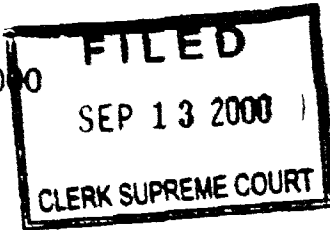


IN THE COURT OF APPEALS OF IOWA

No. 0-469 / 99-1211
Filed September 13, 2000



WILLIAM LAWRENCE RAMSEY,
Plaintiff-Appellant,

vs.

**IOWA DISTRICT COURT FOR
SCOTT COUNTY,**
Defendant-Appellee.

Appeal from the Iowa District Court for Scott County, James E. Kelley,
Judge.

The supreme court granted plaintiff's writ of certiorari from the district court
order finding him in contempt for willfully failing to comply with the alimony
provisions of the dissolution decree. **WRIT OF CERTIORARI ANNULED;
AFFIRMED ON THE APPEAL.**

Dennis A. Bjorklund, Coralville, for plaintiff.

Dennis D. Jasper of Stafne, Lewis, Jasper, Preacher & Rowe, Bettendorf,
for respondent in proceedings below.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

The supreme court granted plaintiff's writ of certiorari from the district court order finding him in contempt for willfully failing to comply with the alimony provisions of the dissolution decree. Plaintiff contends the court (1) abused its discretion by finding he had willfully and contemptuously disregarded the court order to pay alimony; and (2) erred in failing to modify the dissolution decree to reduce his alimony obligation. Respondent seeks appellate attorney fees. We annul the writ of certiorari on the contempt, and affirm the modification decision on appeal.

On June 6, 1994, the district court dissolved the forty-one-year marriage of the parties by decree of dissolution of marriage. Pursuant to the decree, William Ramsey (William) was ordered to pay the respondent Charlene Ramsey (Charlene) \$600 per month commencing July 1, 1994 and continuing until Charlene remarries or dies, for so long as William lives.

On January 26, 1999, Charlene filed an application for order to show cause against William for the nonpayment of alimony. Subsequently, William filed an application to modify the decree to reduce the alimony payments. Hearing was held before the Honorable James E. Kelley, District Judge for the Seventh Judicial District, on June 23, 1999. On July 28, 1999, Judge Kelley found William in contempt for willful and contemptuous disregard for the decree of dissolution. As punishment for the contempt, the judge sentenced William to ten days in the Scott County jail. The judge denied William's counterclaim to

reduce monthly alimony payments. William filed and was granted a writ of certiorari.

William is seventy years old. He retired from the Rock Island Arsenal in 1990. At the time of the dissolution, he received a monthly pension of \$964 and earned an additional \$225 per month at a part-time job. The pension, earned entirely during the parties' marriage, was not divided at the time of dissolution because it was not subject to a qualified domestic relations order. William also operated an automotive repair business at the time of the dissolution. Since the decree, his pension payments have increased to between \$1000 and \$1100 per month. He currently receives a social security check each month, but the amount varies from \$100 to \$350 per month. He reported income from his pension and social security of \$14,952¹ in 1997, and \$15,264 in 1998.

William's health has deteriorated somewhat since the dissolution decree. He has a twenty-six percent disability in his right arm. He has poor vision and was scheduled to have eye surgery. He suffers from diabetes. His health problems prevent him from working part-time or operating his automotive repair business. Due to his poor health and his inability to continue the automotive repair business, William gave his tools to his son. The tools had been awarded to William in the dissolution decree.

¹ The district court's ruling and Charlene's brief report this figure as \$14,000. We are unable to determine from where the \$14,000 figure comes.

In 1997 and 1998, William spent approximately \$10,000 for repairs and maintenance of his 1985 Chevy pickup worth \$2500, with 300,000 miles.² He used the pickup for his automobile repair business. He had a car put in his name for a friend, but makes no payments for the vehicle.

William pays \$419 per month for a house he purchased shortly after the dissolution. He purchased the house on contract, and received a loan for 125 percent of its market value. William admits the purchase was a poor decision. The house has a market value of \$38,000, and William owes \$46,000. His \$419 payment does not include taxes, approximately \$880 per year, and insurance, approximately \$450 per year. He spends approximately \$300 per month on food, and \$200 per month on utilities. William unilaterally reduced the amount of his alimony payments in 1996, and stopped paying alimony altogether after May 1998. He states he could afford to pay alimony of \$150 per month.

Charlene is sixty-four years old. She suffers from diabetes, thyroid dysfunction, a severe back problem, and poor vision. Her health problems keep her from earning an income outside the home. She receives a social security check of \$190 per month, her only source of income. She receives assistance from the State in the form of a medical card, which pays seventy percent of her medical expenses. She receives approximately \$110 for food stamps each month, and spends an additional \$350 per month on food. Charlene lives in low-

² The district court, in its decision on application for contempt and petition to modify, stated William purchased a new pickup truck for over \$10,000. Both William and Charlene agree the court's statement was in error. The record shows instead William spent nearly \$10,000 on his pickup truck; whether it was new or old is irrelevant to our decision in this case.

income housing, and pays \$10 per month on rent. She does not own a car, and spends approximately \$50 per month for transportation. She reports miscellaneous expenses of \$95 per month.

In March 1995, Charlene received approximately \$20,000 from the sale of the parties' homestead. Those funds have been spent. Charlene sold the furniture awarded to her in the decree. The decree of dissolution stated: "[Charlene] has recently inherited \$18,000 from her father's estate, and along with her sister, will share in a net distribution which includes real estate valued at \$140,000." Charlene adamantly denies inheriting anything from her father. However, she did not object to or appeal this finding in the decree.

Contempt. Our review of a contempt ruling is at law, not de novo. *McKinley v. Iowa Dist. Court for Polk County*, 542 N.W.2d 822, 824 (Iowa 1996). We determine whether substantial evidence supports the district court's judgment. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Proof beyond a reasonable doubt must support a contempt finding. *McKinley*, 542 N.W.2d at 824. "Substantial evidence" to support such a finding is "such evidence as could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt." *Ervin v. Iowa Dist. Court for Webster County*, 495 N.W.2d 742, 744-45 (Iowa 1993).

Contempt can be described as willful disobedience. *Ervin*, 495 N.W.2d at 744. "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.

Id. When a contempt allegedly involves a violation of a court's order, the violation must be found to be willful. *Rolek v. Iowa Dist. Court for Polk County*, 554 N.W.2d 544, 547 (Iowa 1996). Acting contrary to a known duty may constitute willfulness for this purpose. *Id.* The alleged contemner carries the burden of producing evidence on any defense tendered. *McKinley*, 542 N.W.2d at 824. The burden of persuasion on the willfulness issue, however, remains on the contemnee. *Id.*

Two defenses to contempt are recognized: (1) indefiniteness of the order and (2) absence of willful disobedience caused by inability to pay. *McKinley*, 542 N.W.2d at 824. William does not challenge the order's definiteness, but claims his failure to make the \$600 monthly alimony payments resulted directly from his inability to pay, and not willful disobedience. We conclude otherwise.

William himself admitted he could afford to pay \$150 in alimony, and yet he made no payments for one year. Not until ordered by the court to do so did he recommence making alimony payments. The record shows William made no payments between May 1998 and May 1999. In May 1999, William made two payments of \$150 each. Again in June 1999, William made one \$150 payment. The record reveals no attempt by William to make even partial payments during the year in question. In addition, William gave away tools he could have sold, spent \$10,000 to repair a truck worth only \$2500, and spends \$30 per month on cable television.

A contemner is not excused from complying, *insofar as possible*, with a court order because of personal disagreement with its practicality. *Ervin*, 495

N.W.2d at 745 (emphasis added). The test for determining an ability to pay "is not merely whether [the contemner] is presently working or has current funds or cash on hand, but whether he has any property out of which payment can be made." *Christensen v. Iowa District Court for Polk County*, 578 N.W.2d 675, 678-79 (Iowa 1998) (quoting *Callenius v. Blair*, 309 N.W.2d 415, 419 (Iowa 1981)). William is not free to prioritize his monthly financial obligations so as to prefer his own creditors over his court-ordered obligation to Charlene. See *McKinley*, 542 N.W.2d at 825.

William unilaterally reduced his alimony payments and, in May 1998, stopped making payments altogether. He paid no alimony for over a year. At the contempt hearing, William stated he would "be happy to" pay \$150 per month. We agree with the district court his willingness to pay \$150 per month in and of itself demonstrates beyond a reasonable doubt his willful disobedience of the dissolution decree. We agree with the district court's conclusion finding beyond a reasonable doubt William's nonpayment of alimony since May 1998 was willful and in contemptuous disregard for the decree of dissolution. While he may not have acted with a bad or evil purpose, substantial evidence supports the conclusion William's nonpayment of alimony was in disregard of Charlene's rights, contrary to a known duty to pay alimony, and coupled with an unconcern whether he had the right to discontinue alimony payments. We annul the writ of certiorari.

Modification. Our review of a modification action is *de novo*. *In re Marriage of Ales*, 592 N.W.2d 698, 701 (Iowa 1999); *Jacobo*, 526 N.W.2d at 864.

We give weight to the trial court's findings of fact, but they do not bind us. *Jacobo*, 526 N.W.2d at 864. We will disturb the trial court's ruling only when there has been a failure to do equity. *In re Marriage of Rietz*, 585 N.W.2d 226, 229 (Iowa 1998).

The party seeking modification must establish by a preponderance of the evidence there has been a substantial change in circumstances since the entry of the decree. Iowa Code § 598.21(8); *Jacobo*, 526 N.W.2d at 864. The changed circumstances relied upon must be material and substantial, more or less permanent or continuous, and must not have been within the knowledge or contemplation of the court when the decree was entered. *Ales*, 592 N.W.2d at 702. The burden rests on the party seeking modification to establish such a change of circumstances by a preponderance of the evidence. *Id.* Factors for the court to consider in determining whether there is a substantial change in circumstances include:

- a. Changes in the employment, earning capacity, income or resources of a party.
- b. Receipt by a party of an inheritance, pension or other gift.
- c. Changes in the medical expenses of a party.
-
- e. Changes in the physical, mental, or emotional health of a party.
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- k. Other factors the court determines to be relevant in an individual case.

Iowa Code § 598.21(8).

William asserts the district court erred in failing to modify the dissolution decree to reduce his monthly alimony payments. He presents a close case. The \$600 monthly alimony payments seem high, but we also consider Charlene

received no part of William's pension, earned in its entirety during the parties' forty-one-year marriage. The alimony payments are nearly equal to one-half the pension payments William receives. The dissolution court contemplated most of the parties' medical problems. We agree with the district court and conclude William has not shown the required change in circumstances to justify a reduction of his spousal support obligation. We affirm the district court on this issue.

Appellate Attorney's Fees. Charlene requests an award of \$1500 in appellate attorney fees. An award of appellate attorney fees in a dissolution proceeding is discretionary. *In re Marriage of Davis*, 608 N.W.2d 766, 773 (Iowa 2000). In determining this question, we consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. *Id.* After considering these factors, we conclude an award to Charlene of \$750 for appellate attorney fees is reasonable.

WRIT OF CERTIORARI ANNULLED; AFFIRMED ON THE APPEAL.