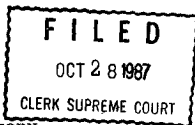


IN THE COURT OF APPEALS OF IOWA



IN RE MARRIAGE OF WALLY E. HORN AND BEVERLY H. HORN

Upon the Petition of	)	107
WALLY E. HORN,	)	
Petitioner-Appellant,	)	Filed October 28, 1987
And Concerning	)	
BEVERLY H. HORN,	)	<u>7-297</u>
Respondent-Appellee.	)	86-1738

Appeal from the Iowa District Court for Linn County (DM 8634), Lynne Brady, Judge.

Petitioner appeals from a district court order finding him in contempt of court for the willful failure to make alimony payments. **REVERSED.**

James W. Carney of Carney, Hudson, Williams, Blackburn & Grask, Des Moines, for petitioner-appellant.

Benjamin W. Blackstock of Eells, Blackstock & Affeidt, Cedar Rapids, for respondent-appellee.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ. Snell, J., takes no part.

PER CURIAM

Petitioner, Wally Horn, was found in contempt on November 4, 1986, by the trial court for willful failure to pay alimony. He appeals this order and the trial court's ruling adverse to his claim for sanctions and fees against respondent, Beverly Horn.

We note at the outset that Wally's challenge to the trial court's contempt order has been brought on appeal. No appeal from an order to punish for a contempt may be brought, but the proceedings may be taken to a higher court for revision by certiorari. Iowa Code § 665.11. However, an application to grant an appeal may be treated by the appellate court as a petition for certiorari. Iowa R. App. P. 304. We so treat this appeal.

The marriage of the parties was dissolved on March 3, 1982. Wally was ordered to pay \$110 per week in alimony. On February 18, 1986, Beverly filed an application to show why he should not be held in contempt. The trial court found Wally had made sporadic payments and that he was delinquent on the date of the application, although he was current in his payments at the time of trial. The trial court found Wally to be in contempt of court for the failure to make alimony payments.

A writ of certiorari may be sought when "an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." Iowa R. Civ. P. 306. *Certiorari* is an action at law, not in equity; consequently, our review is not de novo. Johnson v. Iowa District Court for Mahaska County, 385 N.W.2d 562, 564 (Iowa 1986). Although findings of fact are generally not reviewable on certiorari, we examine the evidence to ensure the burden of proof of contempt has been met when a judgment of contempt has been challenged. See Beyers v. Kilberg, 326 N.W.2d 902, 904 (Iowa 1982). No person may be punished for contempt unless the

allegedly contumacious actions have been established by proof beyond a reasonable doubt. Phillips v. Iowa District Court for Johnson County, 380 N.W.2d 706, 709 (Iowa 1986). However, an absence of willfulness in disobeying a court order is a defense available in a contempt proceeding. Beyers, 326 N.W.2d at 904.

Willful noncompliance was defined in Heishman v. Jenkins, 372 N.W.2d 506, 509 (Iowa 1985), as conduct which 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," citing Lutz v. Darbyshire, 279 N.W.2d 349, 353 (Iowa 1980).

Both Beverly's and Wally's exhibits clearly demonstrate Wally's consistent effort in making his alimony payments. The following chart is illustrative of the figures paid:

<u>Year</u>	<u>Amount Due</u>	<u>Actual Payment</u>	<u>No. of Payments</u>
1982	43x\$110=\$4740	\$4840	24
1983	52x\$110=\$5720	\$5390	44
1984	52x\$110=\$5720	\$5610	22
1985	52x\$110=\$5720	\$5940	22
1986	42x\$110=\$4620	\$4950	19

Wally, in good faith, continuously made payments of \$110, \$220, \$330 and \$440. He testified the reason for the discrepancy in payments was due to (1) the fact the decree was somewhat vague as to when payments were actually due (Beverly also testified there was no specific mention in the decree for the timing of the payments and thus established her own schedule); (2) advice from the Friend of the Court that most people made their payments on a bimonthly basis when they received their paychecks; (3) the closing of his bank which resulted in delay of certain payments, of which Beverly was aware; and (4) employment commitments which kept Wally in Des Moines away from his bank, exacerbated by the fact that the Friend of Court would not accept personal checks.

We determine any alleged noncompliance by Wally was not willful. We find no intent on his part, based on the record of his payments, that he deliberately meant to disregard his duty. The evidence shows Wally had overpaid sums for three years and underpaid sums for two years. The trial court found at the time of trial Wally had, in fact, prepaid alimony sums in an amount of \$110.

As we have considered this appeal as a petition for certiorari, we would sustain the writ had one actually been granted. We therefore reverse the trial court. Contempt of court is too harsh a punishment when Wally made the requisite alimony payments, albeit on a somewhat sporadic schedule.

Beverly has applied for an award of reasonable appellate attorney's fees to be taxed against Wally. Such an award may be granted by the court if the court determines the party against whom the contempt action is brought was in contempt. Iowa Code § 598.24. We have reversed the finding of contempt against Wally and section 598.24 is not applicable. Beverly shall be responsible for her attorney fees on appeal.

REVERSED.