FILED
JAN 29 1992
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-407 / 90-910

IN RE THE MARRIAGE OF LINDA LORRAINE ANTISDEL AND DOUGLAS ARTHUR ANTISDEL

15

Upon the Petition of
LINDA LORRAINE ANTISDEL,

Appellee/Cross-appellant,

And Concerning
DOUGLAS ARTHUR ANTISDEL,

Appellant/Cross-appellee.

Appeal from the Iowa District Court for Adair County, William Joy, Judge.

Douglas seeks review of a district court ruling punishing him for contempt and further modifying the parties' dissolution decree. **VACATED IN PART AND AFFIRMED IN PART.**

Joseph A. Nugent, Des Moines, until his withdrawal, and then Todd E. Babich, Urbandale, for appellant.

David L. Jungmann, Greenfield, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

16

HAYDEN, J.

Douglas and Linda Antisdel were divorced on September 16, 1985. Douglas and Linda had been married for seventeen years. They had four children. The Antisdels were principally farmers and livestock producers in rural Adair County.

The decree which dissolved the parties' marriage incorporated their stipulation which granted custody of their two older children to Douglas, while their two younger children remained with Linda. The decree also provided Linda would be allowed to occupy the family homestead, which was on real estate granted to Douglas.

At the time the decree was entered Linda was living in Creston, Iowa, with the two younger children. She later decided to exercise her option to live on the homestead. Douglas refused to vacate because he believed Linda lost her right to occupy the homestead once she chose to live elsewhere.

On February 14, 1989, Linda filed a petition to modify the decree. She also sought to have Douglas held in contempt for failure to provide support, failure to vacate the marital residence, failure to deliver property, and failure to comply with discovery orders.

On November 21, 1989, the district court entered its modification decree. The district court found the provision concerning the homestead was in the nature of spousal support or alimony. The court concluded Linda had

not waived her right to occupy the homestead. Douglas was ordered to vacate the marital residence within thirty days of the modification decree. After Douglas's motion for a new trial was denied, he appealed on February 2, 1990. Linda cross-appealed.

While the appeal was pending, Linda went to the residence in order to take possession under the terms of the modification decree. She found Douglas had allowed pigs to roam free in the house and it was uninhabitable. Also, Douglas had removed several heaters which made parts of the house too cold to live in.

In January 1990 Linda filed an application for rule to show cause why Douglas should not be held in contempt of court concerning the condition of the marital residence. In February 1990 Linda also filed an application to modify the decree concerning the residence. In April 1990 the district court filed a ruling on the application for rule to show cause, finding Douglas in contempt.

In May 1990 the district court then entered its ruling punishing Douglas for his contempt and further modifying the divorce decree. The court ordered Douglas to jail, required Douglas to pay attorney fees for Linda of $2,750, awarded him the marital residence, and required him to pay Linda $325 per month alimony. The award of alimony was based on the monthly rental value of the marital residence, plus utilities. Douglas then filed the present appeal.

We issued our decision in the previous appeal on October 29, 1991, In re Marriage of Antisdel, No. 90-191 (Iowa App. Oct. 29 1991). In that case we found the provision concerning the homestead was in the nature of a property distribution and thus not modifiable. Id. at 7. We determined the provision gave Linda a lifetime right to occupy the marital residence. Id. At any time when Linda does not choose to occupy it, Douglas has the right to occupy or otherwise control the premises. Id.

I. Douglas contends the district court did not have jurisdiction to find him in contempt of court while the first modification action was being appealed.

Ordinarily, the filing of a notice of appeal from a final decision divests a district court of jurisdiction until some part of the case is remanded. Universal Cooperatives, Inc. v. Tasco, Inc., 300 N.W.2d 139, 142 (Iowa 1981). However, a party may enforce a decree while its correctness is being appealed, unless a supersedeas bond is filed, or a stay entered by this court. Lutz v. Darbyshire, 297 N.W.2d 349, 352 (Iowa 1980). An appeal does not deprive a district court of jurisdiction to punish for contempt. Id.

Douglas sought a stay of the district court's first modification action, but his request was denied. He did not file a supersedeas bond. Therefore, we hold the district court had jurisdiction to find Douglas in contempt for failing to abide by the terms of the first modification decree.

II. A separate issue is whether the district court had jurisdiction to make its second modification of the dissolution decree.

While a district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, the district court does not have authority to revisit and decide differently issues already concluded by that judgment. Franzen v. Deere & Co., 409 N.W.2d 672, 674 (Iowa 1987). A district court does retain jurisdiction to proceed on issues collateral to and not affecting the subject matter of the appeal. Universal Cooperatives, 300 N.W.2d at 142.

In this case, while the second modification was based on new facts and was a new action, the subject matter, the homestead, was the same as the first modification. The district court proceeded on the assumption the dissolution provision concerning the homestead was in the nature of spousal support and subject to modification. However, we held on appellate review the provision was in the nature of a property division and not subject to modification. Furthermore, while we determined Linda was entitled to live in the house for the rest of her life, the district court modified the decree to award the homestead to Douglas.

We vacate the portion of the district court's order which awarded the marital home to Douglas and ordered him to pay $325 per month in alimony.

The district court's award of alimony in its May 1990 order was based solely on the rental value of the marital residence plus utilities. The award of alimony was to recompense Linda for awarding the marital residence to Douglas. Because we vacate the award of the residence to Douglas, we also vacate this award of alimony to Linda. Our holding does not limit Linda's ability to seek a modification of alimony in the future. Linda's right to inhabit the marital residence is not subject to modification in the future, however, because it is part of the property division. See Prochelo v. Prochelo, 346 N.W.2d 527, 529 (Iowa 1984).

III. Douglas also contends there was not sufficient evidence to support the district court's finding of contempt.

Issues in a contempt case are properly considered in a certiorari proceeding. Amro v. Iowa District Court, 429 N.W.2d 135, 140 (Iowa 1988). Because certiorari is an action at law, our review is at law and not de novo. Id. at 140.

An action for contempt of court is treated in the nature of a criminal proceeding. Id. No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Id. Contempt consists of willful disobedience to a court order or decree. In re Marriage of Anderson, 451 N.W.2d 187, 191 (Iowa App. 1989).

We hold there was sufficient evidence to support the district court's decision. The evidence showed Douglas had willfully disobeyed the court order to allow Linda to live in the marital residence by trying to make the house uninhabitable. We affirm the district court's order finding Douglas in contempt.

IV. In its April 18, 1990, ruling on the application for rule to show cause the district court gave Douglas until May 29, 1990, to purge himself of the contempt. On May 29, 1990, the court held another hearing on Douglas's actions to purge himself. The court concluded Douglas's contempt required incarceration. Douglas claims the court erred in not finding he had sufficiently purged himself of the contempt.

One of the purposes of contempt is to compel obedience to an order of the court. Callenius v. Blair, 309 N.W.2d 415, 419 (Iowa 1981). It is therefore proper for the court to provide for purgation of contempt by imposing conditions designed to procure compliance with the court order. Id.

We affirm the district court's finding Douglas had not purged himself of the contempt by May 29, 1990. Douglas admits he did not pay Linda any damages for her loss of use of the house while he was cleaning it up.

V. Finally, Douglas claims the district court erred in awarding Linda $2,750 in attorney fees for the contempt action. Iowa trial courts have considerable discretion in awarding attorney fees. In re Marriage of Hunt, 476 N.W.2d

99, 103 (Iowa App. 1991). To overturn an award the complaining party must show the trial court abused its discretion. Id. We affirm the award of attorney fees to Linda.

VI. Linda seeks attorney fees for this appeal. An award of attorney fees is not a matter of right, but rests within the court's discretion and the parties' financial positions. Id. We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the trial court's decision on appeal. Id. at 104. Each party has sufficient financial resources to pay his or her own attorney fees for this appeal.

Costs of appeal are taxed to Douglas.

VACATED IN PART AND AFFIRMED IN PART.