

**IN THE COURT OF APPEALS OF IOWA**

No. 8-092 / 07-1319  
Filed April 30, 2008

**JAMIE ALLEN FERGUSON,**  
Plaintiff-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Benton County, Thomas Koehler,  
Judge.

Plaintiff filed a petition for writ of certiorari claiming the district court improperly found him in contempt and granted his former wife physical care of their child. **WRIT SUSTAINED.**

D. Raymond Walton of Beecher Law Offices, Waterloo, for appellant.

John Mossman of Mossman & Mossman, L.L.P., Vinton, for Kristine  
Ferguson.

Considered by Sackett, C.J., and Vogel, J., and Beeghly, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**SACKETT, C.J.**

Jamie Allen withheld custody of his infant daughter from her mother because of his concerns about the safety of the child while in her mother's care. He was found in contempt of court, punished by being sentenced to thirty days in jail, and as an alternative to serving the full punishment,<sup>1</sup> having the child's mother established as the primary custodian. He appeals contending there is not substantial evidence to prove beyond a reasonable doubt that he was in contempt of court, and in imposing punishment, the district court did not consider the best interest of the child. We agree and sustain the writ.

**I. BACKGROUND.**

In February of 2007 Jamie Allen filed a petition naming Kristine Bernice Ferguson<sup>2</sup> as respondent. Jamie Allen was seeking to establish custody, physical care, and child support for a minor female child born in September of 2006. Jamie Allen claimed to be the father of the child. In the petition he stated, among other things, that Kristine had suffered from problems with substance abuse, which allegation Kristine denied in her answer. Kristine subsequently filed a petition to establish paternity in which she asked for genetic paternity testing not knowing if Jamie Allen or another man was the father of the child. Subsequent genetic testing showed the other man not to be the child's father.

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<sup>1</sup> The order was

Petitioner is . . . sentenced to be confined to the Benton County Jail for a period of 30 days. All but 15 days of the sentence is suspended and, as an alternative to punishment for the remaining 15 days, and pursuant to Iowa Code Section 598.23(2)(b), the Court hereby grants joint custody of the child [ ] to the parties with primary care to Respondent.

<sup>2</sup> The parties had once been married but that marriage was dissolved.

On May 10, 2007, Jamie Allen and Kristine reached an agreement as to temporary custody of and visitation with the child. This became the consent order that Kristine contends Jamie Allen violated. The order included, among other things, the following paragraphs:

5. Both parties agree to abstain from the use of alcohol or any illegal drugs while their daughter is in their care;
6. The parties agree that until a temporary hearing is held in this matter that they shall exchange their minor child so that each has her one week at a time commencing Sunday, May 6, 2007, at 5:00 p.m. when the Respondent shall have the minor child until the following Sunday at 5:00 p.m. when the Petitioner shall resume care of her and alternate the weeks thereafter exchanging the child every Sunday at 5:00 p.m.;
7. The parties shall agree to meet at a half way point to exchange the minor child which shall be at just off of Exit 56, State Route 92 in Bevington, Iowa, at the truck stop/gas station.

The visitation went according to schedule until July 15, 2007. A boyfriend or former boyfriend of Kristine's had made an unsolicited call to Jamie Allen relating to Jamie Allen information that clearly led him to believe Kristine, who had a known substance abuse problem and had engaged in combative behavior, was again abusing drugs and/or alcohol, maintaining relationships with different men, and exhibiting hostile and combative behavior. The caller, who gave specific information as to the time and place of the behaviors he was reporting, had concern about the child being in Kristine's care. The caller also contacted Jamie Allen's attorney and related similar information to him. Jamie Allen found the information reliable particularly because he was aware of Kristine's background. Within several days the caller recanted his report alleging it had not been true. The caller at trial admitted he had both made the report and recanted it.

Concerned about the child's safety, Jamie Allen consulted his attorney, who talked to Kristine's attorney, relating that Jamie Allen believed it was in the child's best interest that he not deliver the child to Kristine. Jamie Allen did not transfer custody to Kristine on Sunday, July 15.

On July 19, 2007, Kristine filed an application for rule to show cause why Jamie Allen should not be held in contempt for refusing to transfer custody. Hearing was set for July 27, 2007. On July 27,<sup>3</sup> Jamie Allen filed a motion for an emergency order contending he had great concerns about Kristine's ability to care for the child due to her abuse of controlled substances, chronic alcohol abuse, and instability of residence, employment, and relationships with men.

At the July 27 hearing, Kristine gave testimony to support a finding that Jamie Allen failed to comply with the provisions of the consent order in that she was at the exchange point at 5:00 p.m. on July 15, 2007, and Jamie did not appear nor did the child. No hearing was held on the pending July 27 motion.

## **II. ANALYSIS.**

Contempt has been defined as willful disobedience. *McKinley v. Iowa Dist. Court*, 542 N.W.2d 822, 824 (Iowa 1996). A party alleging contempt, here Kristine, has the burden to prove the contemnor, Jamie Allen, had a duty to obey a court order and willfully failed to perform that duty. *Christensen v. Iowa Dist. Court*, 578 N.W.2d 675, 678 (Iowa 1998).

Kristine, the party alleging contempt, has shown a violation of a court order. Therefore the burden shifts to the alleged contemnor, Jamie Allen, to produce evidence suggesting the violation was not willful. See *id.* However,

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<sup>3</sup> It would have been prudent for him to have filed this motion earlier.

Kristine retains the burden of proof to establish willfulness beyond a reasonable doubt because of the quasi-criminal nature of the proceeding. *Ervin v. Iowa Dist. Court*, 495 N.W.2d 742, 745 (Iowa 1993). A finding of disobedience pursued “willfully” 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. *Ary v. Iowa Dist. Court*, 735 N.W.2d 621, 624 (Iowa 2007).

A finding of contempt must be established by proof beyond a reasonable doubt. *Id.* Substantial evidence sufficient to support a finding of contempt is evidence that could convince a rational trier of fact that the alleged contemner is guilty of contempt beyond a reasonable doubt. *Id.* at 624-25.; *In re Marriage of Jacobo*, 526 N.W.2d 859, 866 (Iowa 1995). A failure to follow a court order is not willful if a contemnor shows the order was indefinite or that the contemner was unable to comply with the order. *Christensen*, 578 N.W.2d at 678.

Jamie Allen’s position is that he failed to deliver the child because he was concerned about her safety and he had reasons to believe that Kristine was abusing substances in violation of the custody order.

Kristine at trial was confronted about her alcoholism. Her answers were evasive and her response generally was, “I don’t drink in front of my children.” She admitted she had the child in her care when she was with the caller. She further admitted that she had been in a physical altercation with the caller despite the caller’s recantation of this allegation. She also admitted she had been in a

physical altercation with her sister. She admitted she was drinking on March 17, 2007, just five days after she left treatment.

The only conclusion that can be reached from a review of the record is that Jamie Allen had legitimate concerns about his child's safety while in her mother's care, and as a parent and a joint custodian he was placed in the difficult position of putting his child in danger or himself in jeopardy. The testimony of the caller was unsolicited and definite.<sup>4</sup> The caller reiterated the report he made to Jamie Allen and to Jamie Allen's lawyer. He contended he recanted because he had been untruthful, stating at the time he made the report he was bitter about Kristine breaking up with him, and he was going through a divorce himself.

Jamie Allen, based on the report and Kristine's past record, had legitimate concerns about Kristine's substance abuse in violation of the order. Yet, the order was unclear as to how he should act to assure the child was not with her mother when her mother was drinking.

Kristine has failed to prove beyond a reasonable doubt Jamie Allen willfully violated the order. He testified it is not his intent to keep the child from her. He indicated his willingness to allow Kristine to have the child if Kristine's mother supervised. Kristine introduced no evidence that would support a finding that Jamie Allen's concerns were ill-founded. Despite having had problems with alcohol and substance abuse, she failed to show she was in treatment or aftercare. She refused to answer the question as to whether she was telling the

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<sup>4</sup> He related, among other things, Kristine was taking Remeron and valium; he felt she was not fit to raise the child and if the child were his daughter he would not have wanted Kristine with her; and, Kristine's mother on one occasion found Kristine too intoxicated to let her be with her child.

substance abuse evaluator the truth about her drinking. She has not shown that the order is clear as to what one parent should do if they learn the other is drinking. Kristine has failed to meet her burden to show Jamie Allen is in contempt of court. We therefore sustain the writ. That said, we find it prudent to address the district court's sentence. We believe the district court abused its discretion in punishing Jamie Allen by transferring primary care to Kristine. We recognize that Iowa Code section 598.23(2)(b) provides:

The court may, as an alternative to punishment for contempt, make an order which, according to the subject matter of the order or decree involved, does the following:

...  
b. Modifies visitation to compensate for lost visitation time or establishes joint custody for the child or transfers custody.

The district court should not have proceeded to order primary care without establishing a factual basis for the finding and a determination it was in the child's interest. *Fenton v. Webb*, 705 N.W.2d 323, 327 (Iowa Ct. App. 2005). A child does not lose his or her rights because a parent fails to comply with court rules or orders. *See id.*; *Flynn v. May*, 852 A.2d 963, 975 (Md. Ct. Spec. App. 2004). There was no available evidence to support the custody change.<sup>5</sup> The district court should not have determined custody without evidence to warrant the judgment. *See In re Marriage of Courtade*, 560 N.W.2d 36, 37 (Iowa Ct. App. 1996) ("In child custody cases, the best interests of the child is the first and

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<sup>5</sup> Affidavits in the file present disturbing evidence about Kristine's ability to parent a young child. There are references to Kristine's assaultive behavior, mixing alcohol and prescription drugs, and her various changes of residence and relationships among other things. These affidavits are not evidence; however, we are dealing with the interest of a young child. These affidavits further alert us to the need to have an evidentiary hearing before custody orders are entered.

governing consideration.”). This may include the appointment of a guardian ad litem pursuant to Iowa Code section 598.12. *Fenton*, 705 N.W.2d at 327.

**WRIT SUSTAINED.**

Vogel, J., concur; Beeghly, S.J., dissents in part.



**BEEGHLY, S.J.** (dissents in part and concurs in part)

I dissent from that part of the majority's opinion that concludes Jamie Ferguson was not in contempt of court.

A person may be found in contempt under Iowa Code section 598.23(1) (2007) if there is evidence beyond a reasonable doubt the person willfully violated a court order. *Gimzo v. Iowa Dist. Court*, 561 N.W.2d 833, 835 (Iowa Ct. App. 1997). Conduct is considered willful if it 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." *Lutz v. Darbyshire*, 297 N.W.2d 349, 353 (Iowa 1980).

I find there is sufficient evidence in the record to show beyond a reasonable doubt that Jamie willfully violated the consent order by refusing to exchange Nicolette on July 15, 2007. The evidence shows Jamie acted in "disregard of the rights of others, or contrary to a known duty." See *id.* He acted without court authority to deny Kristine's right to visitation under the court order. I would annul the writ of certiorari.

I concur, however, in the majority's conclusion that the district court abused its discretion by transferring physical care of Nicolette to Kristine. A court must consider the best interests of a child before modifying custody in contempt proceedings. See *Phillips v. Iowa Dist. Court*, 380 N.W.2d 706, 709 (Iowa 1986); *Kirk v. Iowa Dist. Court*, 508 N.W.2d 105, 108 (Iowa Ct. App. 1993). The district court did not make any findings concerning the best interests of Nicolette either

on the record or in the court's written order. Furthermore, no evidence was presented at the contempt hearing concerning the child's best interests. I would remand the case to the district court for a new contempt order based on the evidence presented at the contempt hearing.