

IN THE COURT OF APPEALS OF IOWA

No. 1-209 / 90-1037

FILED

JUN 25 1991

CLERK SUPREME COURT

TIMOTHY MICHAEL FESSLER,

Plaintiff-Appellant,

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vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County,
Luther T. Glanton, Judge.

The district court found Fessler in contempt of court for failure to pay child support. Fessler challenges the sufficiency of the evidence to support the contempt adjudication. **WRIT ANNULLED.**

Larry L. Miller, Des Moines, for plaintiff-appellant.

Bonnie J. Campbell, Attorney General, John M. Parmeter and Patricia Hemphill, Assistant Attorneys General, for defendant-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Plaintiff Timothy Michael Fessler filed a petition for writ of certiorari, contending the trial court should not have found him in contempt for failure to pay child support. We annul the writ.

Plaintiff's marriage was dissolved in 1976. He had two children born May 28, 1971 and August 16, 1975. He was ordered to pay child support of \$25 per week per child. This was modified downward to \$50 per month per child several months after the entry of the dissolution decree.

On December 21, 1979, plaintiff was found in contempt and allowed to purge himself. In 1985 a rule to show cause was filed. A hearing was scheduled. Plaintiff was ordered to appear. He did not appear. A warrant issued for his arrest, and he was presented to the court. The court did not make a finding he was in contempt. The court found his delinquency was in excess of \$13,466. He was ordered released from custody upon the payment of \$1,000 and a promise to pay \$50 a month. The order was dated February 12, 1986.

In 1990 another application to show cause was filed. A rule to show cause issued. Plaintiff appeared. A hearing was held. Plaintiff was found in contempt and sentenced to thirty days in jail and twenty-five of the days were suspended.

Plaintiff, in seeking a writ of certiorari, raised several contentions in support of his position.

Our review is at law. See Johnson v. Iowa Dist. Court for Mahaska County, 385 N.W.2d 562, 564 (Iowa 1986). A writ of certiorari shall be granted when a court exceeds its proper jurisdiction or otherwise acts illegally. Amro v. Iowa Dist. Court for Story County, 429 N.W.2d 135, 138 (Iowa 1988). Illegality exists when the findings of the trial court are not supported by substantial evidence, see Fetters v. Degnan, 250 N.W.2d 25, 27 (Iowa 1977), or when the trial court does not apply the proper law. See Hightower v. Peterson, 235 N.W.2d 313, 317 (Iowa 1975).

I.

Plaintiff first contends he was not in contempt because he substantially complied with the February 12, 1986 order. Plaintiff had, between the February 1986 order and this contempt hearing, made payments of \$50 per month for all but about twelve months. He therefore contends he is not in contempt. We disagree.

The February 1986 order merely provided for the release of plaintiff from custody. The February 1986 order did not modify the order fixing plaintiff's child support obligation at \$100 a month. Clearly, at the time of the contempt hearing plaintiff was substantially delinquent in his child support obligation both as to pre-February 1986 support and post-February 1986 support. Therefore, there was a showing of plaintiff's delinquency. The burden then shifted to plaintiff to show he could not pay, and the default was not

willful. See Skinner v. Ruigh, 351 N.W.2d 182, 186 (Iowa 1984); Lamb v. Eads, 346 N.W.2d 830, 832 (Iowa 1984); Webb v. Iowa Dist. Court for Johnson County, 416 N.W.2d 95, 99 (Iowa App. 1987). Plaintiff did not meet that burden. We reject plaintiff's first contention.

II.

Plaintiff's second contention is that he could not be found in contempt for delinquencies addressed in the February 1986 order. He contends the February 1986 order prevents litigation of the issue of his contempt prior to February 1986. He relies on Clark v. Glanton, 370 N.W.2d 606, 608-09 (Iowa App. 1985) to support his position. Unlike Glanton, the issue of plaintiff's possible contempt was not addressed in a prior order. Glanton, 370 N.W.2d at 608. The February 1986 order contained no decision either finding plaintiff in contempt or finding plaintiff not in contempt. We reject this argument.

III.

Plaintiff's third contention is the trial court erred in allowing him to be examined about his assets because the procedures for conducting a debtor's examination under Iowa Code chapter 630 had not been followed. The extent of plaintiff's assets is clearly relevant to plaintiff's ability to pay. See Skinner, 351 N.W.2d at 185. There is no basis to this argument.

IV.

Plaintiff's last contention is the sentence imposed was not appropriate, and he should have been given an opportunity to purge himself. Plaintiff is an able-bodied person. There is no showing he is incapable of gainful employment. He has failed to prove he was unable to pay the ordered support of less than \$2 per day per child. The sentence is not inappropriate.

WRIT ANNULLED.