

IN THE COURT OF APPEALS OF IOWA

No. 3-1001 / 12-2206
Filed December 5, 2013

**IN RE THE MARRIAGE OF MARIE ALANA MOSER
AND STANLEY D. MOSER**

**Upon the Petition of
MARIE ALANA MOSER,**
Plaintiff-Petitioner-Appellant,

**And Concerning
STANLEY D. MOSER,**
Respondent-Appellee.

Certiorari to the Iowa District Court for Warren County, Richard B. Clogg,
Judge.

Marie Moser files a petition for certiorari from the district court's finding of contempt and denial of her application to show cause arising out of the terms of the decree of dissolution of her marriage to Stanley Moser. **WRIT SUSTAINED; AFFIRMED ON APPEAL.**

Cami Eslick, Indianola, for plaintiff/petitioner/appellant.

Michael P. Holzworth, Des Moines, for respondent/appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Danilson, JJ.

POTTERFIELD, J.

Marie Moser filed a petition for certiorari from the district court's finding of contempt and an appeal from the denial of her application to show cause arising out of the dissolution of her marriage to Stanley Moser. She argues the district court erred in granting Stanley's application to hold her in contempt, and in failing to grant her application to hold Stanley in contempt. We sustain the writ and affirm the appeal; we find substantial evidence supports the district court's decisions as to Stanley, but we find the evidence does not show beyond a reasonable doubt that Marie willfully violated the court-ordered mediation.

I. Facts and Proceedings.

The parties were married in 2007; the marriage was dissolved in 2010. The two have one child. Since the dissolution, the parties' interactions have been contentious. We have previously heard this case on appeal; we modified the original dissolution decree to provide Stanley be named the physical care parent. *In re Marriage of Moser*, No. 10–1059, 2011 WL 944452 (Iowa Ct. App. Mar. 21, 2011).

In August 2012 both parties were found in contempt of court for violation of support and visitation provisions of the decree. In September 2012, Marie again filed an application for rule to show cause requesting the court hold Stanley in contempt, alleging Stanley had denied her Tuesday night visitation on August 21, 2012, after she notified him of her intent to exercise visitation and denied her weekend visitation on Friday, September 7, when she sent her fiancé to pick up the child. Further, she alleged Stanley failed to make a payment to her pursuant to the deadline established in the parties' dissolution decree. After careful review

of the record, we find the district court's findings of fact are substantially supported by the record and adopt its factual findings here:

Despite the Court's Order and the Ruling filed August 6, 2012, which ordered Marie to give Stanley notice by 10:00 a.m. each Monday if she plans to exercise the following Tuesday visitation, Marie sent an email to Stanley on Thursday, August 16, 2012 that she was going to exercise her visitation on August 21, 2012. Stanley did not show up at the exchange location on August 21.

In September, 2012, Marie and her fiancé, Wayne Hall, traveled to Story City to pick up [the child] for visitation. Mr. Hall entered the restaurant to pick up [the child] from Stanley and Marie remained in the van. Mr. Hall did not tell Stanley that Marie was outside in the van. Stanley refused to allow [the child] to go with Mr. Hall. Marie let Stanley leave and return home with [the child] without revealing she was present. Marie did not try to exercise her visitation with [the child] because she wanted to "prove a point".

The Decree filed May 18, 2011 ordered Stanley to pay Marie the sum of \$16,558.00 per year for ten years no later than 60 days after the Decree was filed. Stanley failed to pay the payment due July 18, 2012.

The evidence showed that Stanley's and Marie's attorneys were engaged in negotiations for the payment of a lump sum payment of the property settlement owed to Marie, and Stanley was ready and willing to pay the sum due during these negotiations.

On October 22, 2012, the Court entered an Order for Mediation of Contempt Matter, which ordered "the parties to participate in person at a mediation." On October 30, 2012, Marie's attorney filed a motion to waive mediation which was overruled on November 2, 2012.

On November 14, 2012, Stanley made an application to find Marie in contempt and the Court entered an Order for Mediation of Contempt Matter which provided, in part, "Further, the parties shall be personally present at the mediation."

On November 14, 2012, Marie filed a motion to reconsider the Court's denial of her prior motion to waive mediation.

On November 14, 2012, a Mediator's Certificate was filed stating that Marie "has not appeared as required by court order" for the scheduled mediation.

After making these findings of fact, the court concluded:

The evidence does not show beyond a reasonable doubt that the Respondent, [Stanley], violated the Court's Orders entered on May 18, 2011. Stanley is not guilty of contempt regarding the

visitation in August, 2012, because Marie did not comply with the requirement of prior notice on Monday before the Tuesday visit. Stanley is not guilty of contempt regarding the visitation in September, 2012, because he acted in the best interests of [the child] by refusing to allow her to travel with [Mr. Hall] when he was led to believe Marie was not present.

The evidence does not show beyond a reasonable doubt that the Respondent, Stanley D. Moser, violated the Decree filed May 18, 2011, which ordered Stanley to pay Marie the sum of \$16,558.00 on July 18, 2012, because the evidence showed that Stanley's and Marie's attorneys were engaged in negotiations for the payment of a lump sum payment of the property settlement owed to Marie, and Stanley was ready and willing to pay the sum due during these negotiations.

The Court further finds that the Respondent, Stanley D. Moser, is not guilty of contempt of court pursuant to Iowa Code § 598.23.

The Court finds beyond a reasonable doubt that the Petitioner [Marie] . . . violated the Order entered on October 22, 2012, which ordered "the parties to participate in person at a mediation" because she failed to appear for the mediation scheduled for November 14, 2012.

The Court further finds beyond a reasonable doubt that the Petitioner . . . is guilty of contempt of court pursuant to Iowa Code § 598.23.

Marie challenges the district court's contempt order by writ of certiorari, arguing she should not have been held in contempt. She also contends the court erred in not holding Stanley in contempt.

II. Analysis.

Our standard of review in contempt actions appears somewhat unique. If there has been a finding of contempt, we review the evidence to assure ourselves that the court's factual findings are supported by substantial evidence. The district court's legal conclusions are reviewed for errors of law. A different standard of review exists on appeals from the trial court's refusal to hold a party in contempt under a statute that allows the trial court some discretion. For example, the statutes involved here, Iowa Code sections 598.23 and 598.23A, provide that a person who fails to make court-ordered child or medical support payments "*may* be cited and punished" for contempt. (Emphasis added.) Under statutes such as these, a trial court is not required to hold a party in contempt even though the elements of contempt may exist.

In re Marriage of Swan, 526 N.W.2d 320, 326-27 (Iowa 1995) (internal citations omitted). Marie's application for rule to show cause against Stanley also falls under Iowa Code section 598.23 (2011), giving the district court discretion in determining whether Stanley's actions constituted contempt. The court's finding that Marie acted in contempt of a court order must be supported by evidence beyond a reasonable doubt. See *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995).

Regarding the district court's denial of Marie's request to hold Stanley in contempt, Iowa Code section 598.23, reads: "If a person against whom a temporary order or final decree has been entered willfully disobeys the order or decree, the person *may* be cited and punished by the court for contempt" (emphasis added). Stanley did owe Marie money pursuant to the property settlement, however, the payment was being negotiated by the parties' attorneys. Marie cannot demonstrate willful disobedience regarding the payment. Similarly, Stanley did withhold visitation in August and September, but the court exercised its discretion to find his actions fell short of willful disobedience.

We agree with Marie that the modified order states she "shall notify [Stanley] by 10:00 A.M. each Monday if she is going to exercise the following day's (Tuesday) visitation." The district court's conclusion that her notification the Thursday before was insufficient is unreasonable, and Stanley should have provided visitation on the following Tuesday. Stanley's testimony that he understood the order to require a notification on Monday morning is not sufficient to defeat the court's order that notification occur "by" Monday, not "on" Monday.

Further, Marie is correct that no court order states she is the only individual who can pick up the child for visitation. Though her behavior in remaining in the car and failing to exercise her visitation to “prove a point” is not commendable, Stanley should not have simply refused to allow the child to go with her mother’s fiancé.

Although Stanley withheld visitation on both of these occasions, the district court was not required to hold Stanley in contempt “even though the elements of contempt may exist.” See *Swan*, 526 N.W.2d at 327. Given the discretionary nature of Iowa Code section 598.23, we find the court did not abuse its discretion in declining to hold Stanley in contempt. Further, we defer to the district court’s findings regarding credibility. *McKinley v. Iowa Dist. Ct.*, 542 N.W.2d 822, 825 (Iowa 1996).

Regarding the district court’s decision to hold Marie in contempt, we find the evidence failed to establish her willful disobedience to a court order beyond a reasonable doubt. See *Swan*, 526 N.W.2d at 327. “In order to find a person guilty of contempt, a court must find beyond a reasonable doubt that the individual willfully violated a court order or decree.” *Jacobo*, 526 N.W.2d at 866.

Marie claims she was unaware she was required to attend mediation on November 14th. Her attorney filed a motion to waive mediation, which was denied without a hearing on November 2, 2012. Her attorney then filed a motion to reconsider the denial on November 14, 2012—the day of the mediation—alleging a hearing was required on the motion to waive mediation.¹ Stanley reminds us of a fundamental rule of Iowa law that “knowledge of an attorney is

¹ Marie’s counsel was present for the mediation.

knowledge of the client.” *Carroll v. Martir*, 610 N.W.2d 850, 859 (Iowa 2000). However, the record does not reflect notice to Marie of the November 14th mediation, and the flurry of motions filed that date do not include that information.

The order for mediation contains no date for the mediation—it only states mediation “shall be completed two days prior to the hearing date”—and the hearing date was moved. Further, Marie testified she understood she was not required to mediate due to the parties’ history of domestic violence. Marie testified she was not aware of the scheduled mediation. Stanley failed to prove Marie had notice of the mediation scheduled for November 14; that information is not contained in any court order. The record does not reflect Marie’s willful disobedience to a court order.

Contempt is customarily defined as willful disobedience. “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.”

McKinley, 542 N.W.2d at 824 (quoting *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744 (Iowa 1993)). We are unable to find evidence beyond a reasonable doubt of Marie’s willful disobedience of the court’s order to personally attend mediation on November 14 under this record. We grant Marie’s writ with regard to the court’s finding of contempt against Marie and annul the writ with regard to the court’s decision that Stanley was not in contempt. Costs on appeal are divided equally between the parties.

WRIT SUSTAINED; AFFIRMED ON APPEAL.

