IN THE COURT OF APPEALS OF IOWA

No. 3-029 / 92-610

FILED
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CLERK SUPREME COURT

WILLIAM D. WINTERS,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

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Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Winters seeks review, through a writ of certiorari, of the district court's order that found him in contempt of court for failing to pay child support. **WRIT GRANTED.**

Sidney C. Levine, Des Moines, for plaintiff.

Victoria Lawry and Marc S. Harding , Des Moines, for defendant.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ., but decided en banc.

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OXBERGER, C.J.

Gayle and William Winters were married on March 11, 1981 and had one daughter, Jodi Sue. On March 23, 1982, Gayle filed a petition for dissolution of marriage. The facts surrounding the procedure following the filing of the petition are central to this appeal and will be reviewed at length further in this opinion.

After a hearing, the court entered its decree of dissolution. The decree ordered William to pay $50 per week in child support. Since the entry of the decree, William failed to pay child support for 114 of the 116 months he was required to do so.

On November 18, 1991, Gayle filed an application to hold William in contempt for his failure to pay child support. William filed a motion to dismiss the application on the ground that the district court did not have jurisdiction to hear and determine the contempt action because of the procedural irregularities surrounding the waiver of the ninety day waiting period. The motion did not contain any reference to the failure to file the original notice.

After hearing, the district court overruled William's motion to dismiss and held him in separate counts of contempt of court for each of the 114 months he failed to pay child support. William then filed a motion to amend and an addendum to his motion to amend. The district court overruled the motion except to amend a mistaken reference to

Gayle's presence in the courtroom during the contempt hearing. The district court sentenced William to 114 days in the county jail. However, it suspended all but five days under the condition that, in addition to his support obligation, he pay $50 per month towards the arrearage. William seeks review, through a writ of certiorari, of the district court decision.

Scope of Review

Certiorari is a procedure to test the legality of an action by a lower board, tribunal, or court. Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974). It is an action at law and is not triable here de novo. City of Des Moines v. Iowa Dist. Court, 428 N.W.2d 292, 296 (Iowa 1988). We will uphold the fact findings of the trial court if they are supported by substantial evidence. Downs v. Board of Trustees of Police Retirement Sys., 312 N.W.2d 563, 566 (Iowa 1981).

I. Validity of Underlying Decree

On appeal, William contends the underlying dissolution decree was void, thus eliminating his legal obligation to pay child support. He claims the fact that original notice was not filed with the district court renders the decree void.

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We first review the facts giving rise to William's present contention. On March 23, 1982, Gayle filed a petition for dissolution of marriage, a supporting affidavit, and a financial statement. The next day, she filed a motion for decree during waiting period and two additional affidavits. On that same date, the court entered a temporary restraining order and an order for hearing. The order for hearing stated the petition was set for hearing on April 5, 1982. This allowed William seven days notice.

On March 26, 1982, William accepted service of original notice, petition for dissolution, affidavit, financial statement, motion for decree during waiting period, affidavit, order for hearing, affidavit and temporary restraining order. His signature appears on the acceptance of service. Although William accepted service of the original notice, there is no record of one filed with the court.

On April 5, 1982, the hearing was held. William was not present. The court entered an ordered waiving the 90-day waiting period and a permanent restraining order.

On April 6, 1982, the court entered a decree of dissolution which required William to pay $50.00 per week child support.

On April 7, 1982, William was served with the permanent restraining order, the order waiving the 90-day waiting period and the decree of dissolution. William took no action upon receipt of the documents.

In 1985, Gayle filed a contempt action in order to collect the attorney fees William was required to pay pursuant to the dissolution decree. Prior to trial, William paid the fees. William also paid $110.00 in child support and exercised sporadic visitation.

A decree or judgment can be attacked collaterally only when the judgment is void for lack of jurisdiction. Heishman v. Heishman, 367 N.W.2d 308, 309 (Iowa 1985); Morris Plan Co. of Iowa v. Bruner, 458 N.W.2d 853, 855 (Iowa App. 1990). It is "presumed that the finding of a court that has jurisdiction over the parties is based upon sufficient proof of service of notice and that such finding cannot be held void in a collateral proceeding". Morris, 458 N.W.2d at 856. A judgment, even if erroneous, is conclusive on collateral attack if the court has jurisdiction over both the person and the subject matter. Id. The judgment cannot be avoided collaterally, even if it was rendered on defective notice, and will stand unless there was what in law amounts to no notice. Id.

A substantial defect renders an original notice fatally flawed and any judgment based thereon is void. Id. A mere irregularity does not defeat the notice and does not void the judgment, although the judgment may be voidable. Id. See also Holmes v. Polk City Savings Bank, 278 N.W.2d 32, 34 (Iowa 1979). The distinction between mere irregularities and substantial defects is as follows:

> [M]ere irregularities which relate principally to the form of the notice or to technical or clerical errors, and which do not deceive or mislead the defendant, will not be found fatal to the jurisdiction of the court, but those amounting to a substantial departure from the substance requirements of the rule would affect the validity of the notice.

Parkhurst v. White, 254 Iowa 477, 481-82, 118 N.W.2d 47, 49-50 (1962).

We do not find the notice provided to William, as shown by his signed acceptance of service, deceived or mislead him in any way. We find the notice he received properly apprised him of the substance of the pending action. His signature appears on the acceptance of service. William in no way attempted to challenge any of the orders for nine years following their entry. To some degree, William acted within the terms of the court's order. We find William had actual notice of all proceedings. Accordingly, the defects in the original notice were mere irregularities, and do not render the decree void. Thus, we affirm the decision of the district court.

II. Separate Acts of Contempt

William also contends the trial court erred in finding he had committed 114 separate acts of contempt corresponding with the number of months he failed to pay child support. He argues the application for contempt failed to fully and unambiguously notify him of the multiple accusations against him.

This contempt action was brought pursuant to Iowa Code § 598.23(1) (1991), which provides:

> 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 for a period of time not to exceed thirty days for each offense.

(Emphasis supplied.)

Separate contempts may be punished in a single proceeding under Iowa Code § 598.23(1) and the punishment provided by that section for each "offense" may be imposed as to each of them. Johnson v. Iowa Dist. Court, 385 N.W.2d 562, 563 (Iowa 1986).

Winters urges us to adopt the outcome in Johnson v. Iowa Dist. Court, 385 N.W.2d 562, 563 (Iowa 1986). The application at issue in Johnson did not claim separate acts of contempt but, in relevant part, stated:

> 3. That in accordance with the Decree the respondent should of [sic] paid child support in the amount of $23,550.00, however has paid only $8321.26 and therefore is delinquent $15,288.74.

The application gave no other specific information regarding the number of payments or length of time of delinquency. Accordingly, the court found the application lacked the specificity necessary to find separate acts of contempt. The court noted:

> A district court has the power to assess punishment for more than one act of contempt in a single proceeding based upon allegations contained in a single affidavit. This is possible only where the motion for contempt sets out

> specifically distinct and separate violations of (emphasis added) the order violated. This is because a contempt proceeding has some of the incidents of a trial for crime. . . .Thus, a motion for contempt is comparable to an indictment or information and complaint which must, in separate counts, charge the distinct misdemeanors. [The respondent] did not receive full and unambiguous notification of the multiple accusations made against him upon which the judgment rendered by the trial court was based, and the requirements of due process were not satisfied.

Id. at 564 (emphasis added) (citations omitted).

In this case, the application for contempt provided, in relevant part, as follows:

> 1. Decree was entered herein on April 6, 1982, ordering, among other things, Respondent to pay child support to Petitioner.
> 2. Respondent is able-bodied and well capable of paying support, but has not.
> 3. The actions of Respondent are clearly contemptuous of an order of this court and Respondent should be punished accordingly.

Like the application at issue in Johnson, this application fails to charge, in separate counts, each distinct misdemeanor. Accordingly, while we agree with the district court's serious treatment of William's failure to pay child support, we are unable to sustain the finding he committed 114 separate acts of contempt. We do, however, find sufficient evidence to sustain finding William committed one act of contempt in failing to pay child support.

Accordingly, we grant William's writ of certiorari. We affirm the trial court's finding of a single act of

contempt. We vacate the trial court's finding of 114 separate acts of contempt. We remand this matter to the trial court for sentencing on the finding of a single act of contempt as alleged in the application for contempt.

WRIT GRANTED.

All judges concur except Donielson, J., who dissents and Habhab, J., who joins the dissent. Sackett, J., concurs specially.

DONIELSON, J. (dissenting)

I respectfully dissent. I would sustain the district court's finding that William committed 114 separate acts of contempt and would annul William's writ of certiorari.

"Whether or not separate acts of contempt have been committed depends on the circumstances." Johnson v. Iowa Dist. Court, 385 N.W.2d 562, 563 (Iowa 1986) (quoting 17 C.J.S. Contempt § 100, at 285 (1963) (footnotes omitted)). The application for contempt in this matter was sufficiently specific to find 114 separate acts of contempt. The application specifically referred to the April 6, 1982, decree of dissolution which ordered William to pay child support. That decree stated, in relevant part:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Respondent be and he is hereby ordered to pay to the Petitioner the sum of $50 per week as and for child support, until the child reaches age 18, is self-supporting, or married, whichever occurs first. All payments shall be made through the Friend of the Court's office, and judgment shall be entered against the Respondent and in favor of the Petitioner for each payment as the same becomes due and unpaid.

(Emphasis added.) From the above language, William was clearly apprised from the time of the entry of the decree that each unpaid amount became a separate judgment upon which interest would accrue and the available enforcement methods would attach. Thus, each failure to pay is a separate and distinct violation of a court order.

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The application to cite for contempt stated, in relevant part: "The actions of Respondent are clearly contemptuous of an order of this court and Respondent should be punished accordingly." The word "actions" specifically refers to William's multiple failures to comply with the support provision in the April 6, 1982, decree.

The purpose of requiring the application for contempt to state a distinct and separate violation for each act of contempt to be punished is to assure the defendant receives "full and unambiguous notification of the multiple accusations made against him." Johnson, 385 N.W.2d at 526 (quoting Ex parte McNemee, 605 S.W.2d 353, 357 (Tex. Civ. App. 1980) (citations omitted)). Here, the application to cite for contempt is sufficiently specific to provide William with full and unambiguous notification of the multiple accusations made against him. He failed to pay monthly child support, as ordered by the decree, for 114 months. Each failure to pay is clearly a "distinct and separate" violation of the April 6, 1982, order.

Contempt actions of this nature should be made more easily provable, not more difficult. To require even more specificity than has been provided in this case imposes unnecessary expense and hardship upon the party seeking to recover some remedy arising from the delinquent parent's non-payment of child support.

I agree with the majority's position regarding the original notice problem.

I would annul the writ and sustain the district court's ruling in its entirety.

Habhab, J., joins this dissent.

SACKETT, J. (specially concur) 000701

I concur with the majority decision to grant the writ. However, unlike the majority, I find the dissolution decree void. I find the court was without jurisdiction to enter the dissolution decree.

A petition for dissolution of marriage was filed March 23, 1982, and on April 6, 1982, only twelve days after the petition was filed, a decree of dissolution was filed. Respondent did not appear at the hearing. There was filed an "Acceptance of Service". It allegedly was signed by respondent and stated he accepted service of the original notice, petition for dissolution, affidavit, financial statement, motion for decree during waiting period, affidavit, order for hearing, affidavit and temporary restraining order and acknowledged receipt of service. No copies of any of these documents were attached to the Acceptance of Service. There is no showing respondent was notified the dissolution was to come before the court on April 5.

In the April 6 decree, respondent was ordered to pay child support for a child born three months before the marriage. Petitioner claimed the child was an issue of the marriage.

The order for the April 5 hearing which respondent was suppose to have been served a copy of only set down for

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hearing the matter of restraining order and temporary custody, support and attorney fees.[1]

Furthermore, respondent had to be given twenty days to file an answer. Iowa R. Civ. P. 53.

The court on April 5, and 6, 1982, was without jurisdiction to entertain the action and enter the decree.

I recognize there is a proof showing that after the decree was entered it was served on respondent. This does not cure jurisdictional defects.

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1. Iowa Code section 598.11 provides: [t]he court may make such an order when a claim for temporary support is made by the petitioner in the petition, or upon application of either party, after service of the original notice and when no application is made in the petition; however, no such order shall be entered until at least five days' notice of hearing, and opportunity to be heard, is given the other party. Appearance by an attorney or the respondent for such hearing shall be deemed a special appearance for the purpose of such hearing only and not a general appearance. . . .