

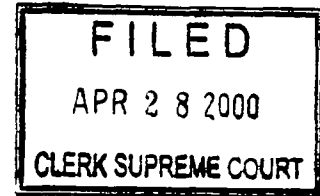
IN THE COURT OF APPEALS OF IOWA

No. 0-166 / 99-0783
Filed April 28, 2000

**IN RE THE MARRIAGE OF TINA MARIE
HAWK AND RICHARD LEE HAWK**

**Upon the Petition of
TINA MARIE HAWK, n/k/a TINA
MARIE LIROFF,**
Petitioner-Appellant,

**And Concerning
RICHARD LEE HAWK,**
Respondent-Appellee.



Appeal from the Iowa District Court for Scott County, Charles Pelton,
Judge.

Petitioner appeals an order finding her in contempt for failure to comply with the terms of her dissolution decree. She also contends the court erred in modifying the terms of the decree to mandate that the children be transported to Iowa for visitation. **AFFIRMED.**

Harold J. Delange, II, Davenport, for appellant.

~~Brett A.~~ Nelson of Nelson, Keys, Keys & Schultz, P.C., Rock Island,
Illinois, for appellee.

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

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HUTINK, J.

I. Background Facts and Proceedings.

Richard Lee Hawk and Tina Marie Hawk were married on September 5, 1987. Their marriage was dissolved on April 9, 1998. They have two children, Nicholas, born July 14, 1987, and Brandon, born April 7, 1986. Prior to the dissolution decree, Tina moved from the Quad-Cities area to Dallas, Texas. In May of 1998 Tina married her current husband, Alan Liroff, and they currently reside in Texas with the parties' children.

The parties' dissolution decree provided:

2. CUSTODY. The parties shall have the joint custody of the minor children of the parties hereto, with the physical custody of the minor children being with TINA MARIE HAWK.

3. VISITATION. The Counter-Petitioner, RICHARD LEE HAWK, shall have the right of reasonable visitation with the minor children to include at least four (4) weeks during the summer. RICHARD LEE HAWK shall travel to Dallas, Texas for visitation until such time as the children are physically able to travel to Iowa. The parties hereto shall alternate paying for the cost of transportation involved in exercising visitation. The cost of visitation shall include expenses for Richard to stay in Dallas while exercising visitation. TINA MARIE HAWK shall be responsible for the costs of the next visitation exercised by RICHARD LEE HAWK.

This Court shall retain exclusive jurisdiction over the issue of visitation of the minor children and specifically whether the children are physically able to travel to the State of Iowa for the purpose of visitation. The parties specifically agree that Iowa is the children's home state under the Uniform Child Custody Jurisdiction Act.

4. DEBTS. . . . In exchange for this distribution of debt, the Counter-Respondent shall pay to the Counter-Petitioner the sum of \$2,500.00, payable to six (6) months as follows: in six (6) equal installments of \$416.67 per month commencing January 15, 1998, and \$416.67 each month thereafter until said sum of \$2,500.00 is paid in full. . . .

On August 24, 1998, Richard filed an "Application for Citation for Contempt of Court," alleging Tina willfully failed to make installment payments and reimburse him for visitation expenses as required under the decree. Richard also filed a "Motion for Court-Ordered Visitation to Occur in Iowa," citing the children's physical ability to do so and Tina's refusal to permit such visits. Both matters were heard and submitted on October 6, 1998.

Tina conceded her failure to make the required payments or reimburse Richard for visitation expenses. She, however, claimed her omission was not willful, citing financial hardship and her husband's lump sum payment of the delinquent amounts after she was notified of pending contempt proceedings.

Tina resisted Richard's request for visitation in Iowa. She disputed Richard's claim that the children were physically able to travel from Texas to Iowa. Tina also claimed Richard's receipt of child pornography via the Internet and inappropriate inquiries to the children concerning her personal matters necessitated supervised visits in Texas.

The district court found Tina's failure to make installment payments and reimburse Richard's visitation expenses were willful violations of its decree. The court also determined Tina's refusal to allow Richard visitation as provided in its decree was willful. Although Tina was cited for contempt, sanctions were withheld pending Tina's payment of \$674.16 to Richard for visitation expenses. Tina was also ordered to pay \$800 of Richard's attorney fees and court costs.

The court further found the children were able to travel to Iowa for visitation, rejecting Tina's contrary assertions. The visitation provisions of the 1998 decree were modified as follows:

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3. VISITATION. Richard shall have the right to visitation with the children with him for the first one-half of the traditional school summer vacation. He shall have visitation with the children with him for one-half of the traditional Christmas holiday vacation. This shall alternate annually between the first one-half and the second one-half, starting in 1999 with the first one-half. For both of these extended visitations, he shall have the children with him in Iowa. Richard shall be responsible for transporting the children from Texas to Iowa. Tina shall be responsible for transporting the children back from Iowa to Texas at the conclusion of the visitation period. If the parties choose to meet halfway and transfer the children, that is acceptable, but if they do not agree, these terms shall apply. Richard shall also be granted reasonable terms of visitation with the children in Texas upon 20 days' notice to Tina, which may include during a portion of the traditional spring break from school and the traditional Thanksgiving break from school. The parties may agree to any other reasonable terms of visitation and change these terms by agreement, but in the event they do not agree, these more specific terms will apply.

On appeal Tina contends the record does not support the district court's decision to cite her for contempt. She also argues that Richard failed to show the requisite change of circumstances justifying modification of the 1998 decree's visitation provisions.

II. Contempt.

A. Standard of Review. A certiorari action is a procedure utilized to test whether a lower board, tribunal, or court exceeded its proper jurisdiction or otherwise acted illegally.¹ Iowa R. Civ. P. 306. We review the district court's action for correction of errors at law. *Wyciskalla v. Iowa Dist. Ct.*, 588 N.W.2d 403, 405 (Iowa 1998). The writ will be sustained if we find the district court acted

¹ Tina seeks review of the district court's action by an appeal rather than certiorari as required by Iowa Rule of Appellate Procedure 304. Iowa R. App. P. 304. This rule provides the case will proceed as though the proper form of review had been sought. *Id.* We consider the notice of appeal in this case as a petition for writ of certiorari and grant the petition. See *Gimzo v. Iowa Dist. Ct.*, 561 N.W.2d 833, 834 (Iowa App. 1997).

illegally or without authority or jurisdiction. *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).

B. Merits on Review of a Judgment of Contempt. On review of a contempt ruling, this court must determine whether substantial evidence exists that would "convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt." *Id.* The party requesting the contempt finding has the burden of proving that the contemner (1) had a duty to obey a court order and (2) willfully failed to perform that duty. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Once the burden of production has shifted, it remains with the contemner. *Medina v. Iowa Dist. Ct.*, 552 N.W.2d 140, 143 (Iowa 1996). The burden of persuasion on the willfulness issue, however, remains on the contemnee. *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 824 (Iowa 1996).

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 v. Iowa Dist. Ct., 429 N.W.2d 135, 140 (Iowa 1988). There are two ways in which the contemner may show 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. *Christensen*, 578 N.W.2d at 678.

~~Tina argues the district court erred in finding her in contempt of court for willfully failing to abide by the provisions of the divorce decree. We disagree.~~

The district court found:

THE COURT FINDS that Tina was intentionally dilatory and obstructive in returning the Decree, thereby delaying payment of the \$2,500.00 to Richard. Moreover, she did not pay the installments after the Decree as required. THE COURT FURTHER FINDS that Tina did not pay "costs of the next visitation exercised by Richard." Tina testifies that she did not have the ability to pay because she was unemployed. Tina chooses to be unemployed and chooses to have her current husband pay her living expenses and debts, and he does so. THE COURT FURTHER FINDS that Tina has willfully violated the terms of the Decree as to visitation by refusing to allow Richard reasonable rights of visitation and by refusing to grant the four weeks of summer visitation.

In reaching the decision to cite Tina for contempt, the district court plainly rejected Tina's financial hardship defense. Because these conclusions implicate the district court's assessment of Tina's credibility and are supported by substantial evidence, we decline to issue a writ and affirm on this issue.

III. Modification of Visitation.

A. Standard of Review. Our review of these equitable proceedings is de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P 14(f)(7).

B. Merits. Iowa Code section 598.41(1)(a) provides:

The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or

significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.

The parent seeking to modify child visitation provisions of a dissolution decree must establish by a preponderance of evidence that there has been a material change in circumstances since the decree and that the requested change in visitation is in the best interests of the children. *In re Marriage of Salmon*, 519 N.W.2d 94, 95-6 (Iowa App. 1994). This standard follows the criteria used in actions to modify child custody, except a much less extensive change in circumstances is generally required in visitation cases. *In re Marriage of Wersinger*, 577 N.W.2d 866, 868 (Iowa App. 1998).

In its findings of fact, conclusions of law, and contempt action order, the district court provided:

THE COURT FURTHER FINDS that Tina has willfully violated the terms of the Decree as to visitation by refusing to allow Richard reasonable rights of visitation and by refusing to grant the four weeks of summer visitation.

THE COURT FURTHER FINDS that Richard has proven that it is in the best interests of the children to modify the terms of the Decree as to visitation with him. The children are physically able to travel to Iowa. If the parties are reluctant to have them travel by themselves on an airplane, they can provide the transportation themselves by automobile.

The district court then modified the visitation decree allowing the children to visit Richard in Iowa. These findings of fact find abundant support in the record, and we adopt them as our own. We believe the resulting visitation schedule ordered by the court accomplishes the purposes of section 598.41(1)(a). We affirm on this issue. We award \$1000 in appellate attorney fees to Richard Hawk.

AFFIRMED.

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