

**IN THE COURT OF APPEALS OF IOWA**

No. 0-013 / 09-0770  
Filed February 24, 2010

**MELISSA A. THOMPSON,**  
Plaintiff-Appellant

**vs.**

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

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Appeal from the Iowa District Court for Polk County, Michael D. Huppert (motion to dismiss ruling), and Carla P. Schemmel (contempt ruling), Judges.

Mother filed a petition for writ of certiorari contending the district court should not have held her in contempt of the court's orders regarding custody and child support. **WRIT ANNULLED.**

Michael B. Oliver of Oliver Law Firm, P.C., Windsor Heights, for appellant.

Michael J. Burdette of Burdette Law Firm, P.C., Clive, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

**SACKETT, C.J.**

Melissa Thompson appeals from the court's ruling finding her in contempt of the court's orders regarding the custody and support of a daughter she has with applicant, James Herriott. She contends the court's ruling is in error because (1) the court lacked jurisdiction to rule on the application for rule to show cause, and (2) there is not substantial evidence to support the finding that Melissa's violation of the court order was willful. We annul the writ.

**I. BACKGROUND.** Melissa and James were divorced in Kansas in 2000. An order filed April 25, 2001, provided that the parties stipulated that James would have primary physical care of the parties' son, Cameron, and Melissa would have primary physical care of the parties' daughter, Morgan. Each parent was to have reasonable visitation with the child not in their physical care. In July 2001, Melissa filed a petition in Kansas seeking primary physical care of both children. She sought the modification because she believed James was emotionally abusive to the children and because Melissa planned to move to New Zealand. In November 2001, the court ordered the children be placed in James's primary physical care "due to the uncertainty of [Melissa's] immediate situations." It ordered that Melissa would have the children every other Christmas holiday and for visits over the summer, and that Melissa would be responsible for travel costs. Melissa thereafter moved to New Zealand, and later to Australia, and James moved to Des Moines, Iowa.

In 2002, Melissa filed a petition for modification in Iowa seeking sole legal custody and physical care of the children. She also filed an application for rule to

show cause claiming James was in contempt of the court's custody order. On the application for rule to show cause, the court found James was in contempt of the decree by denying phone conversations between Melissa and the children, refusing to secure a passport for Cameron to visit Melissa, and by failing to consult Melissa regarding other welfare issues of the children. An order was entered in July 2004, addressing the custody issue. The court ordered that the parties continue to have joint legal custody and James retain primary physical care of the children. It noted each parent was equally uncooperative, causing an extremely negative impact on the children. It urged Melissa and James to put aside their differences to avoid traumatizing their children and to follow the requirements of joint legal custody. It found Melissa had failed to prove a substantial change in circumstances or that she could provide superior care. It ordered Melissa was to have visitation with each child for approximately six weeks over the summer. She was to pay James \$400 per month in child support and pay for transportation costs for the children's visits.

In February 2006, James filed a motion to modify custody and support. He asserted the parties had agreed to allow the daughter, Morgan, now nine years old, to have an extended visit with Melissa in Australia. The parties stipulated that Morgan would reside with Melissa from June 3, 2006, until August 1, 2007, and that Melissa's support obligation would be suspended during the extended visit. In April 2006, the court modified the decree providing for the extended visit as requested by the parties. It provided that all other provisions of the decree would remain in full force.

Shortly before Morgan was scheduled to return to Iowa, James learned that Melissa did not intend to send Morgan back. On July 20, 2007, he filed an "Application Under the Hague Convention on the Civil Aspects of International Child Abduction," seeking Morgan's return. The court file shows that on July 31, 2007, Melissa informed the Polk County District Court by letter that she filed documents in the Federal Family Court of Australia seeking custody of Morgan. Her letter states in relevant part,

On April 10, 2006, an order was made for Morgan Herriott, the minor child, to reside with me for 14 months due to a change of circumstances, according to the father. Due to a change of circumstances since that order was filed, I have now filed for final orders to be determined in Australia where she has resided for over a year.

The Judicial Registrar here in Federal Court presided over the initial hearing on July 25, 2007, and has set forth a further hearing in September, and for James Herriott to be served personally by August 15, 2007.

In the Australian Family Court, Melissa resisted James's application under the Hague Convention claiming several exemptions under the regulations applied and therefore a court did not have to order Morgan's return to the United States. Melissa claimed that there would be a grave risk that Morgan would be in an intolerable situation if she were forced to return, and that Morgan strongly objected to the return.

The family court entered an order on November 20, 2007, determining that if it declined jurisdiction under the Hague Convention, an Iowa court would be suitable to address the matter. It also found, in its exercise of discretion under the Hague Convention, that Melissa's retention of Morgan in Australia was wrongful and there was not a grave risk that Morgan would suffer harm or an

intolerable situation if she returned. It noted Morgan objected to the return but gave her objection less weight because she was only eleven and did not understand the historical and current complexities of her family.

Melissa appealed. The appellate court allowed further evidence to be presented regarding Morgan's objection to returning to live with James. It reversed the lower court on March 27, 2008, finding Morgan's objection to returning outweighed any other considerations supporting her return. It explained that Morgan's objection was beyond the mere expression of a preference and she was of an age and maturity where her view should be taken into account.

Although the record indicates James had notice of the Australian proceedings, it appears James did not personally participate, aside from initially filing the application under the Hague Convention. The record shows the "applicant" seeking Morgan's return was the "Department of Community Services."

On October 29, 2008, Melissa filed an application with the Family Court of Australia at Sydney seeking an order giving her sole legal custody and physical care of Morgan. On January 28, 2009, an Australian court issued an order noting there was no appearance by or on behalf of James contesting the application. It ordered that James was prohibited from removing Morgan from Australia, and that Melissa would have sole legal custody and physical care of Morgan. It provided that Morgan should have time with James at times and places mutually agreed to by Melissa and James.

Prior to entry of this order, on December 3, 2008, James filed an application in the Iowa District Court for Polk County, seeking to initiate contempt proceedings against Melissa for failing to comply with the custody and support order in effect in Iowa. Melissa filed a motion to dismiss arguing that Iowa no longer had jurisdiction over the matter since Australia was now Morgan's "home state." The district court denied the motion to dismiss, finding that Iowa retained exclusive, continuing jurisdiction over the child custody determination. James testified at an April 23, 2009 hearing on the contempt matter. Melissa did not appear but was represented by counsel. Following the hearing, the court issued its ruling and found Melissa was guilty of two counts of contempt of court by failing to return Morgan to the United States and by failing to pay child support as required by the modified Iowa decree. It ordered Melissa to serve thirty days in jail on each count, and that a warrant be issued for her arrest.

On May 26, 2009, Melissa filed a petition for writ of certiorari and an application to stay the contempt order. Our supreme court granted the petition and stayed the contempt order pending appellate review. The matter was transferred to our court. Melissa contends the district court was without authority to find her in contempt because (1) it no longer had subject matter jurisdiction over custody and support issues, and (2) James failed to prove that Melissa's violation of the Iowa modified decree was willful.

**II. STANDARD AND SCOPE OF REVIEW.** Contempt proceedings under chapter 598, involving noncompliance with a dissolution decree, is punitive in nature. *In re Marriage of Swan*, 526 N.W.2d 320, 327 (Iowa 1995). In these

proceedings, “the trial court may consider all the circumstances, not just whether a willful violation of a court order has been shown, in deciding whether to impose punishment for contempt in a particular case.” *Id.* The court has broad discretion and we will uphold the decision unless that discretion has been grossly abused. *Id.* In our review we do evaluate whether substantial evidence supports the court’s findings. *Gizmo v. Iowa Dist. Ct.*, 561 N.W.2d 833, 834-35 (Iowa Ct. App. 1997).

**III. FINDING OF CONTEMPT.** Our code provides,

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 and be committed to the county jail for a period of time not to exceed thirty days for each offense.

Iowa Code § 598.23(1) (Supp. 2007). A person may only be punished for contempt if their disobedience of the court decree is established by proof beyond a reasonable doubt. *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995); *Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 709 (Iowa 1986). James carries the burden of proving Melissa had a duty to obey a court order and failed to perform that duty. See *Skinner v. Ruigh*, 351 N.W.2d 182, 185 (Iowa 1984); *Gizmo*, 561 N.W.2d at 835. Thereafter, Melissa has the burden to submit evidence that she did not willfully violate the decree. *Skinner*, 351 N.W.2d at 185; *Gizmo*, 561 N.W.2d at 835. Overall, James maintains the burden of persuasion to prove beyond a reasonable doubt that Melissa willfully violated the decree. *Skinner*, 351 N.W.2d at 185; *Gizmo*, 561 N.W.2d at 835.

To prove 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.

*Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998); *Wurpts v. Iowa Dist. Ct.*, 687 N.W.2d 286, 290 (Iowa Ct. App. 2004). Contempt is established if the applicant proves some of the disobedience of the order was willful. *Ervin v. Iowa Dist. Ct.*, 495 N.W.2d 742, 744 (Iowa 1993); *Gizmo*, 561 N.W.2d at 835. Available defenses to refute a claim of contempt are indefiniteness or uncertainty of the decree, or the person was not willfully disobeying the decree. *Bevens v. Kilburg*, 326 N.W.2d 902, 904 (Iowa 1982).

Melissa argues she should not have been found in contempt because (1) the district court did not have jurisdiction over James's contempt application, and (2) her violation of the decree was not willful. Melissa claims the court did not have jurisdiction because Australia assumed jurisdiction over the custody issue. She contends

[w]ith a valid order in Australia, the Iowa district court should have recognized that Iowa no longer had subject matter jurisdiction over Morgan's custody in lieu of the Hague Ruling and the Australia custody proceedings and dismissed James'[s] contempt application.

We find this argument does not completely address the time period James alleges Melissa was in contempt of the modified decree issued in Iowa on April 10, 2006. James alleges Melissa was in contempt for failing to return Morgan on August 1, 2007, as the decree required, and was in contempt of the decree on and after August 1, 2007. Melissa had no authority by any court order to retain Morgan in her care until March 27, 2008, when the Australian Family Court



determined Morgan should remain in Australia due to her objections to returning. If there was such authority, it is not in the record. There is prima facie evidence that Melissa was in willful disobedience of the court's order, at the very least, between August 1, 2007, and March 27, 2008.

Melissa claims that by August 1, 2007, Australia was Morgan's "home state" for custody purposes under the Uniform Child-Custody Jurisdiction and Enforcement Act. The "home state" is "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child-custody proceeding." Iowa Code § 598B.102(7) (2007); *see also* § 598B.105 (noting that our court treats a foreign country as if it were a "state" of the United States for applying certain provisions of the act, including the definition of "home state" and issues concerning jurisdiction). Indeed, Morgan did live in Australia for over six months prior to the filing of Melissa's action in Australia and prior to James's filing of the application under the Hague convention and his application for rule to show cause. However, we do not consider Morgan's living with Melissa from June 3, 2006, through August 1, 2007, to be a change of home state under the act. Morgan's stay with Melissa was an extended *visit* agreed to by both parties. Morgan was there on a student visa and her stay was intended to be temporary. During that period, and at least until the Australian appellate decision, James continued to have primary care of Morgan and Morgan's legal residence remained in Iowa. Also, Melissa's wrongful retention of Morgan past August 1, 2007, probably did not confer jurisdiction in the Australian courts. Under the Uniform Child-Custody

Jurisdiction and Enforcement Act, as a general rule, a court should decline to exercise jurisdiction when a person seeks to invoke the court's jurisdiction through unjustifiable conduct. Iowa Code § 598B.208; see *Barcus v. Barcus*, 278 N.W.2d 646, 650 (Iowa 1979) (noting that a previous version of section 598B.208 permitted a court "to decline jurisdiction when a party uses the processes of the court of a sister state to obtain possession of a child and then defies the court in refusing to return the child to its jurisdiction").

We find this case akin to *Bevers v. Kilburg*, 326 N.W.2d 902, 905 (Iowa 1982), where a mother and her attorney were found to be guilty of contempt for failing to obey a child custody order. While a dissolution action was pending in Iowa, the mother and child were living in Colorado. *Bevers*, 326 N.W.2d at 903. The final decree was issued and granted custody of the child to the father, who lived in Iowa. *Id.* When the mother learned of the decision, she hired an Iowa attorney to seek a stay of the decree and to file an appeal. *Id.* She then, with her attorney's blessing, secreted the child away to a mountain resort. *Id.* at 903-04. Meanwhile, the father had flown to Colorado to obtain custody of the child, could not find the child or the mother, and returned to Iowa without the child. *Id.* The mother did not return to her Colorado home with the child until she learned that her attorney had obtained a stay of the custody order. *Id.* at 903. The court found the mother and her attorney were in contempt of the court's order because their conduct "willfully obstructed the enforcement" of the decree. *Id.* at 905. Contempt was established even if the violation was only for the week between issuance of the decree and the order granting a temporary stay, and even though

the mother and attorney were seeking relief through the court system. See *id.* at 903-04. “Even good faith efforts to pursue further legal proceedings do not give aggrieved parties the right to flout a court order.” *Id.* at 905 (citing *In re Marriage of Welsher*, 274 N.W.2d 369, 371-72 (Iowa 1979)).

Here, Melissa did not seek to amend the decree requiring Morgan to be returned on August 1, 2007, or a stay on this provision or the child support provision. She was obligated to follow the decree until she obtained such an amendment. In *Bevens*, in finding the attorney in contempt, the court noted that he had thirty years of legal experience. *Id.* at 904. In this case, Melissa was also familiar with proper legal procedures as she was employed as a court reporter while she was living in the United States and had obtained counsel in Iowa to address previous custody and support issues. “For whatever reasons, neither a party to the action, nor a third party shall engage in conduct which obstructs the enforcement of a court decree.” *Bevens*, 326 N.W.2d at 905 (citing Restatement (Second) of Judgments § 63 (1982)). We need not and do not address whether the Australian court had subject matter jurisdiction to issue a ruling regarding Morgan’s custody. Melissa was in contempt of the modified decree before any jurisdiction was assumed by an Australian tribunal.

Melissa also claims her failure to comply with the order was not willful for several reasons. These include, among other things:

1. Iowa’s obligation to give full faith and credit to the Australian order bars the contempt action.
2. James’s unclean hands bar the contempt action.
3. James’s delay in filing the contempt action shows his acquiescence to the Australian order granting Melissa custody.

We find these arguments are meritless. As explained above, any jurisdictional or full faith and credit arguments do not address why Melissa disobeyed the Iowa order from August 1, 2007, until an amended or alternative custody ruling was made. Her other arguments point to alleged conduct on the part of James and do not explain whether her own behavior was or was not willful. We find Melissa, beyond a reasonable doubt, willfully failed to comply with the decree. Her actions were an intentional disregard of the order, and James's rights, and her failure to follow the order and seek appropriate recourse obstructed attempts to enforce it. We have considered all of her arguments and annul the writ.

We affirm the court's award of trial attorney fees. James also requests appellate attorney fees. An award of appellate attorney fees rests in our discretion. *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We grant James's request and award \$750 in appellate attorney fees.

**WRIT ANNULLED.**