IN THE COURT OF APPEALS OF IOWA

FILED
AUG 27 1986
CLERK SUPREME COURT

IN RE THE MARRIAGE OF MARGARET M. SAWYER
AND CHARLES A. SAWYER

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Upon the Petition of MARGARET M. SAWYER,	)	Filed August 27, 1986
Petitioner-Appellee,	)	6-267 / 85-1797
And Concerning CHARLES A. SAWYER,	)	
Respondent-Appellant.	)	

Appeal from the Iowa District Court for Wapello County (No. CD - 3151-1283) - Richard J. Vogel, Judge.

Respondent appeals from trial court's order finding him in contempt of court and refusing to modify visitation provisions. **AFFIRMED AS MODIFIED, WRIT SUSTAINED.**

Robert C. Oberbillig, of the Legal Aid Society of Polk County, for the respondent-appellant.

Samuel O. Erhardt and Sam K. Erhardt, Ottumwa, for the petitioner-appellee.

Considered by Oxberger, C.J., and Snell, and Sackett, JJ.

SACKETT, J.

Respondent Charles A. Sawyer appeals from the trial court's order finding him in contempt of court and refusing to modify the visitation provisions of his dissolution decree. We sustain the writ and modify the decree.

The marriage of Petitioner Margaret M. Sawyer and Respondent Charles A. Sawyer was dissolved and the parties were granted joint custody of their four children born in 1979, 1980, 1981, and 1983. Physical care of the children was placed with Charles. At that time he was residing in Des Moines. Margaret was awarded visitation on alternate weekends, one month in the summer and one week at Christmas.

The parties had no assets. Charles received a $366 per month disability benefit and was a self-employed cab driver. In the prior calendar year he earned about $6,000 driving his cab. Margaret was unemployed and was not ordered to pay child support. She was living in Ottumwa. Charles was ordered to pay the cost of transporting the children for visitation.

On October 3, 1985, Margaret filed an application to have Charles found in contempt for failing to provide the required transportation. On October 17, 1985, Charles filed an application to modify the original decree claiming he had lost his job and car and could no longer provide the transportation. He asked that the decree be modified.

The trial court found Charles guilty of contempt and refused to modify the decree.

I.

Charles contends Margaret failed to meet the burden of proving him guilty of willful contempt beyond a reasonable doubt and he offered sufficient evidence to show his default was not willful.

In Lamb v. Eads, 346 N.W.2d 830, 832 (Iowa 1984) the Iowa Supreme Court said:

> The general rule holds that an applicant for a contempt citation establishes a prima facie case by proving the duty which is on the contemner and the contemner's failure to perform the duty. The contemner then has the burden of showing he could not perform the duty, if he relies on that ground. See Wilson v. Fenton, 312 N.W.2d 524, 527 (Iowa 1981) ("the alleged contemner has the burden of proof on a defense of inability to comply"); Foust v. Denato, 175 N.W.2d 403, 405 (Iowa 1970) ("when the evidence clearly shows the order of court has been disobeyed, a party who seeks to purge himself of contempt by showing his inability to comply with the order of court has the burden to prove it"); 17 Am.Jur.2d Contempt §51, at 54 (1964); 17 C.J.S. Contempt §84(2), at 214 (1963).
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> The principle that places the burden on the contemner to show that his default was not willful necessarily means that upon the contemner's failure to make the requisite showing the default may be found to be willful. Lamb, 346 N.W.2d at 832.

The burden of proof to show contempt is now evidence beyond a reasonable doubt. Phillips v. Iowa District Court for Johnson County, 380 N.W.2d 706, 709 (Iowa 1986); McCarthy v. Iowa District Court Jefferson County, 386 N.W.2d 122, 125 (Iowa App. 1986). Our review is not de novo. McCarthy, 386 N.W.2d at 125.

Not every violation of a court order will sustain a finding of contempt; it must be shown that there was a willful disobedience. Id. To establish the requisite willfulness, there must be "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." Id. at 125-26.

At the time the application was filed Charles was unemployed. He was supporting himself and the four children with his disability pension of $366, plus $98 in ADC and $240 in food stamps. His car had broken down and he lived

100 miles from Margaret's home. Charles testified the cost of gas for the visitation was $90. Margaret also was still unemployed, although she helped care for a relative in return for room and board.

The trial court determined he could rent or borrow a car and found him in contempt.

While we have been strong and firm in our position that noncustodial parents should have the right to contact with their children and while we recognize that Margaret has no funds to provide transportation, we refuse to find the record supports a finding of willful contempt on Charles' part. He has a major responsibility to provide food, shelter and clothing for this family on his very meager income. Margaret also has a duty to provide for these children's support and while she has a home for visitation she has done nothing more despite Charles' worsened condition.

I.

Charles contends his divorce decree should be modified. Our review is de novo. Nevertheless, the trial court has reasonable discretion in determining whether modification is warranted and that discretion will not be disturbed on appeal unless there is a failure to do equity. In re Marriage of Vellernack, 334 N.W.2d 761, 762 (Iowa 1983).

To modify a decree (1) there must be a substantial and material change in the circumstances occurring after the entry of the decree; (2) not every change in circumstances is sufficient; (3) it must appear that continued enforcement of the original decree would, as a result of the changed conditions, result in positive wrong or injustice; (4) the change in circumstances must be permanent or continuous rather than temporary; (5) the change in financial conditions must be substantial; and (6) the change in circumstances must not have been within

the contemplation of the trial court when the original decree was entered. See Vellernack, 334 N.W.2d at 762.

We determine Charles has shown his current financial situation makes transportation impossible. We therefore modify the decree by striking that provision therefrom.

Margaret's application for attorney fees is denied.

AFFIRMED AS MODIFIED. WRIT SUSTAINED.[1]

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[1] Appellant properly should have sought a writ of certiorari. We therefore treat the case as though the proper procedure had been followed. Iowa R. App. P. 304.