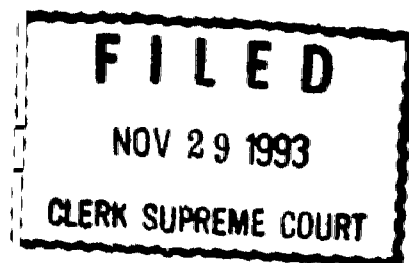


IN THE COURT OF APPEALS OF IOWA

No. 3-481 / 93-126



BETH ANN SCHNEIDER,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

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

Plaintiff appeals the district court ruling finding her
in contempt of court for failing to comply with the
visitation provision of the parties' dissolution decree.

WRIT SUSTAINED.

J. Russell Hixson and Jan M. Mohrfeld of Gamble &
Davis, Des Moines, for plaintiff.

No appearance for defendant.

Heard by Schlegel, P.J., and Habhab, J., and Perkins,
S.J.* Donielson, J., takes no part.

*Senior judge from the 5th Judicial District serving
on this court by order of the Iowa Supreme Court.

~~PERSONAL~~

The ~~district~~ district court dissolved the marriage of Beth and Kurt ~~Schneider~~ on November 14, 1991. The parties were awarded joint custody of their three children: Dustin, born June 27, 1983; Melisa, born March 5, 1985; and Nicole, born December 6, 1988. Beth was granted primary physical care of the children. The decree awarded Kurt specific visitation, which included alternating weekends and three weeks of visitation in the summer. Kurt was ordered to pay child support of \$84 per week.

Kurt moved to Chicago in December 1991, and then to Kansas in May 1992. During this period of time he was not always able to exercise his weekend visitation. His parents, Joseph and Doris Schneider, would sometimes exercise Kurt's visitation time. Eventually Beth decided she would no longer allow the grandparents to exercise Kurt's visitation because she was not advised prior to visitations whether Kurt would be present or not. In September 1992 Kurt moved back to Des Moines and is living with his parents. He has resumed more regular visitation.

In August 1992 the district court found Kurt in contempt for failure to pay child support. In September 1992 Kurt filed a petition to cite Beth for contempt for failure to allow visitation. His parents filed a petition for grandparent visitation. In October 1992 Beth filed an application seeking to have Kurt held in contempt, alleging continued failure to pay child support, other violations of

the dissolution decree, and violation of a temporary injunction.

The district court held a consolidated hearing on the three petitions. The court found Kurt in contempt for failure to pay child support and for failure to comply with the life insurance provision of the decree. The court sentenced him to six days in jail.

The court found that Beth was in contempt for not allowing Kurt visitation on certain occasions. The court sentenced her to two days in jail and permanently expanded Kurt's visitation from three weeks to five weeks during the summer. The court also modified the dissolution decree to provide that Kurt, his parents, or members of his immediate family could pick up the children for visitation. Beth was ordered to pay \$750 towards Kurt's attorney fees.

The court also found the grandparents had established a substantial relationship with each of the children and it was in the children's best interests to grant specific visitation rights for the grandparents. The grandparents were awarded three weekend visitations each year.

Beth appealed, claiming the district court exceeded its jurisdiction. The proper form of review where the inferior court is alleged to have exceeded its jurisdiction is by certiorari. State v. Moret, 486 N.W.2d 589, 591 (Iowa 1992). Under Iowa Rule of Appellate Procedure 304, we may proceed as though a petition for writ of certiorari was filed, even though the case was brought on appeal, where

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our proper form of review is by certiorari. See Shannon v. Hansen, N.W.2d 412, 414 (Iowa 1992).

A contempt proceeding is essentially criminal in nature, and each element must be established beyond a reasonable doubt. In re Marriage of Schradle, 462 N.W.2d 705, 709 (Iowa App. 1990). We are not bound by the trial court's conclusions of law and may inquire into whether it applied erroneous rules of law that materially affected its decision. State v. Lipcamon, 483 N.W.2d 605, 606-607 (Iowa 1992).

Beth argues that the district court exceeded its jurisdiction by treating the contempt citation as a modification action. She claims the court did not have authority to order a modification in addition to a jail sentence. Iowa Code section 598.23(1) allows a court to punish contempt with jail time. Section 598.23(2)(b) allows compensatory modification of visitation "as an alternative to punishment." She also argues the court should not have modified the decree to allow family members other than Kurt to pick up the children for visitation.

The plain language of section 598.23 provides that the court can modify visitation to compensate for lost visitation time, or impose a jail sentence, but not both. Phillips v. Iowa District Court, 380 N.W.2d 706, 709-710 (Iowa 1986). A district court does not have statutory authority to provide in its contempt order that a party be

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sentenced to a jail term and be further punished by having the term of a dissolution decree modified. Id. at 710.

Thus, the district court was without authority to sentence Beth to a jail term and to punish her by permanently modifying the dissolution decree by expanding Kurt's summer visitation and allowing any member of Kurt's immediate family to pick up the children for visitation.

Beth contends the district court abused its discretion in ordering her to pay \$750 towards Kurt's trial attorney fees. 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 that the trial court abused its discretion. Id.

We conclude the district court abused its discretion in ordering Beth to pay Kurt's attorney fees in these contempt proceedings. No evidence was produced to show the parties' respective abilities to pay attorney fees. Additionally, both parties filed contempt actions, and both parties were successful in their contempt actions. We conclude no attorney fees should have been awarded.

In summary, we have stricken the district court's modification of the dissolution decree to increase Kurt's summer visitation and to allow members of Kurt's immediate family to pick up the children for visitation. We have reversed the district court's award of attorney fees to Kurt. We note that Beth has not appealed the finding that

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she was in contempt or the provision granting Doris and Joseph ~~_____~~ grandparent visitation.

We ~~_____~~tain the writ of certiorari. The district court's ruling is affirmed except for the provisions we have specifically stricken or reversed. Costs of this appeal are assessed to Kurt Schneider.

WRIT SUSTAINED.