IN THE COURT OF APPEALS OF IOWA

No. 5-714 / 05-0402
Filed November 23, 2005

IN RE THE MARRIAGE OF AMY CLARK PECK AND ROBERT FRANK PECK

Upon the Petition of
AMY CLARK PECK,
Petitioner-Appellee,

And Concerning
ROBERT FRANK PECK,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Robert Peck appeals the district court's dismissal of his application for an order holding his former wife Amy Peck in contempt of court for alleged violations of the visitation provisions of the parties' dissolution of marriage decree. **AFFIRMED IN PART AND REVERSED IN PART.**

Andrew Howie of Hudson, Mallaney & Shindler, P.C., West Des Moines, for appellant.

Jeanne Johnson and Robert Laden of Laden & Pearson, Des Moines, for appellee.

Considered by Zimmer, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Robert Peck appeals the district court's dismissal of his application for an order holding his former wife Amy Peck in contempt of court for alleged violations of the visitation provisions of the parties' 1998 dissolution of marriage decree. He also contends the court erred in ordering him to pay $1,440 in Amy's trial attorney fees. Amy seeks an award of appellate attorney fees. We affirm in part and reverse in part.

Robert and Amy were divorced on December 2, 1998. They are the parents of two minor children, Conner and Jesse. The dissolution decree placed the children in the parties' joint legal custody, placed physical care of the children with Amy, and granted Robert liberal visitation rights. Because the parties could not agree on a visitation schedule for Robert, they began using the default schedule established in the decree. The schedule provided, in relevant part, that Robert would have visitation every Tuesday and Wednesday from 4:15 p.m. until 7:15 p.m. and every other weekend. It also provided: "Involving extracurricular activities, the parties will notice each other and provide an opportunity for discussion and consulting in enrollment and participation of all extracurricular activities."

On November 4, 2004, Robert brought a contempt action against Amy alleging she had denied him visitation with the children, in violation of the dissolution decree, on six separate, specified occasions. A hearing was held and the court entered a ruling on January 27, 2005, denying Robert's application. The court found Robert failed to prove by evidence beyond a reasonable doubt that Amy "willfully and intentionally denied [Robert] visitation during the children's

extra-curricular activities. . . ." Robert was ordered to pay $1,440 toward Amy's trial attorney fees.

On January 28, 2005, Robert filed a motion asking the court to enlarge its ruling. On the same day the district court *sua sponte* ordered that it would review its award of trial attorney fees in light of a then-recent decision by this court. After receiving additional legal authorities and conducting another hearing the district court addressed and overruled Robert's motion and declined to change its order for attorney fees. Robert appeals.

> When a trial court refuses to hold a party in contempt in a dissolution proceeding, our review is not de novo. Instead, we review the record to determine if substantial evidence exists to support the trial court's finding.
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> An individual may not be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Contempt consists of willful disobedience to a court order or decree.

In re Marriage of Hankenson, 503 N.W.2d 431, 433 (Iowa Ct. App. 1993) (internal citations and quotations omitted).

> "Willful disobedience" requires
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> 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 contemnor had the right or not.

McKinley v. Iowa Dist. Ct., 542 N.W.2d 822, 824 (Iowa 1996) (citation omitted). The alleged contemnor has the burden of providing evidence on any defense tendered. *Id.* The burden of persuasion on the willfulness issue, however, remains on the person alleging contempt. *Id.* Parents can be held in contempt for interfering with visitation rights of a noncustodial parent or failing to return children to the custody of the other parent. *See Sulma v. Iowa Dist. Court*, 574

N.W.2d 320, 322 (Iowa 1998) (upholding finding of contempt against father for refusing mother visitation); *Wells v. Wells*, 168 N.W.2d 54, 64 (Iowa 1969) (upholding finding of contempt against mother for refusing to return children to father as required by the decree).

Robert contends he was denied visitation with either one or both of the children on October 5, 6, 12, 13, 19, and 26, 2004. We conclude substantial evidence supports the district court's finding that Robert failed to show by proof beyond a reasonable doubt that Amy willfully denied him visitation. The record shows that on the dates of October 5, 6, and 12 Robert had both boys with him for visitation, although he took one or both to athletic practices. Robert in fact testified he did so and that he saw both Conner and Jesse on those dates. In addition, Amy presented uncontroverted evidence that the boys' practices on October 13 and 26 were cancelled and thus Robert saw both boys on those dates for the entire time of his visitation without interruption.

There is also evidence that Jesse stayed home from school ill on October 19, and for that reason Robert was able to have visitation with Conner only and not with Jesse on that evening. Amy testified Robert had acquiesced to a similar arrangement in the past. When one child was ill the ill child would stay with Amy and Robert would have visitation with the well child only. We agree with the district court that under the circumstances it was reasonable for Amy to keep Jesse home and doing so did not constitute a willful violation of the decree.

We conclude substantial evidence supports the district court's finding that Robert did not prove beyond a reasonable doubt that Amy was in contempt of court. The court did not err in dismissing Robert's contempt application.

Robert next claims the district court improperly ordered him to pay $1,440 toward Amy's trial attorney fees. Iowa Code section 598.24 (2003) provides the court with the authority to tax reasonable attorney fees, as part of the costs, only against a party found in default or contempt of the decree. The statute does not authorize taxing the other party's attorney fees against the party seeking the contempt finding. Thus, there was no statutory authority for the attorney fees ordered by the district court here.

Amy attempts to argue for the first time on appeal that the attorney fee award may have been justified either as a sanction under Iowa Rule of Civil Procedure 1.413 or the "common-law" rule for attorney fees. However, because such issues were never raised by Amy or by the trial court itself, and were never addressed by the trial court, such issues are not properly before us on appeal. *See Meier v. Senecaut,* 641 N.W.2d 532, 537 (Iowa 2002). ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). We conclude the court exceeded its statutory authority in taxing attorney fees against Robert, and we reverse that portion of the district court's order.

Finally, Amy seeks an award of appellate attorney fees from Robert. However, just as section 598.24 does not authorize taxation of another party's trial attorney fees against a party seeking a contempt finding it also does not authorize taxation of appellate attorney fees against a party seeking a contempt finding. *Cf. Bankers Trust Co. v. Woltz,* 326 N.W.2d 274, 278 (Iowa 1982) (holding that the right to attorney fees is statutory, and that a statute which justifies *awarding* attorney fees in the trial court also justifies *awarding* attorney

fees in the appeal); *Schaffer v. Frank Moyer Constr., Inc.,* 628 N.W.2d 11, 22 (Iowa 2001) (concluding that because statute did not limit attorney fees to those incurred in district court it also contemplated the award of appellate attorney fees). We conclude Amy is not entitled to appellate attorney fees for the same reason she is not entitled to an award of trial attorney fees, the relevant statute does not authorize such an award.

Costs on appeal are taxed one-half to Robert and one-half to Amy.

AFFIRMED IN PART AND REVERSED IN PART.