

IN THE COURT OF APPEALS OF IOWA

No. 6-806 / 96-0964

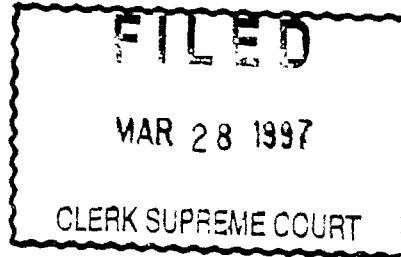
JOSEPH R. O'ROURKE,

Plaintiff,

vs.

**IOWA DISTRICT COURT
FOR SCOTT COUNTY,**

Defendant.



Certiorari to the Iowa District Court for Scott County, James E. Kelley, Judge.

Plaintiff in certiorari action challenges district court order finding him in contempt for willfully failing to comply with various provisions of the dissolution decree. **WRIT ANNULLED.**

James L. Tappa of Spector, Tappa & Nathan, Rock Island, Illinois, for plaintiff.

Arthur L. Buzzell, Davenport, for defendant.

Heard by Cady, P.J., and Huitink, J., and McCartney, S.J.*

* Senior judge from the Second Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

The plaintiff, Joseph R. O'Rourke (Joseph), by certiorari, seeks review of the order of the Iowa District Court for Scott County, the defendant herein, finding the plaintiff in contempt of a court order directing him to perform certain acts arising out of a dissolution. The writ is annulled.

Joseph and his then wife, Linda O'Rourke (Linda), were married in 1968. In September 1992, Joseph filed his petition seeking a dissolution of the marriage.

The cause came on for trial before the defendant court in October 1994, and on December 28, 1994, the district court entered its decree of dissolution together with its order providing for the distribution of certain substantial assets owned by the parties.

Joseph and certain of his brothers were owners of a number of subchapter S corporations. By court order, Linda received one-half of the "interest" of Joseph in those corporations, including one corporation designated by the court as "O'R Bro. of Ga."

Linda later became aware that Joseph received \$167,456 as his share of the subchapter S income from O'Rourke Bros. of Georgia (O'R Bro. of Ga.). None of this was paid by Joseph to Linda, although under the decree of dissolution as set forth above she owned an undivided one-half interest in that subchapter S corporation.

At trial in October 1994, Joseph testified that all he received from these various businesses was his salary and at that time, i.e., the time of trial, O'R Bro. of

Ga. had not paid out any income to him other than his regular salary. Financial affidavits provided by Joseph indicated a monthly salary of \$4000.

After Linda became aware of this particular distribution and asserted she was entitled to one-half thereof, or \$83,728, she sought reimbursement of that sum. Joseph proffered her approximately \$900 in settlement, calculating it to represent approximately $\frac{4}{365}$ of one-half of the total distribution on the theory that her ownership began only at the time of the decree and from that point on until the end of the year she was only entitled to that fraction of the days of ownership divided by the 365-day year.

Linda then sought to have Joseph held in contempt. In January 1996, at the contempt hearing, Joseph testified he received some of the \$167,456 distribution from O'R Bro. of Ga. after January 1, 1995 and some before, but admitted he did receive a sharing of the profits before the trial of the dissolution.

Thus, his testimony in January 1996 at the contempt hearing is at odds with his testimony given in October 1994 at the time of the dissolution trial.

The dissolution trial court in its findings stated, after the parties had agreed each was to receive one-half of Joseph's interest in O'R Bro. of Ga., as follows:

The representation has been made on the record that there have been no substantial changes to the petitioner's [Joseph's] ownership in the said businesses between the date of the original commencement of the hearing on this matter on October 16, 1994, and the date of this decree.

Thus, the court acted in reliance upon Joseph's testimony at the dissolution trial that there had been no distribution of profits in the subchapter S corporation, O'R Bro. of Ga. The financial statements filed by Joseph prior to trial (and never amended) did not reflect any distributions and showed the value of \$15,000 as attributable to his share of that corporation.

Linda further asserted as part of her application to show cause why Joseph should not be held in contempt that he had not turned over to Linda in accordance with the dissolution court's decision a certain watch and a gold bracelet. Joseph contended the gold bracelet had been lost in March 1995 and that he never owned the certain type of watch directed to be delivered over to Linda. It appears, however, he did subsequently provide those items to Linda. The trial court did not find Joseph's explanations as to why he did not deliver these personal property items to Linda to be credible, and found his failure to deliver the items willful and in defiance of the court order and, as a consequence, found him in contempt of that order.

The fighting issue, however, is Joseph's insistence that he was not in contempt of court in failing to pay over one-half of the distribution from O'R Bro. of Ga. to Linda. He contends the decree of the dissolution court did not direct him to pay such amount of money and, therefore, there is no evidence to support a finding of willful failure on Joseph's part to pay that sum.

Our review is to determine whether or not there is substantial evidence to support the judgment of the trial court in finding Joseph to be guilty of contempt.

Bervers v. Kilburg, 326 N.W.2d 902, 904 (Iowa 1982). That review is not de novo but we review to assure ourselves that proper proof supports the findings and judgment.

Lane v. Oxberger, 224 N.W.2d 245, 247 (Iowa 1974).

The evidence to support a finding of contempt must be such that there is no reasonable doubt the failure was willful and intentional. *Palmer College of Chiropractic v. Iowa Dist. Ct.*, 412 N.W.2d 617, 619 (Iowa 1987).

Turning to the record before the contempt trial court (a different district court judge from the district court judge who tried the dissolution), if in fact the payment of the distribution from O'R Bro. of Ga. was made subsequent to December 28, 1994, then Linda would be entitled to one-half thereof since her "interest" in O'R Bro. of Ga. would carry with it the right to any income subsequently distributed to the owners of the stock. The supreme court in *Post-Newsweek Cable, Inc. v. Board of Review*, 497 N.W.2d 810 (Iowa 1993), adopted the Black's Law Dictionary definition of "interest" that it denotes a "legal share in something." *Id.* at 813 (quoting Black's Law Dictionary 468 (6th Ed. 1990)). Under this set of circumstances, there would be substantial evidence that Joseph willfully failed to follow the dictate of the dissolution decree.

If payments were made before the decree of dissolution giving Linda one-half interest in the O'R Bro. of Ga. subchapter S corporation, then Joseph misled the court both in his testimony that he had received nothing other than his salary from O'R Bro.

of Ga. at the time of trial and by his financial statements provided the court for trial of the dissolution.

Although the decree of dissolution does not state that Joseph is to pay Linda one-half of the income accretions in O'R Bro. of Ga., it is implicit when Linda is awarded one-half interest in the subchapter S corporation. By the same token, the decree does not direct Joseph to pay himself such accretions. The dissolution court did not have before it any information that distributions had, in fact, been made prior to the trial of the matter, which lack of information is directly attributable to Joseph, both by his testimony and by his financial statements which were never amended. If he received such sum from the corporation subsequent to trial but before the decree, it would manifestly alter the financial statements to a considerable degree -- the accretion of \$167,000 to his available assets was not de minimis. This amount severely warps his financial statements and his trial statements.

Joseph argues that contemptuous conduct must be based upon a clear and specific court direction and that such direction (to pay Linda) is not found in the dissolution decree. One cannot withhold information and then later be heard to say that since the court did not specifically direct him to attend to the omitted matter, he cannot be held in contempt. By his own conduct he created the situation in the first instance. In *Palmer College of Chiropractic*, 412 N.W.2d at 620, the supreme court held the rule of specificity is not applied "when the party's actions were calculated to

subvert the court's instruction." We conclude Joseph's actions were designed to subvert the direction of the court.

Based upon the foregoing, we find there was substantial evidence Joseph willfully and contumaciously defied and ignored the order of the dissolution court in effecting the distribution of assets. Based upon the foregoing, the writ of certiorari is annulled.

WRIT ANNULLED.