IN THE COURT OF APPEALS OF IOWA

No. 7-716 / 07-0739
Filed November 15, 2007

IN RE THE MARRIAGE OF AMBER K. WHITESIDE AND HARRY L. WHITESIDE, JR.

Upon the Petition of
AMBER K. WHITESIDE, a/k/a
AMBER K. DEWITT,
Petitioner-Appellee,

And Concerning
HARRY L. WHITESIDE, JR.,
Respondent-Appellant.

Appeal from the Iowa District Court for Bremer County, Stephen P. Carroll, Judge.

Harry Whiteside, Jr. appeals the district court's dismissal of his application for an order holding his former wife, Amber DeWitt, in contempt of court for alleged violations of provisions of the parties' dissolution of marriage decree. **AFFIRMED IN PART AND REVERSED IN PART.**

Harry L. Whiteside, Ionio, pro se.

Karla J. Shea of Yagal, McCoy & Riley, P.L.C., Waterloo, for appellee.

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

MILLER, J.

Harry Whiteside, Jr. appeals the district court's dismissal of his application for an order holding his former wife, Amber DeWitt, in contempt of court for alleged violations of provisions of the parties' October 2002 dissolution of marriage decree. Amber seeks an award of appellate attorney fees and costs. We affirm in part and reverse in part.

Harry and Amber were divorced on October 14, 2002. They are the parents of two minor children, Olivia and Darin. The parties stipulated to joint legal custody of the children, that physical care of the children should be placed with Amber, and Harry would have liberal visitation rights. Their stipulation also provided,

> The parties acknowledge that as joint custodial parents, neither party has greater legal rights or responsibilities for the children than the other.
>
> It is the intention of the parties to consult on all major decisions concerning their children's educational, religious, physical and emotional health and well-being.
>
> It is acknowledged and agreed that both parties shall have access to, and be made aware of, medical, school, and other records and reports regarding Olivia and Darin.

On April 19, 2005, Harry filed a petition for modification of the decree requesting joint physical care of the children. The district court denied the petition on December 6, 2005. On October 4, 2006, Harry filed a second petition for modification, this time seeking expanded visitation with the children.[1] That matter was still pending as of the filing of the present appeal.

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[1] We note that in ruling on Harry's contempt application the district court mistakenly stated Harry's second modification petition involved "placement of the children." However, this misstatement by the court did not affect the substance or result of the court's ruling.

On December 14, 2006, Harry brought the present contempt action against Amber alleging she had failed to communicate important matters to him regarding the welfare and education of Darin, in violation of the parties' stipulated decree. A hearing was held on the contempt application on February 5, 2007. After the hearing but prior to the court's ruling on the contempt application, Harry filed an application for emergency relief seeking an order to discontinue Darin's use of Ritalin. Amber filed a motion to dismiss the application for emergency relief. In it she alleged the application was patently frivolous, undertaken solely to harass and intimidate her and cost her money. She requested an award of attorney fees as a sanction against Harry pursuant to Iowa Rule of Civil Procedure 1.413 for filing the frivolous application for emergency relief. These matters were still pending when Harry filed this appeal.

The district court entered a written order on April 12, 2007, concluding Amber had not willfully violated the terms and conditions of the decree and dismissing Harry's contempt application. The court ordered Harry to pay $400 toward Amber's trial attorney fees in the contempt proceeding.

Harry appeals from the court's dismissal of his application to hold Amber in contempt, contending substantial evidence shows that Amber violated the parties' decree by failing to communicate with him on important matters regarding Darin's welfare, and that the court exceeded its statutory authority in ordering him to pay $400 toward Amber's trial attorney fees. Amber seeks an award of appellate attorney fees.

> 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.
>
> 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

> 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. Court, 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*.

The specific event which led Harry to file the contempt action was Amber's alleged failure to tell him that Darin had been caught stealing fruit snacks from his kindergarten teacher. However, he also alleged there had been "several direct refusals" to communicate with him about the children's well-being, and that Amber often "chooses to not keep me informed of the very serious issues in the children's lives." We conclude substantial evidence supports the district court's finding that although the parties do not communicate well, the failure to communicate is not solely attributable to Amber.

Amber testified that immediately after the dissolution Harry refused to speak to her face-to-face or on the telephone so they started text-messaging.

However, many times he would not respond to her messages. When Harry remarried, Amber began communicating through his wife because they could communicate well. However that communication also became strained when Harry's wife asked Amber not to communicate with her about the children anymore because it would make Harry angry and "she would pay the price." In addition, Amber testified that she always tries to keep Harry reasonably informed of important matters regarding the children, both at home and at school. She further testified she did call Harry after the fruit snack incident but did not reach him and before he called back he discovered in Darin's backpack correspondence between Darin's teacher and Amber regarding the fruit snack incident. Harry acknowledged on cross-examination that he and Amber had communicated in many ways prior to the contempt action, including telephone, e-mail, through his wife, face-to-face, and through attorneys.

We conclude substantial evidence supports the district court's conclusion Harry did not prove beyond a reasonable doubt that Amber willfully violated the terms and conditions of the parties' decree. The court did not err in determining Harry did not meet his burden to prove Amber was in contempt of court and dismissing Harry's contempt application.

Harry next claims the district court exceeded its statutory authority in ordering him to pay $400 toward Amber's trial attorney fees. Iowa Code section 598.24 (2005) 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.

Amber argues the district court did not award her trial attorney fees under section 598.24, but instead as a sanction under rule 1.413 for filing a frivolous suit the only purpose of which was to harass her. However, Amber did not request such a sanction in the contempt action. Nor did the court purport to order the attorney fees as a sanction under rule 1.413 in its ruling on the contempt application. Furthermore, due process requires fair notice and opportunity to be heard before the imposition of sanctions, or a finding of the underlying violation, under rule 1.413. *See K. Carr v. Hovick*, 451 N.W.2d 815, 817-18 (Iowa 1990). No such notice or opportunity was given here. We can find no indication in the record before us the court awarded Amber attorney fees as a sanction under rule 1.413. Accordingly, we conclude the court exceeded its statutory authority in taxing attorney fees against Harry, and we reverse that portion of the district court's order.

Finally, Amber seeks an award of appellate attorney fees and costs from Harry. 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. 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); *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). We conclude Amber 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.

Amber further contends we should apply rule 1.413 to this appeal and order Harry pay her appellate attorney fees as a sanction for this frivolous appeal. "Because of the substantial similarity of our rule [1.413] and the Federal Rule of Civil Procedure 11, we look to the federal decisions for guidance." *State ex rel. Iowa Dep't of Human Servs. v. Duckert*, 465 N.W.2d 871, 873 (Iowa 1991). On its face, Federal Rule of Civil Procedure 11 does not apply to appellate proceedings. *Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 406, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359, 382 (1990). Iowa Rule of Civil Procedure 1.413 similarly does not expressly apply to appellate proceedings. Further, Iowa has separate "Rules of Appellate Procedure," and they do not refer to or incorporate by reference rule 1.413 .

In addition, limiting the use of a rule 1.413 sanction to actions in the trial courts "accords with the policy of not discouraging meritorious appeals. If appellants were routinely compelled to shoulder the appellees' attorney's fees, valid challenges to district court decisions would be discouraged." *Id*. at 408, 110 S. Ct. at 2462, 110 L. Ed. 2d at 383. Iowa, unlike the federal courts, up to this point has chosen not to enact an appellate rule allowing a similar sanction in a

civil appeal.[2] Accordingly, we conclude Amber cannot be awarded appellate attorney fees as a sanction under Iowa Rule of Civil Procedure 1.413.

We conclude substantial evidence in the record supports the district court's finding Harry did not prove beyond a reasonable doubt that Amber willfully violated the terms and conditions of the parties' decree. The court did not err in dismissing Harry's contempt application. We further conclude the court exceeded its statutory authority in taxing trial attorney fees against Harry, and it did not order such fees as a sanction under rule 1.413. Amber's request for appellate attorney fees is likewise not authorized by the relevant statute. Her request for appellate attorney fees as a sanction under rule 1.413 is denied.

Costs on appeal are taxed one-half to Harry and one-half to Amber.

AFFIRMED IN PART AND REVERSED IN PART.

[2] Federal Rule of Appellate Procedure 38 provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."