

IN THE COURT OF APPEALS OF IOWA

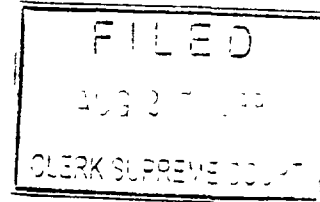
No. 1999-196 (9-420) / 98-1737

Filed August 27, 1999

DAVID L. KIELER,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR LINN COUNTY,
Defendant.



Appeal from the Iowa District Court for Linn County, Thomas L. Koehler,
Judge.

The petitioner challenges a district court ruling finding him in contempt for
failure to pay child support. **WRIT ANNULLED.**

James W. Affeldt and Richard Q. Barrett of Elderkin & Pirnie, P.L.C., Cedar
Rapids, for plaintiff.

Thomas J. Miller, Attorney General, Diane M. Stahle, Special Assistant
Attorney General, Michael J. Parker, Assistant Attorney General, and Michael E.
Wallace, Assistant County Attorney, for defendant.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

David Kieler, by a Petition for Writ of Certiorari, appeals a district court ruling finding him in contempt for failure to pay child support. He contends the district court erred in finding he had not proved his defense of inability to pay. Writ annulled.

David and Lynn Kieler have two children, Zachary, born August 29, 1979, and Karry, born December 25, 1990. A decree of dissolution of marriage was entered on April 27, 1995. At the time of the dissolution, David had been earning an annual income exceeding \$100,000 for several years. On that basis, David was ordered to pay \$1765 child support per month. Following the dissolution, David and his construction business encountered financial difficulties. David's child support payments became delinquent in October of 1997. Between October of 1997 and August of 1998, the date of the contempt hearing, David made no voluntary support payments.¹ However, he did continue to pay other creditors for some time following his last child support payment: alimony payments were made for two more months, interest payments on a project for four months, and house payments for seven months. Additionally, David acknowledged he could earn at least \$37,000 per year as a carpenter, he had a rental property, and maintained other assets, such as real estate.

At the contempt hearing, David raised a defense of inability to pay. The district court did not believe David was being truthful with regard to his income. David was found, beyond a reasonable doubt, to have willfully failed to pay child

¹ During this time period David made an involuntary payment of \$2730 through a State Tax Refund Offset.

support even though his annual income for 1997 exceeded \$37,000 and, at the time of the hearing, he was earning \$20 to \$25 per hour. David was found to be in contempt of court and was ordered to be confined to the Linn County Correctional Center for thirty days.

David appeals.

I. STANDARD OF REVIEW. Our review on certiorari is limited to determining whether the district court acted illegally or without jurisdiction. *Zimmermann v. Iowa Dist. Court for Benton County*, 480 N.W.2d 70, 74 (Iowa 1992). Our review is for correction of errors at law. *Id.* We are bound by the district court's findings of fact if supported by substantial evidence. Iowa R. App. 14(f)(1); *Zimmermann*, 480 N.W.2d at 74. Contempt judgments must be reviewed to ensure substantial evidence supports the judgment of contempt. *Ervin v. Iowa Dist. Court for Webster County*, 495 N.W.2d 742, 744 (Iowa 1993). Contempt is sufficiently shown if some of the default was willful. *Amro v. Iowa Dist. Court for Story County*, 429 N.W.2d 135, 140 (Iowa 1988). Because of the quasi-criminal nature of the proceedings, a finding of contempt must be established by proof beyond a reasonable doubt. *Phillips v. Iowa Dist. Court for Johnson County*, 380 N.W.2d 706, 708-09 (Iowa 1986). Substantial evidence is such evidence as could convince a rational trier of fact the alleged contemner is guilty of contempt beyond a reasonable doubt. *Ervin*, 495 N.W.2d at 744-45.

II. EVIDENCE OF CONTEMPT. The district court concluded that David "had shown an utter disregard of the rights of the petitioner to receive" regular child support payments. The district court further concluded that David's "contumacious actions have been established by proof beyond a reasonable doubt." We agree.

The State had the burden of demonstrating David had a duty to obey a court order and failed to perform the duty, with the burden then shifting to David to produce evidence suggesting he did not willfully violate the order or decree at issue. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). When the contempt turns on willfulness, the burden shifts to the alleged contemner. *Ervin*, 495 N.W.2d at 745 (Iowa 1993). The burden is one of production and not of persuasion. *Id.*

Willful disobedience supporting a contempt finding:

"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."

Amro, 429 N.W.2d at 140 (quoting *Lutz v. Darbyshire*, 297 N.W.2d 349, 353 (Iowa 1980)). There are two ways in which the contemner may show that a failure to comply with a court order was not willful: (1) the order was indefinite; or (2) the contemner was unable to perform the act ordered. See *McKinley v. Iowa Dist. Court for Polk County*, 542 N.W.2d 822, 824 (Iowa 1996).

In the case at bar, it was established that David had a continuing child support obligation upon which he had made no voluntary payments from October of 1997 until the date of the contempt hearing on August 31, 1998. David's defense was that

he had been unable to pay. Although he presented evidence of financial hardship, we find substantial evidence to support the trial court's finding that David willfully failed to make child support payments.

The test for determining an ability to pay "is not merely whether [the contemner] is presently working or has current funds or cash on hand, but whether he has any property out of which payment can be made." *Christensen v. Iowa Dist. Court for Polk County*, 578 N.W.2d 675, 678-679 (Iowa 1998). 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 (quoting *McKinley*, 542 N.W.2d at 825).

In the case at bar, David argued he had been unable to make his child support payments. However, the record does not support David's claim of inability to pay or any good faith efforts on David's part to pay his child support obligations. David was required under the dissolution decree to pay \$1765 per month from October 19, 1997 until the time of the contempt hearing. Instead, he voluntarily paid nothing during this time frame. He *did not* pay a lesser amount each month. He *did not* make some of the payments. David just did not pay any child support. He had assets and income from which he could have made at least partial payments on his child support obligations, as he in fact was able to make payments to other creditors. This is sufficient evidence to prove willfulness. *See Christensen*, 578 N.W.2d at 678-79 (in contempt for not using available assets to satisfy support obligation); *Rater v. Iowa*

Dist. Court for Polk County, 548 N.W.2d 588, 591 (Iowa App. 1996) (inability to pay defense requires proof of a good faith effort to comply with the court order).

Finally, we note David's contention the fact his child support obligation was reduced by the court proved his inability to pay, thus, the district court erred in finding he had acted willfully. We disagree. The obligation was modified because one of the children being supported was no longer a minor. The modification also reflects the district court believed David had suffered some reduction in income. However, a finding that David's child support obligation should be reduced in the future is not a finding that he was unable to pay the child support in question, just that he was now unable to pay the full amount of child support originally ordered.

For these reasons, the writ is annulled.

WRIT ANNULLED.