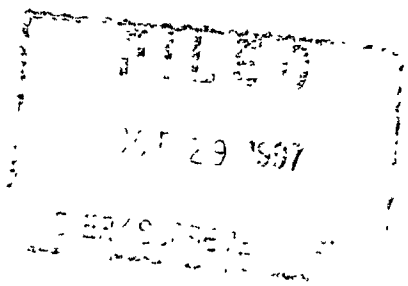
IN THE COURT OF APPEALS OF IOWA



No. 7-424 / 96-1966
Filed 10/29/97

IN RE THE MARRIAGE OF STEVEN M. REYHONS AND CHRISTINE E. REYHONS

000305

Upon the Petition of
STEVEN M. REYHONS,
Appellee,

And Concerning
CHRISTINE E. REYHONS,
n/k/a CHRISTINE DURGIN,
Appellant.

Appeal from the Iowa District Court for Jones County, Thomas M. Horan, Judge.

On appeal from the denial of her application to show cause, the appellant argues the district court erred in failing to find the appellee in contempt for denying her visitation with their son. **AFFIRMED.**

Franklin R. York of Ackley, Kopecky & Kingery, Cedar Rapids, for appellant.

Matthew G. McQuillen and Marty A. Hagge of Remley, Willems & McQuillen, Anamosa, for appellee.

Decided en banc.

STREIT, J.

Christine Durgin contends the trial court grossly abused its discretion in not finding Steven Reyhons, the father of her son, Matthew Reyhons, in contempt for failure to abide by a visitation order. The trial court found Steven did not willfully violate the court order. We find the court did not err in its conclusions on willfulness and did not grossly abuse its discretion in refusing to find Steven in contempt. We affirm.

I. Background & Facts.

Christine and Steven were divorced on March 1, 1990. Christine was awarded the physical care of their son, Matthew, born August 14, 1985. Christine moved to Missouri. In November 1994, the parties filed a stipulation agreeing to transfer primary care of Matthew to Steven and to grant Christine ten weeks of summer visitation. The court approved the stipulation and modified the custody decree, ordering primary physical care to be with Steven and for Christine to have ten weeks of summer visitation.

Matthew visited Christine for three weeks in the summer of 1995, but the visit ended after Matthew decided he wanted to return to Iowa. Steven testified Matthew had behavioral problems after the three-week visitation. On May 14, 1996, Christine notified Steven she would pick up Matthew on June 15, 1996 to begin her ten-week summer visitation in Missouri. Steven would not allow Christine visitation with Matthew in Missouri because he did not feel a ten-week visitation with Christine in

Missouri was in Matthew's best interests. As an alternative visitation he suggested Christine have a two-week visitation from 8:00 a.m. to 7:00 p.m. each day with visits occurring in Linn or Jones County, Iowa.

Christine filed an application for Steven to show cause why he was not in contempt for failing to grant her the requested summer visitation in 1996. The court denied her application. Christine appeals.

II. Standard of Review.

If there has been a finding of contempt, appellate courts review the record to insure substantial evidence supports the judgment. *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995). When an application for contempt is dismissed, a direct appeal is permitted. *In Re Marriage of Ruden*, 509 N.W.2d 494, 496 (Iowa App. 1993). In the case of dismissal, review is for errors of law. *Id.* The trial court has broad discretion in determining contempt and "unless this discretion is grossly abused, the [trial court's] decision must stand." *Swan*, 526 N.W.2d at 327.

III. Contempt Proceedings.

The statute at issue here is section 598.23 of the Iowa Code. It states:

> If a person against whom a temporary order or final decree has been entered willfully disobeys the order or decree, the person may be cited and punished by the court for contempt and be committed to the county jail . . .[or] as an alternative punishment for contempt, [may make orders regarding the subject matter of the order or decree].

A. Willful Violation. To find a person in contempt under this statute a court must find beyond a reasonable doubt that the individual willfully violated the

court order. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Willful disobedience is:

> 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 trial court ruled it was not convinced beyond a reasonable doubt that Steven was in willful disobedience of the visitation order. This was not error under this record. Steven did not violate the order with a deliberate, evil or bad purpose. In fact, his purpose was to do what was in the best interests of his child under the circumstances.

Steven was frightened about the physical and psychological effect a ten-week visit with Christine would have on Matthew. There had been no contact between Christine and Matthew between July 12, 1995 and May 14, 1996. Matthew was so unhappy with his visit the summer of 1995 he returned to Iowa seven weeks early. When he returned he displayed behavioral problems. When visitation with Christine in 1996 was discussed, Matthew threatened to run away if forced to visit Christine in Missouri. Steven thought Matthew's behavioral problems were caused by something that scared him during the last visitation at Christine's. When asked why he didn't like his visits with Christine he would only reply he did not like to be left alone. Steven did not completely deny Christine visitation with Matthew. He would allow

Christine day visitation in Iowa so mother and son could become familiar with each other again.

In light of the evidence on willfulness which was before the trial court, the trial court did not err in finding Steven had not been found beyond a reasonable doubt to have willfully violated the court order. In all custody and visitation cases our focus must always be on the best interests of the child. *See* Iowa Code § 598.41 (1991); *Nicolou v. Clements*, 516 N.W.2d 905, 906 (Iowa App. 1994). It was not error for the trial court to consider the parent was acting in his child's best interests in determining willfulness for a contempt proceeding.

B. Trial Court's Discretion. Even if all the elements of contempt did exist, the trial court was not required to hold Steven in contempt under the applicable statute in this case. Iowa Code § 598.23 (if a person against whom a temporary order or final decree has been entered willfully disobeys the order or decree, the person *may be cited* and punished by the court for contempt)(emphasis added). *See State v. Lipcamon*, 483 N.W.2d 605, 607 (relevant statute provided the court may hold a party in contempt for a violation of an order). The trial court, as the trier of fact, was free to accept or reject the validity of Steven's explanantion for denying Christine visitation. *See Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996)(the trier of fact has the prerogative to determine which evidence is entitled to belief). The district court has a better opportunity than the appellate court to evaluate the credibility of witnesses. *Id.* This court is prohibited from weighing the credibility

of witnesses. *Grinnel Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). In light of all the circumstances, the court decided Steven's explanation was credible. He denied visitation out of a real concern for the best interests of his child. Under the laws of contempt, denial on this basis was not willful. It was not a gross abuse of discretion for the court to refuse to cite him for contempt.

AFFIRMED.

VOGEL, J. (concurring in part and dissenting in part) 000311

I concur with the result reached by the majority, but I dissent as I find Steven's conduct is a clear and willful violation of the dissolution decree. While he claims he was motivated by protecting the best interests of Matthew, his method runs contrary to the orderly procedure of our judicial system. I would reverse the trial court's conclusion the evidence did not show Steven was in willful disobedience of the visitation order beyond a reasonable doubt.

Willfulness was first defined in a criminal context in Iowa:

> "Wilful," as used in a penal statute, is not synonymous with "voluntary," nor does in necessarily involve the element of malice. . . . It is therefore uniformly held that the term "wilful," in such statutes, not only means intentionally or deliberately done, but with a bad or evil purpose, as in violation of law, or wantonly and in disregard of the rights of others, or knowingly and of stubborn purpose, or contrary to a known duty, or without authority, and careless whether he have the right or not.

Parker v. Parker, 102 Iowa 500, 505-06, 71 N.W. 421, 422 (1897) (citations omitted). The court further explained that one could have a positive purpose or intent and "yet if he does this intentionally, and knowing that he has no right to do so, he is guilty of the offense defined in this statute." *Id.* 102 Iowa at 506-07, 71 N.W. at 423. This definition of willful was applied to contempt actions, since they are "quasi-criminal and are commonly treated as criminal in nature even when they arise in civil actions." *Huston v. Huston*, 255 Iowa 543, 548-49, 122 N.W.2d 892, 896 (1963).

A parent does not have discretion to grant, deny, or qualify the other parent's visitation rights. If there is jurisdiction of the parties and legal authority to make an order, it must be obeyed, however erroneous or improvident. *In re Marriage of Welsher*, 274 N.W.2d 369, 371-72 (Iowa 1979). The terms of the dissolution decree are controlling. Absent circumstances presenting immediate and readily apparent risk of harm to the child, both parents are expected to comply with the visitation provisions of the dissolution decree or seek remedial relief from the court.

Withholding the transfer of the child under some circumstances should not be considered contempt where application to the court for relief is impractical if not impossible. For example, a parent could deny visitation if that parent reasonably believed the other parent was under the influence of alcohol or other drugs which would place the child in immediate risk of harm.

The present case does not present a similarly urgent situation. Steven knew during the summer of 1995 that visits with Christine were not going well. Moreover, Christine's contact with Matthew during the following school year was nonexistent. It was then incumbent upon Steven to make application to the court to modify the visitation schedule for the summer of 1996, citing the best interests of Matthew. Steven did nothing to address his concerns for nearly a year, then, unilaterally denied visitation. He had ample time to pursue modification of the decree, but failed to do

so. Absent an immediate and readily apparent risk of harm to Matthew, Steven had no discretion to disobey a court order.

Our system of justice does not tolerate a party to a decree to pick and chose the provisions he or she is bound to uphold. The visitation provision would stand until Steven sought relief through the court. Rather than seeking relief, he chose to disobey the clear terms of the decree. The law only requires proof the violation was willful to establish contempt. *Gizmo v. Iowa Dist. Court for Hardin County*, 561 N.W.2d 833, 835 (Iowa App. 1997). Acting contrary to a known duty may constitute willfulness for this purpose. *Rolek v. Iowa Dist. Court for Polk County*, 554 N.W.2d 544, 547 (Iowa 1996); *Palmer College of Chiropractic v. Iowa Dist. Ct.*, 412 N.W.2d 617, 621 (Iowa 1987).

The trial court erred in concluding Steven's actions were not willful. All the elements of contempt do exist in this case. It was error for the trial court to consider the parent was acting in the child's best interests in militating against a finding of willfulness. The proper procedure to utilize when the child's best interests are in issue and a change in visitation is sought is a modification of the decree.

Nothwithstanding a finding of willful disobedience, the determination by the trial court not to cite and punish Steven for contempt was within the court's discretion and should not be overturned absent an abuse of that discretion. Iowa Code § 598.23 ("the person *may be cited and punished* by the court for contempt.") (emphasis

added); *see State v. Lipcamon*, 483 N.W.2d 605, 607 (Iowa 1992) (stating the relevant statute provided the court *may* hold a party in contempt for violating a court order) (emphasis added).

While I concur with the majority the decision of the trial court not to find Steven in contempt and to punish him was not an abuse of discretion, I dissent from the majority's determination the trial court was correct in concluding Steven's conduct was not willful. Iowa Code section 598.23 strikes the correct balance defining contempt but providing the court the discretion in determining which contumacious conduct to cite and punish. We should not weaken the application of the statute by so restricting the definition of willfulness that only the most egregious conduct could be cited as contempt.

I would reverse the trial court's decision Steven's conduct was not willful, but affirm the decision of the court not to cite and punish Steven for contempt.

SACKETT, J. (concurring specially)

I concur specially. In concurring, I am not condoning Steven's decision to change Christine's visitation, nor do I intend in any way to convey that a custodial parent has the right to modify a court-ordered visitation without court approval.

The trial court is best able to determine whether Steven's conduct was wilful disobedience of the court order. I affirm because the trial court found it was not.