

IN THE COURT OF APPEALS OF IOWA

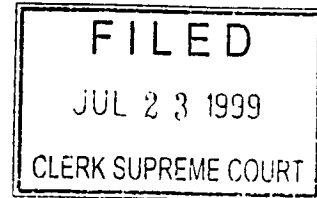
No. 9-233 / 97-1380

Filed July 23, 1999

**IN RE THE MARRIAGE OF ANGELA DAWN NICHOLSON
AND KURT ALLEN NICHOLSON**

Upon the Petition of
ANGELA DAWN NICHOLSON,
Appellant,

And Concerning
KURT ALLEN NICHOLSON,
Appellee.



Appeal from the Iowa District Court for Warren County, Gary G. Kimes,
Judge.

Angela Nicholson appeals and Kurt Nicholson cross-appeals the district court's order dismissing Angela's citation for contempt, granting Kurt's petition to modify the parties' dissolution decree, and dismissing Kurt's petition for abuse of process.

**AFFIRMED IN PART AND REVERSED IN PART ON APPEAL, AND
AFFIRMED ON CROSS-APPEAL.**

William Mooney of Murray, Jankins and Noble, Des Moines, for appellant.

Tina Jerstad and Phil Watson of Phil Watson P.C., Des Moines, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ.

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HUITINK, P.J.***I. Background Facts.***

Kurt and Angela Nicholson's marriage was dissolved on October 21, 1991. The court's decree incorporated their stipulated division of assets. The decree also provided for joint custody and shared physical care of their two children, Jacob, born April 1, 1987, and Mitchell, born July 26, 1989.

In 1989 Kurt won an Iowa Lottery annuity payable in installments of \$116,000 per year, for twenty years on December 15 of each year. The lottery winnings were divided according to the following provision of the Nicholsons' stipulation:

The Petitioner shall receive a 40% interest in the Respondent's annuity receivable from the Iowa Lottery. The parties shall execute such documents as may be necessary to transfer a 40% interest in the Lottery annuity from the Respondent to the Petitioner.

In December 1991 Kurt collected the annuity proceeds at the Iowa Lottery office. At that time, he inquired concerning prepayment division of the proceeds according to the stipulation. Kurt's request was denied. The parties subsequently agreed to annually divide the net proceeds Kurt received in the percentages provided in their stipulation. For reasons hereinafter discussed, the 1991 lottery installment was not divided. The 1992, 1993 and 1994 installments were divided as agreed.

Shortly after the decree was entered, the Nicholsons attempted reconciliation. Although the length of their resulting cohabitation is disputed, Angela concedes residing with Kurt for most of 1992 and part of 1993.

The Nicholsons filed separate individual income tax returns for calendar year 1991. Angela reported forty percent of the gross 1991 lottery installment as taxable income, and Kurt deducted that amount as alimony on his return. Kurt also claimed the dependency exemptions for the children. Subsequent audits and amended returns resulted in substantial adjustments to the Nicholsons' respective 1991 tax liabilities. Kurt's alimony deduction was disallowed, and he was assessed \$55,000 in additional federal taxes, interest, and penalties. Angela's amended 1991 return resulted in a \$11,951 refund of state and federal income taxes.

In 1994 the Nicholsons' decree was modified by placing their children's physical care with Kurt. Angela was ordered to pay \$290 monthly child support based on an imputed \$970 monthly net income. Angela's share of annual lottery installments was not included as income in calculating her child support obligation.

In November 1996 Angela garnished Kurt's 1996 lottery installment in an effort to collect her share of the 1991 lottery proceeds. In a February 15, 1997, ruling on Kurt's motion, the district court quashed the garnishment and ordered prepayment division of all future lottery installments.

Prior to entry of the court's order for prepayment division, Kurt, with Angela's consent, assigned the lottery proceeds to Woodridge Financial Corporation as security for a personal loan. The terms of this assignment include Angela's continued receipt of forty percent of each lottery installment payable in 1997 through 2009.

These proceedings commenced with Angela's application to have Kurt cited for contempt. Angela alleged Kurt's failure to pay her share of the 1991 lottery installment, attempts to deduct alimony, and assignment of lottery proceeds constituted willful disobedience of the district court's 1991 decree.

Kurt denied any contumacious behavior and sued Angela for abuse of process. Kurt also sought modification of Angela's child support obligation citing the district court's order for prepayment division of future lottery installments.

In its consolidated order, the district court found the record did not support a finding of contempt. The court also found the record did not support Kurt's abuse of process claim. The court, citing its earlier order for prepayment division of lottery proceeds, found a substantial change in circumstances justifying modification of Angela's child support obligation. After including Angela's share of lottery income, the district court increased Angela's child support obligation from \$290 to \$792 per month beginning May 1, 1997.

Angela raises four issues on appeal: (1) the district court erred in adopting verbatim Kurt's proposed findings of fact and conclusions of law; (2) the record contains sufficient evidence to support a finding of contempt against Kurt; (3) regardless of the court's finding on contempt, the court erred in not compelling Kurt to pay Angela her share of the 1991 lottery payment; and (4) the district court erroneously considered the parties' lottery proceeds in modifying Angela's child support obligation.

In his cross-appeal, Kurt urges the district court erred in refusing to find Angela liable for abuse of process relating to her failed attempt to garnish his 1996 lottery annuity payment.

II. Standard of Review.

We review the dismissal of an application for contempt for errors at law. *See* Iowa R. App. P. 4; *McDonald v. McDonald*, 170 N.W.2d 246, 247 (Iowa 1969). We review Angela's request that the court compel payment of the 1991 lottery payment de novo. *See* Iowa R. App. P. 4. We review the court's findings on the abuse of process claim for errors at law. *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203, 208 (Iowa 1995). Finally, we review the district court's ruling on Kurt's petition to modify the parties' dissolution decree de novo. *See* Iowa R. App. P. 4.

III. Proposed Findings and Conclusions.

We have previously approved the practice by trial judges of requesting counsel for both parties in a case to submit proposed findings and conclusions following trial, provided counsel are also permitted an opportunity to comment on the proposal submitted by the other. *See In re Marriage of Siglin*, 555 N.W.2d 846, 848 (Iowa App. 1996); *Production Credit Ass'n v. Shirley*, 485 N.W.2d 469, 475 (Iowa 1992); *Kroblin v. RDR Motels, Inc.*, 347 N.W.2d 430, 435 (Iowa 1984). By the same token, however, we do not encourage the practice of adopting verbatim the proposed findings and conclusions submitted by one of the parties. *See Care Initiatives v. Board of Review*, 500 N.W.2d 14, 16 (Iowa 1993).

We have previously ruled on the proper method of reviewing such claims in *Siglin*, wherein we stated:

Although we recognize legitimate concerns exist as to the extent of a judge's actual input into the process when a proposed decree is adopted verbatim, these concerns do not necessarily mean the decision was not a product of independent judicial judgment. Consequently, we do not apply a separate standard of review on appeal from a decree prepared by counsel.

Siglin, 555 N.W.2d at 848-49 (citations omitted). We have reviewed the entire record and find the district court's factual findings enjoy substantial support. We have adopted many of them as our own. Additionally, our review of the record indicates that while the district court did adopt much of Kurt's proposed findings, it did rule against him on the abuse of process claim. Such diversion from Kurt's proposed order is evidence of the district court's exercise of independent judicial judgment.

IV. Contempt.

Contempt can be described as willful disobedience. *Amro v. Iowa Dist. Court*, 429 N.W.2d 135, 140 (Iowa 1988). A finding of willful disobedience 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. *Ervin v. Iowa Dist. Court*, 495 N.W.2d 742, 744 (Iowa 1993). Because of the quasi criminal nature of contempt proceedings, the finding of contempt must be supported by proof beyond a reasonable doubt. *Phillips v. Iowa District. Court*, 320 N.W.2d 706, 708-09 (Iowa 1986).

We, like the district court, find Angela has failed to meet her burden of proof. There is no dispute concerning Angela's acquiescence in the distribution of net lottery proceeds upon their receipt by Kurt. Moreover, the district court in finding the 1991 lottery proceeds were used for joint family expenses expressly rejected Angela's contrary assertions. This conclusion implicates the district court's assessment of the parties' credibility and finds substantial evidentiary support in the record. We, either on de novo review or as a matter of law, are unable to reach a different conclusion. We also reject Angela's assertions concerning Kurt's income tax returns or his assignment of lottery proceeds as security for a loan. Neither implicates any willful disobedience of a court order.

V. Abuse of Process.

Kurt asserts the district court erred in finding the record did not support a finding of abuse of process by Angela. Iowa has adopted section 682 of the Restatement (Second) of Torts (1977), which provides:

One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.

Comment b to section 682 provides:

[T]here is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant.

For abuse of process to occur there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.

See also Pundzak, Inc. v. Cook, 500 N.W.2d 424, 429-30 (Iowa 1993).

We find no error in the district court's ruling. There is no evidence in the record indicating Angela used the legal process to obtain anything other than the alleged debt she believed Kurt was withholding from her. The fact that the district court later found no debt *legally* existed is not evidence of Angela's abuse of the legal process. We affirm the district court on this issue.

VI. Modification of Child Support.

Modification of a dissolution decree is permitted when there has been a material and substantial change in circumstances since the original decree. *Mears v. Mears*, 213 N.W.2d 511, 514-15 (Iowa 1973). The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of evidence. *Thayer v. Thayer*, 286 N.W.2d 222, 223 (Iowa App. 1979).

Not every change in circumstances constitutes a sufficient basis for modification. *In re Marriage of Vetterneck*, 334 N.W.2d 761, 762 (Iowa 1983); *Simpkins v. Simpkins*, 258 Iowa 87, 90, 137 N.W.2d 621, 623 (1965). Iowa Code section 598.21 allows modification of a prior child support award where the support ordered varies by at least ten percent from the amount due under the most current child support guidelines. *See* Iowa Code § 598.21(9) (1997).

As noted earlier, Angela's current support obligation was set in 1994 without regard for her annual receipt of taxable lottery proceeds. She argues the proceeds were properly excluded from her income then and there is no change justifying their

inclusion now. *See In re Marriage of Swartz*, 512 N.W.2d 825, 826 (Iowa App. 1992) (lottery winnings are not earnings for purposes of setting alimony award and are treated as property subject to division).

Whether lottery proceeds payable in installments, like income from any other source, should be included in calculating child support is a question beyond the context of this modification proceeding.

We, nevertheless conclude Kurt has failed to show the requisite change in circumstances necessary to justify modification of Angela's child support obligation. Although Angela now receives direct payment of annual lottery proceeds, neither the gross amount received nor the intended inclusion of lottery proceeds as property subject to division has changed. In the absence of other evidence indicating a change in the parties' financial situations or needs of the children, the district court should not have modified Angela's child support obligation. We therefore reverse on this issue.

VII. Attorneys fees and costs.

After considering the parties' respective financial conditions, and the mixed result of this appeal, we order each party to pay his or her own attorney's fees and one-half of the court costs.

We have carefully considered all of the remaining issues raised on appeal and cross-appeal and find them to be without merit or otherwise disposed of by the foregoing opinion.

**AFFIRMED IN PART AND REVERSED IN PART ON APPEAL, AND
AFFIRMED ON CROSS-APPEAL.**