IN THE COURT OF APPEALS OF IOWA

No. 9-388 / 08-1579
Filed August 6, 2009

IN RE THE MARRIAGE OF ANTHONY MCCABE AND KRISTI MCCABE

Upon the Petition of

ANTHONY MCCABE,
Petitioner-Appellant,

And Concerning

KRISTI MCCABE,
Defendant-Appellee.

Appeal from the Iowa District Court for Winneshiek County, Michael J. Shubatt, Judge.

Anthony McCabe appeals the district court's dismissal of his application for an order holding his former wife, Kristi McCabe, in contempt of court. **AFFIRMED.**

Dale Putnam, Decorah, for appellant.

Judith O'Donohoe of Elwood, O'Donohoe, Braun, White, L.L.P., New Hampton, for appellee.

Considered by Sackett, C.J., and Vogel, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MILLER, S.J.

Anthony McCabe appeals the district court's dismissal of his application for an order holding his former wife, Kristi McCabe, in contempt of court for her failure to convey one-half of her 401(k) retirement account to him pursuant to the parties' dissolution decree. We affirm the judgment of the district court.

I. BACKGROUND FACTS AND PROCEEDINGS.

Anthony and Kristi McCabe were married in 1997. Anthony filed a petition for dissolution of marriage in January 2007. The petition came before the court for trial in November 2007.

At the time of the trial, Kristi was employed by Rockwell Collins and Anthony was employed by a rural electrical cooperative. Both parties had retirement accounts through their employers. In the financial affidavit and "Statement of Affairs" that Kristi filed with the court before trial, she listed only one retirement account for herself: a "Rockwell Collins 401(k)" valued at $41,078. Anthony likewise identified only one retirement account for Kristi in his financial affidavit: a "Rockwell Collins Retire." valued at $35,000. But in a "Statement to the Court" that Anthony filed the day of trial, he referred to two different retirement accounts for Kristi, proposing that she receive the entirety of "her Rockwell Collins retirement account having a value of $42,741" and a percentage distribution of her "pension."

After the trial commenced, the parties reached an agreement as to all disputed issues. The following stipulation regarding the division of their retirement accounts was read into the record:

> Also, we had stipulated that the retirement accounts would be divided by virtue of a QDRO [Qualified Domestic Relations Order] by both of the parties. Tony is receiving all of his retirement account. So there will be no QDRO for Tony's. He is receiving half of Kristi's retirement account. As of today's date, whether it goes up or down before the order is signed, it will be whatever it was today; and Ms. O'Donohoe [Kristi's attorney] is going to prepare that QDRO . . . in 30 days.

Upon being informed of the parties' agreement, the court entered a decree dissolving the parties' marriage, approving their stipulation, and directing counsel to submit a supplemental decree incorporating that stipulation for its approval. A supplemental decree approved by counsel for both parties was filed in December 2007. That decree provided in relevant part that "Tony will also receive one-half the value of Kristi's retirement account with Rockwell Collins as of November 29, 2007. Attorney O'Donohoe shall prepare the Qualified Domestic Relations Order by December 30, 2007."

O'Donohoe prepared a QDRO, which was approved by Anthony's attorney, Dale Putnam, and the district court in February 2008. After the QDRO was entered, Anthony attempted to withdraw money from his portion of Kristi's 401(k) account and was unable to do so. He was informed by Kristi's employer that the parties' QDRO did not divide Kristi's 401(k) account, which was known as the "Rockwell Collins Retirement Savings Plan." It instead divided a "Rockwell Collins Pension Plan,"[1] a second retirement account Kristi had through her employment at Rockwell Collins.

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[1] Because the parties refer to this plan as Kristi's "pension" and to the "Rockwell Collins Retirement Savings Plan" as her 401(k) plan, we will do so as well throughout our opinion. However, we note that in *In re Marriage of Benson*, our supreme court defined a "pension" as generically referring to "'a plan established and maintained by an employer primarily to provide systematically for the payment of [generally ascertainable]

Putnam, on Anthony's behalf, sent a letter to O'Donohoe on March 10, 2008, which stated,

> Apparently the QDRO you sent only went to Kristi's pension and did not go to her 401(k) plan which my client was likewise to receive half of. Please immediately prepare and forward to me the QDRO for the 401(k) plan to avoid the necessity of a Application for Rule to Show Cause.

Upon receiving no response to that missive, Putnam sent another letter to O'Donohoe on April 15, 2008, declaring, "If I do not have the QDRO by Monday, April 21, I will be filing the necessary application for rule to show cause." O'Donohoe ignored that letter as well.

Anthony consequently filed an application for rule to show cause on May 13, 2006.[2] The application alleged he

> was to receive one-half of the retirement account of the Respondent. Said account includes a 401(k) and a pension. So far, the Petitioner has only received via Qualified Domestic Relations Order one-half of the pension. Numerous demands have been made on the Respondent to complete a Qualified Domestic Relations Order and convey one-half of the 401(k) which she has failed to do.

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benefits to . . . employees, or their beneficiaries, over a period of years (usually for life) after retirement.'" 545 N.W.2d 252, 253 (Iowa 1996) (quoting Black's Law Dictionary 1135 (6th ed. 1990)). There are two main types of pension plans: defined benefit plans, such as IPERS, and defined contribution plans, such as 401(k) plans. *Id.* at 254; *In re Marriage of Sullins*, 715 N.W.2d 242, 248-49 (Iowa 2006). There is no information present in the record as to which type of plan the "Rockwell Collins Pension Plan" is.

[2] This is the third contempt action filed by Anthony in these proceedings. The first was filed in August 2007 and the second in January 2008. The district court declined to find Kristi in contempt in either instance. Anthony also filed a small claims action against Kristi in February 2008 regarding property he was awarded in the dissolution that he alleged Kristi withheld from him. Kristi filed a counterclaim seeking damages for, among other things, "her therapist's bills and harassment." Following a hearing, the court dismissed both parties' claims. This level of contention between the parties is concerning given their agreement to share physical care of their three children. *See In re Marriage of Hansen*, 733 N.W.2d 683, 698 (Iowa 2007) ("The prospect for successful joint physical care is reduced when there is a bitter parental relationship . . . .").

At the hearing on Anthony's application, when Kristi was asked why she had not transferred one-half of her 401(k) plan to Anthony as required by the parties' decree, she testified, "Honestly, and no objection to my lawyer, but I knew nothing about it until later that it hadn't been taken care of, and it was not to be one-half." Kristi also explained that the "pension was never mentioned" during the parties' negotiations. She testified "[i]t was the 401k" that was to be divided because "[t]hey [Rockwell Collins] don't do the pension plan anymore." Kristi did not believe Anthony was "entitled to both. [He's] only entitled to a portion of the 401(k)."

Following the hearing, the district court entered an order finding Kristi was not in contempt and dismissing Anthony's application for rule to show cause. The court reasoned it could not

> find that Respondent is in contempt for not providing a QDRO assigning Petitioner a one-half interest in her 401(k) plan from Rockwell Collins because the decree, which the parties by their legal counsel prepared and submitted, does not define what is meant by "retirement plan." Respondent did in fact provide a QDRO that was approved by Petitioner and filed with the Court on February 5.

Anthony appeals. He claims the district court erred in not finding Kristi in contempt for her failure to execute a QDRO transferring one-half of her retirement account to him. Both Anthony and Kristi seek an award of appellate attorney fees.

II. SCOPE AND STANDARDS OF REVIEW.

Where a district court declines to find a party in contempt under a statute that allows the court discretion, we review for an abuse of discretion. *In re*

Marriage of Swan, 526 N.W.2d 320, 327 (Iowa 1995). Iowa Code section 598.23(1) (2007) provides a party *may* be found in contempt for violating the terms of a dissolution decree. Thus, unless the court "grossly abused" its discretion, its decision will not be reversed. *See id.*

III. MERITS.

A finding of contempt must be supported by proof beyond a reasonable doubt. *In re Marriage of Spears*, 529 N.W.2d 299, 304 (Iowa Ct. App. 1994). There must be evidence the alleged contemnor's conduct was "intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemn[o]r had the right or not." *In re Marriage of Wegner*, 461 N.W.2d 351, 353 (Iowa Ct. App. 1990) (citations omitted). "The only defense available to a contemnor, other than absence of willfulness in disobeying the order, is indefiniteness or uncertainty of the order at issue." *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995).

The district court found Kristi was not in contempt of the parties' dissolution decree "[b]ased on the ambiguity contained in the Supplemental Decree" as to what was meant by "retirement account," "which is heightened by the entry of a QDRO that does not include the 401(k) plan." Anthony asserts no such ambiguity exists in the parties' decree and that regardless of Kristi's "position on whether she was required to turn over half of both her pension and 401(k), her testimony reveals that she knew that she was at least required to enter a QDRO on her 401(k)."

Kristi, on the other hand, argues she complied with the decree in executing "a QDRO for what she believed to be half her retirement account," which through no fault of her own, "Rockwell Collins interpreted . . . as meaning half her pension plan." She asserts she "did not believe she was court ordered to provide Anthony with one-half of both her pension plan and 401(k) account." Thus, according to Kristi, "in the absence of an agreement by Anthony to vacate the pension order, she should not be found in contempt for failing to give him the 401(k) on top of the pension."

Although we are troubled by aspects of this case,[3] we do not believe the district court abused its discretion in refusing to find Kristi in contempt because the provision at issue is somewhat ambiguous and subject to more than one reasonable interpretation. The supplemental decree, prepared and approved by both attorneys in this case, simply provided, "Tony will also receive one-half the value of Kristi's retirement account with Rockwell Collins as of November 29, 2007." It did not specify the retirement account or accounts to be divided even though it appears both parties were aware Kristi had more than one retirement

[3] We are perplexed by the stubborn refusal of Kristi and her attorney to execute a QDRO conveying one-half of the 401(k) account given Kristi's acknowledgment at the contempt hearing and on appeal that Anthony was "entitled to a portion of the 401(k)." Even though we do not believe such conduct was contemptuous due to the ambiguity in the parties' decree, it seems to us that a more reasonable, cost-effective, and expeditious approach on Kristi's behalf would have been for her attorney to simply prepare a second QDRO, for the 401(k) account. The parties would have thereafter been free to litigate the propriety of the first QDRO dividing Kristi's pension. Instead, we are faced with an appeal of a contempt action over a matter on which the parties appear to essentially agree, which we suspect, given Anthony's request for $600 in trial attorney fees and $2500 in appellate attorney fees, has resulted in considerable and unnecessary expense for both parties.

account through her employment at Rockwell Collins.[4] Furthermore, Kristi did execute a QDRO, which she believed conveyed one-half of her 401(k) account to Anthony as required by the decree. Accordingly, we find no error in the district court's dismissal of Anthony's contempt application. *See Swan*, 526 N.W.2d at 327 (stating a court may consider all of the circumstances, not just whether a technical violation of the terms of the dissolution decree occurred, in determining whether to find a party in contempt).

Both parties request an award of appellate attorney fees. Iowa Code section 598.24 authorizes the court to tax reasonable attorney fees, as part of the costs, against a party who has been found in default or contempt of a dissolution decree. *See Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982) (holding that a statute that justifies awarding attorney fees in the trial court also justifies awarding attorney fees in the appeal). Because we conclude the district court did not abuse its discretion in finding Kristi was not in default or contempt of the parties' decree, we deny Anthony's claim for appellate attorney fees. We also deny Kristi's claim for appellate attorney fees because section 598.24 does not authorize taxation of the alleged contemnor's attorney fees against the party seeking a contempt finding. *See Hockenberg Equip. Co. v. Hockenberg's Equip.*

[4] As previously mentioned, Kristi listed only one retirement account—her 401(k)—on her financial affidavit and in the statement of affairs she filed with the court on the day of trial. Her testimony at the contempt hearing reveals that she did not disclose her pension in those pretrial filings. We note our legislature and courts have stated that parties to a dissolution proceeding must candidly disclose their financial status. *See* Iowa Code § 598.13(1) ("Both parties shall disclose their financial status."); *see also Schantz v. Schantz*, 163 N.W.2d 398, 406 (Iowa 1968) ("In the consummation of division of property the parties are required to exercise utmost good faith and to make full disclosure of all material facts . . . ."); *In re Marriage of Meerdink*, 530 N.W.2d 458, 459 (Iowa Ct. App. 1995).

& Supply Co., 510 N.W.2d 153, 158 (Iowa 1993) (stating subject to a "rare exception" not applicable here, a party generally has no claim to attorney fees in the absence of a statute or contractual provision allowing such an award).

IV. CONCLUSION.

We conclude the district court did not abuse its discretion in refusing to find Kristi in contempt of the parties' dissolution decree. The judgment of the district court is therefore affirmed. We decline both parties' requests for an award of appellate attorney fees.

AFFIRMED.