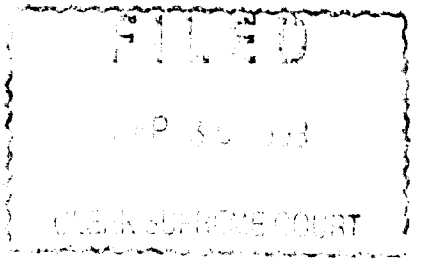
IN THE COURT OF APPEALS OF IOWA

No. 8-298 / 97-1718
Filed September 30, 1998



JEANNE LEA GARRETT n/k/a
JEANNE LEA BRATTON,
Plaintiff,

vs.

IOWA DISTRICT COURT
FOR WASHINGTON COUNTY,
Defendant.

Appeal from the Iowa District Court for Washington County, Robert Bates, Judge.

The plaintiff seeks certiorari review of the district court's finding that she was in contempt of court for a wilful violation of the court's order regarding visitation.

WRIT ANNULLED.

Robert G. Schlegel of Day, Meeker, Lamping & Schlegel, Washington, for plaintiff.

No appearance for defendant.

Considered by Cady, C.J., and Streit and Mahan, JJ.

STREIT, J.

Jeanne Bratton filed a writ of certiorari challenging the district court's finding she was in contempt of court for not following the visitation provisions set out in a July 1997 Iowa court order. Because we find substantial evidence supporting the finding Jeanne wilfully violated the order, we affirm the trial court and annul the writ.

I. Background Facts & Proceedings.

Larry Garrett and Jeanne Bratton were divorced in Nebraska in 1993. Jeanne was awarded physical custody of their four children. The decree set forth a schedule specifying Larry's weekend, holiday, and summer visitation. Jeanne filed an application to move the children from the State of Nebraska in 1996. The move was agreed to by Larry and the parties agreed physical custody of the children would remain with Jeanne, subject to Larry's reasonable visitation rights. The stipulation was referred to by a Nebraska court in a "journal entry."[1] There was no formal decree or judgment filed by this stipulation.

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[1] The Nebraska court noted:

> NOW ON THIS 5th day of September, 1996, the mater before the Court being the application of the Respondent to move the minor children from the State of Nebraska for employment purposes, and the Court being duly advised of the Stipulation filed by the Petitioner and Respondent herein, finds that it is in the best interest of the minor children that the Respondent be allowed to move to the State of Iowa for employment purposes, that the children continue to be placed in her care, custody and control subject to reasonable visitation by the Petitioner.

Jeanne moved to Iowa in September of 1996. In June 1997, Larry moved to Iowa and attempted to exercise visitation on June 13. Jeanne did not allow him to visit the children.

Larry filed a Notice of Filing Foreign Judgment pursuant to Iowa Code chapter 626A to enforce the Nebraska divorce decree which set out specific weekend, holiday, and summer visitation. Jeanne received the notice, but did not respond nor has she claimed the original judgment had been modified by the September 5, 1996, journal entry. On July 25, 1997, the Iowa trial court entered an Order to Enforce Foreign Judgment. The court ordered Larry would have the same visitation schedule contained in the Nebraska divorce decree.

A week after the filing of the order enforcing the Nebraska judgment, Jeanne informed Larry by letter she would only allow him "reasonable visitation," as they had agree in their 1996 stipulation. In essence, Jeanne expressed her intent not to follow with the Nebraska divorce decree nor the Iowa enforcing order. Jeanne intended to allow Larry one two-hour supervised visit the first Sunday of each month. She further required him to give her forty-eight hours notice of whether he would attend the visitation. On August 7, Larry filed an application to show cause alleging he attempted to exercise his visitation after the July 25 order, but Jeanne denied him visitation.

The district court found Jeanne in contempt of the Iowa court's July 25, 1997, visitation order. The district court sentenced Jeanne to fifteen days in jail with

mittimus to be suspended if Jeanne permitted visitation to proceed as scheduled. She was ordered to pay $125 toward Larry's attorney fees. Jeanne filed a writ of certiorari to challenge the court's contempt finding.

II. Standard of Review.

A writ of certiorari is granted when a court exceeds its proper jurisdiction or otherwise acts illegally. Iowa R. Civ. P. 306. Illegality exists when the findings of the court do not have substantial evidentiary support or when the tribunal does not apply the proper law. *Ziegenhorn v. Iowa Dist. Court for Muscatine County*, 510 N.W.2d 894, 896 (Iowa App. 1993). Appellate review of a writ of certiorari challenging a finding of contempt is at law, not de novo. *Zimmermann v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992). The question is whether substantial evidence supports the court's judgment. *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744 (Iowa 1993). Contempt must be established by proof beyond a reasonable doubt. *McKinley v. Iowa Dist. Court,* 542 N.W.2d 822, 824 (Iowa 1996). The trial court has broad discretion in determining contempt and "unless this discretion is grossly abused, the [trial court's] decision must stand." *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995).

Proof of contempt in violating a court order requires a showing there was a wilful violation. *In re Marriage of Spears*, 529 N.W.2d 299, 304 (Iowa App. 1994). No person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. *Id.*

III. Contempt Proceedings.

The statute at issue is section 598.23 of the Iowa Code. It states:

> If a person against whom a temporary order or final decree has been entered wilfully disobeys the order or decree, the person may be cited and punished by the court for contempt and be committed to the county jail . . .[or] as an alternative punishment for contempt, [may make orders regarding the subject matter of the order or decree].

To find a person in contempt under this statute a court must find beyond a reasonable doubt that the individual wilfully violated the court order. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). Wilful disobedience is:

> [C]onduct 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.

We evaluate whether Jeanne wilfully violated the court order in light of the strong assumption it is within the best interests of the children to have a continuing association with their father. *Green v. Sherman*, 173 N.W.2d 843, 847 (Iowa 1970). Denying a father visitation with his children is not in their best interests. *See* Iowa Code § 598.41(1); *In re Marriage of Daniels*, 568 N.W.2d 51, 56 (Iowa App. 1997)(identifying denial of visitation as a factor in determining custody).

A parent is not in contempt of court-ordered visitation unless they wilfully disobey the court order. Our appellate courts have held it is not wilful disobedience to deny visitation in the face of a court order when visitation was denied due to a substantial belief it was not within the best interests of the children, *see Huston v.*

Huston, 122 N.W.2d 892, 896 (Iowa 1963)(denial of visitation was in good faith when, at physician's recommendation, father kept sick son home for the weekend rather than allowing visitation with mother) or when the evidence does not sufficiently show visitation was prevented. *In re Marriage of Ruden*, 509 N.W.2d 494, 496 (Iowa App. 1993)(finding mother could have done more to assure father visited children but the evidence was insufficient to prove she deliberately prevented visitation).

Similarly, it is not a wilful violation of a court order when one parent relies on a verbal agreement with the other parent that visitation will be something other than what the court ordered. *See Huyser v. Iowa Dist. Court for Marion County*, 499 N.W.2d 1, 3 (Iowa 1993). That is not the case here. When Larry filed the Nebraska decree in Iowa and the Iowa court entered an order approving same, Jeanne was effectively informed the agreement was no longer in effect.

The Iowa court entered an order enforcing the Nebraska visitation order. The visitation provisions stated Larry would have holiday, weekend, and summer visitation. Jeanne received notice the Nebraska visitation schedule would be enforced by an Iowa court. She did not bring an action to modify the visitation provisions enforced by the Iowa court.

Jeanne argues Larry has not seen his children for approximately a year. He has made arrangements to visit and then not arrived for visitation or called to cancel. There have been times when her children canceled other activities to have visitation

with Larry, only to have him cancel at the last minute. Jeanne does not think this situation is in the best interests of her children. For this reason, she has effectively stopped Larry from having visitation with his children. She refused to speak to him over the phone, she reported him to the police and the city council when he came to her house and, most recently, unlisted her phone number which she would not divulge to Larry. She would only communicate with him by letter. She insists he is entitled to only two hours of supervised visitation on the first Sunday of each month, despite the fact there is an Iowa court which has ordered otherwise. Jeanne's reasons for denying Larry visitation are inadequate to show the disobedience of the visitation order was not wilful. Larry is now in the position to exercise visitation under the decree. His past failures to exercise visitation are not a sufficient reason for denying him visitation.

Larry, on the other hand, has not regularly exercised his visitation rights, has not followed through after scheduling visitation, and has shown up at Jeanne's residence, unannounced, expecting to have visitation with the children. None of these factors, however, justify Jeanne's wholesale denial of Larry's visitation. She has not offered any evidence it is in the best interests of her children to deny Larry visitation. Jeanne argues she fears Larry will abduct the youngest child. This allegation is not supported by the evidence. Larry now lives in Iowa. He rents land where he has parked his recreational vehicle and resides. He receives mail at a post office box.

Jeanne has presented no evidence the children will be harmed by allowing Larry to exercise his court-ordered visitation.

Jeanne cannot unilaterally decide it is not within the children's best interests to have contact with their father. She has attempted to redefine Larry's visitation according to what she believes suitable, in spite of the order of the court. Unless Jeanne obtains a court order modifying the visitation provisions contained in the July, 1997, Iowa District Court Order, she must abide by the provisions of that order. We agree with the trial court the evidence shows, beyond a reasonable doubt, Jeanne wilfully disobeyed the court's visitation order. Jeanne's writ is denied. The trial court is affirmed.

WRIT ANNULLED.