedings.**

Mary Kovacevich (f/k/a Mary McCormick) and Blake McCormick's marriage was dissolved in 1995. The dissolution decree, among other things, awarded physical care of the parties' three children to Kovacevich; McCormick was ordered to pay child support; pay one-half of the cost of medical insurance; pay one-half of the unreimbursed medical expenses; and maintain life insurance. Over the years, numerous applications to show cause were filed in the dissolution proceeding and McCormick had been found to be in contempt on at least one occasion prior to 2005.

In March 2005, Kovacevich filed an application to show cause alleging McCormick willfully had not paid child support, had not maintained a life insurance policy, and had not paid his share of medical and dental expenses obligations, all in violation of various provisions of the parties' dissolution decree. In September 2005, Kovacevich filed an application to show cause alleging McCormick Construction—a closely held family construction business and McCormick's employer—had willfully refused to withhold child support from McCormick's earnings in violation of three separate Orders for Mandatory Income Withholding. A hearing on both motions was held on December 7, 2005.

On December 7, 2005, the district court entered an order noting that both McCormick Construction and McCormick "stipulated that they are in contempt of court and the factual allegations of both applications are true." The court

accepted the stipulations and found both “to be in contempt as alleged, beyond a reasonable doubt.”

McCormick was sentenced to 180 days incarceration in the Lucas County Jail. Mittimus was withheld pending compliance with these conditions: (1) “Blake McCormick shall pay the sum of \$5000, representing accrued attorney fees; accrued judgment interest; costs; and uninsured medical expenses to the office of Petitioner’s counsel not later than 12/31/05.”; (2) “Blake Arlo McCormick shall pay all child support and reimbursement for health insurance (\$1,116.24) through Child Support Recovery not later than 12/31/05” and “shall pay one-half (1/2) of all unreimbursed medical expenses . . . within ten (10) days of receipt of copies [by certified mail, for which cost he was responsible] of the provider[’]s statement, invoice or the insur[e]r’s Explanation of Benefits”; (3) “Blake McCormick shall not refuse or fail to pick up the foregoing certified mail”; (4) “Blake Arlo McCormick shall comply with all other provisions of the prevailing Decree not specified herein.” The order further specified:

Upon satisfaction of all terms and conditions hereof, and compliance with all other orders of the Court herein, for a period of 180 days shall constitute substantial compliance and the contempt findings herein shall be purged. The 180 days shall run from 12/7/05.

On January 11, 2006, Kovacevich filed a notice of default and motion for issuance of mittimus, alleging the failure to pay \$5000 to her counsel as required by the December 7, 2005 order. She dismissed her motion without prejudice on January 31, 2006. On July 21, 2006, Kovacevich’s counsel filed a partial satisfaction acknowledging receipt of \$5000.

On May 10, 2007, Kovacevich again filed a notice of default and motion for issuance of mittimus, alleging that payment of the \$5000 to counsel was not timely; that McCormick had not paid the uninsured medical expenses pursuant to the protocol established, nor complied with all other orders of the Court as required by the December 7, 2005 order. She also filed a separate motion to show cause in four counts alleging willful nonpayment of current child support, willful nonpayment of medical support, willful nonpayment of unreimbursed medical contribution/payment, and failure to maintain life insurance or provide proof thereof.

A hearing was held on October 31, 2007. After hearing the testimony of both Kovacevich and McCormick, the court stated:

The Court has considered the testimony and the exhibits admitted into evidence here[,] and has weighed the credibility of the witnesses.

And you know, this thing has gone on all too long. And it's clear to the Court that something needs to be done.

The hearing on the mittimus and on the separate contempt was held in accordance with the record made here today.

The Court now finds as follows. The respondent has failed to comply with the conditions of the Order of December 7, 2005 in a willful manner in paying the [\$]5,000 attorney fees and costs amount after the 12-31-05 deadline as required. Granted, he did make the payment, but it was late.

He has failed to pay all delinquent child support and reimbursement of health insurance premiums as required. Failed to pay half of the unreimbursed medical expense. Failed to pick up certified letter as required by that December 7 Order.

Therefore, mittimus shall issue forthwith and respondent serve the previously ordered 180 day sentence in the Lucas County jail on the separate contempt, the Lucas County jail for the first contempt which was stipulated to.

On the separate contempt the Court now finds that the respondent has willfully failed to pay his current child support, has willfully failed to pay unreimbursed medical expense, his half.

Respondent has willfully failed to maintain life insurance, as required. Respondent has willfully failed to pay for medical insurance, his half.

A written ruling was entered in the court file. It reads in part:

On the separate contempt the Court now finds:

(1) Respondent has willfully failed to pay his current child support.

(2) Respondent has willfully failed to reimburse uninsured medical expense (1/2).

(3) Respondent has willfully failed to maintain life ins. as required.

(4) Respondent has willfully failed to pay for medical insurance (1/2).

Therefore, Respondent is found in willful contempt (4 counts) as outlined above and is sentenced to 30 days times 4, or 120 days in the Lucas County Jail. This sentence shall run consecutive to the 180 days previously ordered for a total of 300 days.

McCormick challenges the court's orders. He contends, first, that the 2005 order of contempt contained an illegal sentence and is thus void. He also argues: that the 2005 contempt had been purged by the passage of time and the filing of partial satisfaction; there was insufficient proof of either the default of the 2005 contempt or for a new finding of contempt; the district court erred in finding four separate counts of contempt and in imposing consecutive sentences; and, finally, that he received ineffective assistance of counsel.

## **II. Standard of Review.**

Our review on certiorari is limited to determining whether the district court acted illegally or without jurisdiction. *Zimmermann v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992). Review is not de novo but at law. *Id.* "Illegality exists when the court's factual findings lack substantial evidentiary support, or when the court has not properly applied the law." *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998).

### III. Discussion.

#### A. Challenge to 2005 Order.

McCormick's challenge to the December 2005 contempt order is untimely and we need not discuss it further. See *Hutcheson v. Iowa Dist. Ct.*, 480 N.W.2d 260, 264 (Iowa 1992) (finding that to challenge a contempt order, one must file a petition for writ of certiorari within thirty days of the district court's contempt order); accord *Madyun v. Iowa Dist. Ct.*, 544 N.W.2d 441, 443 (Iowa 1996) (noting that had petitioner been challenging the legality of the court's original order finding him in contempt, rather than issuance of mittimus, it would be untimely).

#### B. 2005 Contempt Purged.

McCormick contends that the passage of time and partial satisfaction filed by counsel purged the 2005 contempt. We disagree. As noted above, the 2005 Order specifically addressed this issue: "*Upon satisfaction of all terms and conditions hereof, and compliance with all other orders of the Court herein, for a period of 180 days shall constitute substantial compliance and the contempt findings herein shall be purged.*" (Emphasis added). McCormick does not argue that he satisfied all terms and conditions of the December 2005 Order. Absent satisfaction of all terms and conditions of the order, the contempt is not purged.

#### C. Sufficiency of Proof.

With respect to the violations of the 2005 Order, McCormick testified that in December 2005 he stipulated to the court that he was in contempt. He testified that he did not timely pay \$5000. He acknowledged that he had not paid his half of uninsured medical expenses. He testified that he did violate the order

“[i]n several ways.” The district court did not err in its issuance of mittimus on the December 7, 2005 contempt order.

McCormick also challenges the court’s finding of four separate acts of contempt. A person can be held in contempt if a person “willfully disobeys the order or decree.” Iowa Code § 598.23(1) (2007). “Contempt is sufficiently shown if some of the default is willful.” *Amro v. Iowa Dist. Ct.*, 429 N.W.2d 135, 140 (Iowa 1988). A finding of 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 contemner had the right or not.

*Id.*

The finding of contempt must be established by proof beyond a reasonable doubt. *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744 (Iowa 1993). “Hence substantial evidence can be described as such evidence as could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt.” *Id.*

We find substantial evidence to support each of the district court’s findings of contempt. In fact, McCormick does not contest that he has not paid his child support, half of the medical expenses, and half of the medical insurance. Nor does he argue that he has maintained life insurance as required. He complains, however, that those failures are not willful because he is financially unable to meet those obligations. See *Christensen*, 578 N.W.2d at 678 (finding a failure to follow a court order is not willful if a contemner shows the contemner was unable to comply with the order).

McCormick testified that shortly after the 2005 contempt order was entered, McCormick Construction went out of business. He testified that he then became self-employed and that he and his current wife were the owners of the business. He complained that he did not make enough to pay his support obligations: he acknowledged he made only one child support payment in 2007 and that he had not made a child support payment between the time he was served with the May 2007 motion to show cause and the October 2007 hearing. He testified, however, that he was current on his own rent and utility bills and paid for the care of his other three children.

The district court impliedly found that McCormick's complaints of inability to pay were not credible. We note that a parent is "not free to prioritize the parent's financial obligations so as to prefer the parent's own creditors over the parent's court-ordered obligation." *Id.* at 679. There is sufficient evidence from which a rational trier of fact could conclude that each of the four allegations of contempt were willful violations of court orders. Substantial evidence in the record supports the court's findings of contempt.

*D. Punishment Imposed.*

We have historically granted courts wide discretion in the matter of sentencing for contempt. *Newby v. Iowa Dist. Ct.*, 259 Iowa 1330, 1343, 147 N.W.2d 886, 894 (1967). We will interfere only where that discretion has been clearly abused. *Id.* By that we mean a finding that the court's decision rests on grounds that are unreasonable or untenable, clearly against logic, or founded on erroneous conclusions. *Glenn v. Farmland Foods, Inc.*, 344 N.W.2d 240, 243 (Iowa 1984).

*Shedlock v. Iowa Dist. Ct.*, 534 N.W.2d 656, 660 (Iowa 1995).

Pursuant to Iowa Code section 598.23 (2007), a person who willfully disobeys a court order or decree may be punished by the court for contempt and sentenced to jail for up to thirty days *for each offense*. Where there are multiple instances of contempt, each may be separately punished. *See Kirk v. Iowa Dist. Ct.*, 508 N.W.2d 105, 109 (Iowa Ct. App. 1993).

The district court did not abuse its discretion in imposing a thirty-day sentence on each of the four counts of contempt. In addition, based on McCormick's pattern of behavior, we cannot say that the district court abused its discretion in sentencing McCormick to consecutive thirty-day jail terms. We will not disturb the punishment imposed on McCormick by the district court.

*E. Ineffective Assistance Claim.*

McCormick contends he was denied effective assistance of counsel at the contempt hearing. He contends that counsel should have presented more than McCormick's tax return and his own testimony as to his income and inability to pay. Counsel in this certiorari proceeding contends: "The tax return showed a net income level which needed to be explained, given the much higher gross revenue to McCormick's business."

Kovacevich argues that two defenses to contempt are recognized: (1) indefiniteness of the order and (2) absence of willful disobedience caused by inability to comply. *See Christensen*, 578 N.W.2d at 678. She argues that ineffective assistance of counsel is not one of the defenses and cannot offer McCormick relief. We consider McCormick's claim of ineffective assistance of

counsel not as a defense to the alleged contempt, but a request for a new hearing at which his defense is effectively presented.<sup>1</sup>

The right to counsel has been extended to civil contempt proceedings because imprisonment was a contemplated sanction. See *McNabb v. Osmundson*, 315 N.W.2d 9, 14 (Iowa 1982) (holding that parent “was entitled to counsel in the first hearing that resulted in his incarceration, and will be entitled to counsel in any subsequent hearing if it will result in the loss of his physical liberty”). And in a case involving termination of parental rights, the court concluded that due process requires counsel appointed under a statutory directive to provide effective assistance. *In re D.W.*, 385 N.W.2d 570, 579 (Iowa 1986).

Our ultimate concern in claims of ineffective assistance is with the “fundamental fairness of the proceeding whose result is being challenged.” *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 696, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The party claiming ineffective assistance of counsel must show (1) that counsel’s performance was deficient, and (2) that actual prejudice resulted. *Strickland*, 466

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<sup>1</sup> In *Lamb v. Eads*, 346 N.W.2d 830, 833 (Iowa 1984), the supreme court wrote:

If Donald flouted the dissolution decree in some or all of the six years, he could be held in contempt for that conduct although he might presently be unable to pay support. *McNabb*, 315 N.W.2d at 15 (“a willful contempt in not paying past installments of child support provided in a valid decree, shown by clear and convincing evidence, may stand despite . . . the present inability of the contemner, through indigency, to make payment”). If Donald was unable to pay during the six years, he had the burden to show the inability. When he failed to make such a showing the district court constitutionally found him in contempt as to past installments. He had counsel in that proceeding, and both his procedural and substantive constitutional rights were observed. (Underlined emphasis added).

U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. A failure to establish either factor will defeat the claim. See *D.W.*, 385 N.W.2d at 583 (noting that having found counsel's performance not deficient, inquiry could end).

Our review of counsel's performance must "be highly deferential," *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694, and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [party] must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, 104 S. Ct. at 2066, 80 L. Ed. 2d at 694-95 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83, 93 (1955)); see *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

McCormick has not established that his counsel's performance was deficient. Evidence was offered to show his purported inability to pay, both through his own testimony and his tax return. One can always claim that counsel might have done more; but, that is not sufficient to establish that counsel's performance was deficient.

We conclude the record now before us is adequate to support our determination that counsel's performance in the contempt proceeding was not deficient.

#### **IV. Attorney Fees.**

Kovacevich requests an award of her appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We are to consider the needs of the party making the request, the ability

of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). In light of the penalties imposed on McCormick's contempts, we deny the request for appellate attorney fees.

**V. Conclusion.** The district court did not err in issuing mittimus on the 2005 contempt or in its current findings of contempt. Accordingly, the writ is annulled.

**WRIT ANNULLED.**